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# AMERICAN STATUTE LAW

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AN ANALYTICAL AND COMPARED DIGEST OF THE CONSTITUTIONS AND CIVIL PUBLIC STATUTES OF ALL THE STATES AND TERRITORIES RELATING TO PERSONS AND PROPERTY

IN FORCE JANUARY 1, 1886

BY

FREDERIC J. STIMSON

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## PREFACE.

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MANY years ago the present writer conceived the idea of undertaking a work the object of which should be to digest and compare the statutes of the various states of the Union upon subjects of public general interest ; but the difficulties of treatment seemed at first so insurmountable that it was only after several years of patient consideration and practical experiment that the author felt emboldened to make the attempt. The prime difficulty was, of course, that of bulk. The statutes of the thirty-eight states, the eight organized territories, and the District of Columbia, in their latest and fullest revisions, are at present contained in two hundred and thirty-five octavo volumes, containing, at a rough estimate, about one hundred and thirty thousand large pages. To embody these, or even any considerable portion of them, in one or two volumes of manageable size seemed at the first sight a hopeless undertaking.

Upon examination, however, the author found that the bulk of these voluminous laws was, after all, identical in the several states. He found that one main stream of legislation could be traced, occasionally comprehending all the Northern, Eastern, and North-Western states, more often divided into two main bodies, the one following in its legislation the general model of the State of New York, the other that of the New England states. He found, besides this, another important group, containing the South-Western states, under the general lead of Maryland and Virginia ; and still a third and smaller group, comprising the gulf states. Besides these three main groups, there was one state with laws wholly anomalous (Louisiana), and others (like California, Dakota, New Mexico, and Georgia) with laws peculiar to a greater or less extent. Here at once it became evident that, by a process of citing the respective laws once for all, with a list of all the states enacting them, and without repetitions, the work might be reduced by nine tenths or more of its first apparent size.

But, furthermore, it will readily be seen that many of the statutes in all states are of purely local interest or special application. For instance, the law of the laying out of roads, of the manner of assessing taxes, and the laws creating special corporations, municipal or otherwise, or special kinds of corporations, can rarely be wanted by a lawyer outside of the state where such statute or corporation exists ; and as every one is presumed to have the statutes of his own state at hand, it would obviously neither be possible nor profitable to collate statutes of this description. And of course all private acts and local or special laws may be wisely omitted. Perhaps one half of the bulk of the statutes was taken away by these exceptions. And, finally, for the purposes of the present edition, the author has not deemed it advisable to collate the statutes of criminal law, nor many statutes of civil procedure, such as no one will be likely to want unless he is actually conducting a case in court out of his own state,

11 July 1891



when, of course, he will have access to the laws of such foreign state. It has thus become possible to reduce the work to its present size, this volume, which is complete in itself, containing the state constitutions and all statutes affecting rights of property and private individuals; and the second volume (which the author hopes to have ready in a year or more) to contain the law of corporations, public and private, of insolvency, and of procedure.

Furthermore, every expedient that the author's ingenuity could suggest has been employed to save space. The general law which prevails in the greatest number of states has been printed in large type; the law which, though not so general, has been adopted in many, is printed in smaller; and the law which is peculiar to one or two states, in the smallest type of all. The titles of chapter, article, section, title, etc., have been dropped throughout in citing the state laws, as explained in the Table of Citations. Indeed, this was a necessary change, as the terms were used with no uniformity of meaning in the state laws, and to retain them would only have resulted in inextricable confusion. Wherever a consecutive numbering is found in the revisions of the states it has been adopted, as being the simplest for citation purposes.

It has, of course, been usually necessary to recast the laws in the author's words, as the wording is hardly ever identical in the several states, and to have retained it would have required a hundred volumes, instead of two, making the work practically impossible. The author has throughout chosen the clearest language, and the most concise, following by preference that wording which has been adopted in the greatest number of states, but never omitting to give the fullest and most particular statement which is anywhere to be found, and always giving more than one statement of the same law, as it exists in more than one state, if there seems to be the slightest probability that there is involved a real difference of meaning between the two.

Frequently, owing to the obscurity of statutes or their imperfect or ambiguous expression, he has been compelled to interpret them in the light of the similar laws of other states. Where this has been done, the author believes that his interpretation is generally the correct one. At all events, the law being in itself ambiguous or unintelligible, it will serve to guide the reader to the meaning which the statute in question has in most of the states borne. It has been necessary to strictly exclude citations of cases, as that would practically have involved citing all the cases in all the state reports (for there are very few cases which do not directly or indirectly involve a statute), and the book would have been increased in volume to an unwieldy extent. For such points the reader is referred to the digests of case law.

An index to the volume is appended; but the author, by the requirements of his subject, has adopted a general arrangement so carefully logical that he believes the reader, after a short experience of the book, will find the Table of Contents as exact and accurate a guide as he could wish. The general scheme of the work will be found there. Part I. comprises the state constitutions, and may be roughly divided into the *Bill of Rights* (Division I.), the *Political Provisions* (Division II.), and the *Judicial Systems* (Chapter V. of Division II.). Part II., occupying all the rest of this volume, contains all the general statutes relating to individuals, their persons, or property, save only those which relate to procedure in the courts. Division I. of Part II. contains the statutes upon that law which may roughly be said to correspond to the old (but unscientific) division, made by Sir Matthew Hale, of the law into *the law of things*, and Division II. to *the law of persons*. The terms *Normal* and *Abnormal Law* have, however, seemed much more exact to indicate the distinction the author had in mind, and they have been adopted.

Dr. Thomas Erskine Holland, in his work on Jurisprudence, has adopted the general division of legal subjects which has seemed to the writer the most logical and the most exact, and, slightly modified, it is appended as follows, with the places of this work where the corresponding subjects may be found:—

## I. PRIVATE LAW.

## 1. SUBSTANTIVE LAW.

Normal Law. (Part II., Division I.)

Abnormal Law. (Part II., Division II.)

## 2. ADJECTIVE LAW. (Part IV.)

## II. PUBLIC LAW.

## 1. CONSTITUTIONAL LAW.

(Part I.)

## 2. ADMINISTRATIVE LAW.

(Part III.)

## 3. CRIMINAL LAW, and

## 4. CRIMINAL PROCEDURE.

(Not generally incorporated in this work. See Part. V.)

## III. INTERNATIONAL LAW.

(Except in so far as Inter-State law is analogous, it forms no part of this work.)

It is needless to say that the arrangement of statutes in the state revisions themselves by no means corresponds to that in this work (see *General Scheme*, below), nor, indeed, is it in any two states alike. Most states adopt the unscientific alphabetical arrangement of subjects, according to the initial letter of such subject-titles as they happen to adopt, which again, it may be added, are in no two states identical. Many states have a rough division of criminal or public laws; and the others are shovelled in in a heap. Ohio, California, Dakota, Georgia, and Louisiana have attempted a logical arrangement. It occasionally happens that this diversity of arrangement has necessitated the insertion of similar provisions in different parts of this work, — though the author has succeeded in avoiding this, except in rare instances, and has always tried to give a cross reference. Thus the law requiring an acknowledgment of a debt to be in writing in order to take it out of the Statute of Limitations is, in some states, placed under the law of limitations in the division of Civil Procedure (Part IV., Division II., of this work), and in others under that of contracts, — *i. e.*, the Statute of Frauds (Part II., Division I., Title VI., of this work). The latter position has been chosen by the author; and all such statutes will there be found together, with a cross-reference from Part IV., Division II.

One of the other difficulties which at first suggested themselves to the plan of this work was the continual changing of the laws by the annual or biennial legislatures. To meet this the author proposes to publish biennial supplements, containing the *ad-denda* and *corrigenda* made by such laws to this edition of his work. One such will be found at the end of this volume containing laws published since the stereotyping of this edition. The author's experience has shown, however, that the number of corrections so required is surprisingly small. As a matter of fact, the several states at the present time do rarely change their important, substantive law; and the time of the annual or biennial legislatures is mostly taken up with private enactments, charters, revenue laws, and local improvements, none of which fall within the main scope of this work.

For convenience of citation, in case there should be future editions, the sections and articles of this book have not been numbered consecutively, thus leaving places for future changes and additions without altering all the numbering of the book, and doing away with the necessity for star pages. See in the Explanatory Note.

A volume like the present, based on no previous authority, containing nearly a thousand pages of matter, and attempting to present in brief a vast body of constantly-growing statutes, with the hundreds of thousands of citations of such statutes made necessary, can hardly be written and printed with mathematical accuracy. The author cannot

flatter himself that many errors have not occurred. But the work has been twice verified by him ; and a third verification would have made it necessary to have this edition a year behind its date, without any compensating increase in accuracy. And he hopes, at least, that most of the errors will be found to lie in the figures of the citations, and not in the essential part of the work, — errors of citation or of omission rather than positive misstatements of the law.

Many things further occur to the author to say. The investigation of the growing legislation of five-and-forty free commonwealths, with their errors, their experiments, and their reforms, has proved very suggestive both to the jurist and the student of social science. But this must be left for discussion in other places or in other books than the present. Two formal suggestions, however, the author cannot refrain from expressing ; he hopes, for the relief of future students in this department of human science, that all the states will follow the example of the few in numbering their annual statutes, in separating general from special acts, and in not superimposing new statutes upon subjects already treated in the laws, without specifying what in the old is repealed, what is amended, and what is left to stand.

BOSTON, Jan. 20, 1886.

## EXPLANATORY NOTE.

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IN order to attain the conciseness required in this work without obscurity, the writer has adopted a few contrivances which will be easily understood when the reader's attention is once called to them. In the first place, the division for citation purposes is always into article and section, the article number being always the decimal of the section, and both are continuous throughout the book; and gaps in the numbering are thus left at the ends of the articles and chapters. This is done both for convenience of citation, and in order to enable future editions of this book to be printed, incorporating changes and additions in the state laws without changing the numbering of any section or article of the present edition. Thus Art. 414 is the Statute of Frauds; and any special provision will accordingly be numbered from § 4140 to § 4149; article 415, § 4150, succeeds, whether all these numbers are used in this edition or not.

Many abbreviations are used, but will all be found in the table below. As further expedients to save space, citations of consecutive numbers are clearly indicated, but not written in full; thus §§ 4372-7 is printed instead of §§ 4371, 4372, 4373, 4374, 4375, 4376, 4377; and frequently when the same state statute runs through an article of this book, the abbreviation *ib.* is employed, referring the reader to the first place where the law is cited in that article, and thus avoiding innumerable repetitions of it. The same citation is never repeated in the same section of this work, but the abbreviation for the state is deemed sufficient; the reader, in all such cases, being expected to look just above for the reference to the state law. The note references are the small letters *a*, *b*, *c*, etc., but when the same notes are referred to continually throughout all of one article or chapter in this book, they are printed as notes to the article or chapter, at the beginning of it, and such notes are always referred to by the note signs \* † ‡ etc. The word *state* ordinarily includes any state or territory; but when printed with a capital letter the word *State* always means the home state, or the state whose laws are referred to, as distinct from others.

Finally, the states are always cited in the following order, which experience has shown to be the most convenient, viz.: New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska (Northern States); Maryland, Delaware, Virginia, West Virginia, North Carolina, Kentucky, Tennessee, Missouri, Arkansas, Texas (Middle States); California, Oregon, Nevada, Colorado, Washington, Dakota, Idaho, Montana, Wyoming, Utah (Western States); South Carolina, Georgia, Alabama, Mississippi, Florida, Louisiana, New Mexico, Arizona (Southern States); the District of Columbia. The abbreviations employed are those ordinarily in use; except that *Io.* is used for Iowa instead of *Ia.*, it being found that the latter

was in great danger of being confounded with Louisiana, owing to its close resemblance to La. in the type. For the same reason Uta. is used for Utah, to avoid too great a similarity with Vt. used for Vermont. The abbreviation U.S. in citations refers to the United States Revised Statutes; or to the United States annual laws, if followed by a year number.

In conclusion, the author would remind the reader that when he fails to find the laws of the state of which he is in search upon any subject, it will be because such state has no statute upon the question; but it does not follow that the law as administered in the courts is not the same as in the states quoted. Generally the states follow the common law (see § 1003), or the law of that neighboring or older state to which they are historically related (see citation order above, and the remarks made in the Table of Citations). The California and Georgia provisions will be often a useful guide in determining the common law upon any subject, as will be the Louisiana codes for the civil law.



# TABLE OF STATE CITATIONS,

## WITH REMARKS UPON THE CODES.

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THE letter **C.** stands for Constitution, in all the state citations. The biennial or annual laws are always cited by year, chapter, number, or page and section, except where otherwise specified; where the number of a citation is given with no title, it always means the latest revision or collection of general laws, as below specified for the several states respectively.

**Alabama (Ala.).** *Constitution of 1875*, as printed in the Code of 1876; cited by article and section; thus, 17,2: Art. 17, § 2. *Statutes*: Code of 1876; cited by continuous section number; thus, 4987: § 4987. *Biennial Laws of 1879, 1881, 1883, 1885*; cited by year, chapter, and section; thus, 1885,97,4: chapter 97, § 4, of the laws of 1885. The Code of Alabama is a moderately exhaustive code of the common law, based somewhat upon the statutes of New York and other states.

**Arizona (Ariz.).** *Statutes*: Compiled Laws of 1877; cited by continuous section number as above. *Biennial Laws of 1879, 1881, 1883, and 1885*; cited by year, chapter, and section as above. The original law of Arizona was Spanish or Mexican, upon which statutes, for the most part English or of the common law, have been engrafted.

**Arkansas (Ark.).** *Constitution of 1874*, as printed in Mansfield's Digest; cited by article and section, as in Alabama. *Statutes*: Mansfield's Digest of 1884; cited by continuous section number, as in Alabama. *Biennial Laws*: 1885; cited by year, chapter, and section, as in Alabama. The laws of Arkansas are moderately exhaustive, resembling those of Missouri. There is a code of practice, now incorporated in the Digest.

**California (Cal.).** *Constitution of 1873*, as printed in Hittell's Codes; cited by article and section, as in Alabama. *Statutes*: Hittell's Codes of 1876, 2 vols., with Vol. III., bringing them down to 1881; cited by continuous section number, as in Alabama, modifications made by Vol. III. being indicated by suffixing the abbreviation *Amt.* *Biennial Laws of 1883 and 1885*; cited by year, chapter, and section, as in Alabama. The codes of California comprise the Political Code (§§ 1-4999), a Civil Code (§§ 5000-9999), a Code of Civil Procedure (§§ 10001-12104), and a Penal Code (§§ 13001-14614); and are the most exhaustive attempt at codifying the English common law yet made in the United States. Many of the civil-law provisions are also incorporated therewith and enacted in the codes. The codes of California have been largely copied by Dakota. There is a later edition, of 1885, by Deering.

**Colorado (Col.).** *Constitution of 1876*, as printed in the General Statutes of 1883; cited by article and section, as in Alabama. *Statutes*: General Statutes of 1883; cited by continuous section number, as in Alabama. *Biennial Laws of 1885*; cited by year, chapter, and section; Civil Code of 1877, a code of practice; cited *Civ. C.* A moderately exhaustive collection of statutes, based on those of New York, California, and other states.

**Columbia, District of (D.C.).** Most of the United States statutes which apply to the District of Columbia are found in the volume of United States statutes of 1873 (commonly termed *Post Roads*), in that part which relates to the District (cited *D.C.*). The law of Maryland is commonly in force when there is no United States law applicable.

**Connecticut (Ct.).** *Constitution* of 1818, as printed in Revision of 1875 and amended in Laws 1879, p. 490; cited by article and section, as in Alabama. *Statutes*: the Revision of 1875; cited by title, chapter, and section; or by title, chapter, part, article, and section; thus, 18,11,1,3: Title 18, Chapter 11, Part 1, Article 1, § 3. *Annual Laws* of 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885; cited by year, chapter, and section, as in Alabama. A brief collection of common-law statutes resembling those in other New England states or New York. In future, the laws will be biennial; see § 277.

**Dakota (Dak.).** *Statutes*: Levisée's Codes, 2 vols., 1883, containing the Code of Civil Procedure, cited by continuous section number (cited *C. Civ. P.*); the Political Code (*Pol. C.*), cited by chapter and section; the Civil Code (*Civ. C.*), the Probate Code (*Prob. C.*), the Justice's Code (*Just. C.*); the Penal Code (*P. C.*); and the Code of Criminal Procedure (*C. Crim. P.* or *C. Cr. P.*), cited by continuous section number. *Biennial Laws* of 1885; cited as before. The Dakota codes are founded on those of California (most of which is re-enacted) and of New York. The Constitution of the proposed State of Dakota has not been incorporated in this edition.

**Delaware (Del.).** *Constitution* of 1831, as printed in the Revised Code of 1874; cited by article and section, as in Alabama. *Statutes*: Revised Code of 1874; cited by chapter and section; thus, 124,8: Chapter 124, § 8. *Biennial Laws*: Vols. 15, 16, and 17, each volume being in two separate parts, each part containing the laws of one session; thus, V. 17, Part 2, contains the laws of 1885. The parts are not, however, cited, as the chapters are numbered continuously through each volume. The statutes of Delaware, with those of South Carolina, are perhaps the most conservative and the least comprehensive of all the states and territories.

**Florida (Fla.).** *Constitution* of 1868, as printed in the Digest of 1881; cited by article and section, as in Alabama. *Statutes*: Digest of 1881; cited by chapter and section, as in Delaware. *Biennial Laws* of 1883 and 1885; cited by year, continuous chapter, number, and section. The statutes of Florida form a moderately comprehensive common-law code, like that of Alabama.

**Georgia (Ga.).** *Constitution* of 1877, as printed in the Code of 1882; cited by article and section, as in Alabama. *Statutes*: Code of 1882; cited by continuous section number, as in Alabama. *Biennial Laws* of 1883; cited by year, chapter, and section. The code of Georgia, with the exception of those of California and Dakota, is the result of the most ambitious and comprehensive attempt made by any state to codify the common law. It is largely based on text-books.

**Idaho (Ida.).** *The statutes* of Idaho are in great confusion. The general laws of 1881 contain the Code of Civil Procedure (*C. Civ. P.* or *Civ. C.*); cited by continuous section number; the laws of 1874-5 contain the Probate Code (*Prob. C.*), besides many acts concerning miscellaneous subjects which are not numbered at all. *Biennial Laws*: 1874-5, 1876-7, 1879 (containing the Criminal Code, *Crim. C.* and Criminal Practice Act, *C. Cr. P.*), 1881 (General Laws), 1882-3 and 1884-5. These laws are generally copied from those of Dakota or California. As the annual laws are not numbered, they have to be referred to by number of page and section.

**Illinois (Ill.).** *Constitution* of 1870, as printed in Cothran's Revised Statutes of 1883; cited by article and section, as in Alabama. *Statutes*: Cothran's edition of 1883 (there is a later compilation by Starr and Curtis); cited by chapter and section, as in Delaware. *Biennial Laws* of 1885; cited by year, chapter, and section. A moderately comprehensive collection of common-law statutes, largely founded on New York law.



**Indiana (Ind.).** *Constitution of 1851*, as printed in Revised Statutes of 1881; cited by article and section, as in Alabama. *Statutes*: Revised, of 1881; cited by continuous section number, as in Alabama. *Biennial Laws* of 1883, 1885, and 1885 Extra Session (*Ex.*); cited by year, chapter, and section. A somewhat more comprehensive compilation than that of Illinois. Many statutes in the states of Indiana, Illinois, Michigan, Wisconsin, and Minnesota are copied from New York.

**Indian Territory** is subject to United States Laws.

**Iowa (Io.).** *Constitution of 1857*, as printed in the Revised Code of 1880; cited by article and section, as in Alabama. *Statutes*: Miller's Revised Code of 1880 (2 vols.); cited by continuous section number, as in Alabama. *Biennial Laws* of 1882 and 1884; cited by year, chapter, and section. Iowa has the most extensive common-law code of any of the Northern states; many civil-law provisions also are enacted in it.

**Kansas (Kan.).** *Constitution of 1859*, as printed in the Compiled Laws of 1879; cited by article and section, as in Alabama. *Statutes*: the Compiled Laws of 1879 (Dassler); cited by chapter and section, as in Delaware. *Biennial Laws* of 1881, 1883, and 1885. A moderately comprehensive common-law compilation, founded on laws of New York, Ohio, and Iowa. There is another Dassler's Revision of 1885.

**Kentucky (Ky.).** *Constitution of 1850*, as printed in the General Statutes of 1873; cited by article and section, as in Alabama. *Statutes*: the General Statutes of 1873 are cited down to p. 438 of this volume; thereafter, the General Statutes of 1881. Both are cited by chapter and section, which are generally identical in the two editions. Bullitt's Codes (*Civ. C.* and *Crim. C.*), 1876, cited by continuous section number. *Biennial Laws*, 1873-4, 1875-6, 1877-8, 1879-80, 1881-2, 1883-4; cited by year and date of enactment. The statutes of Kentucky are conservative and not extensive, being largely founded on those of Virginia.

**Louisiana (La.).** *Constitution of 1879*, as printed in Acts of 1880; cited by continuous section number. *Statutes*: Revised Civil Code, Voorhis, 1875; cited by continuous section number without title; Voorhis' Revised Laws, 1884 (*D.*); cited by continuous section number (thus, D. 223); Code of Practice (*C. P.*), Voorhis' 3d edition, 1882; cited by continuous section number (thus, C. P. 997). *Biennial Laws*, 1884. The Louisiana statutes are entirely civil law (based chiefly on the Code Napoleon, except for a few common-law statutes copied from other states and found only in the Revised Statutes); and, as such, anomalous in the Union. See, however, New Mexico and Arizona; and a few other states have enacted civil-law provisions in their codes; see Georgia, Iowa, California, Texas, and Dakota.

**Maine (Me.).** *Constitution of 1820*, as printed in the Revised Statutes of 1883; cited by article, part, and section; thus, Me. C. 4, 1, 8: Article 4, Part 1, § 8. *Statutes*: Revised Statutes of 1883; cited by chapter and section, as in Delaware; *Biennial Laws* of 1885. The statutes of Maine resemble those of Massachusetts, but are less extensive in scope.

**Maryland (Md.).** *Constitution of 1867*, as printed in code of 1878; cited by article and section, as in Alabama. *Statutes*: Revised Code of 1878; cited by article and section, like the constitution. *Biennial Laws*: 1880, 1882, 1884. A moderately extensive common-law system, conservative in scope, resembling the statutes in Pennsylvania and Virginia. There are also many local laws, not, of course, incorporated in this work.

**Massachusetts (Mass.).** *Constitution of 1780*, as printed in the statutes; cited by part, chapter, section, and article, or part, chapter, and article; thus, 2, 5, 1, 1: Part 2, Chapter 5, Section 1, Article 1. *Statutes*: Public Statutes of 1882; cited by chapter and section, as in Delaware. *Annual Laws* of 1882, 1883, 1884, and 1885. A conservative collection of statutes, but rather more comprehensive than those of the other New England states.

**Michigan (Mich.).** *Constitution of 1850*, as printed in Howell's Statutes of 1882; cited by article and section, as in Alabama. *Statutes*: Howell's Annotated Statutes of

1882 (2 vols.); cited by continuous section number, as in Alabama. *Biennial Laws* of 1883 and 1885. A very comprehensive collection of statutes, copying many both from New York and from Massachusetts.

**Minnesota (Minn.).** *Constitution* of 1857, as printed in the General Statutes, 1878; cited by article and section, as in Alabama. *Statutes*: General Statutes of 1878; cited by chapter and section, as in Delaware. *Biennial Laws* of 1879, 1881, 1881 Extra Session (*Ex.*), 1883, and 1885. The statutes of Minnesota resemble those of Wisconsin, and are largely founded upon New York laws.

**Mississippi (Miss.).** *Constitution* of 1869, as printed in Code of 1880; cited by article and section, as in Alabama. *Statutes*: Code of 1880; cited by continuous section number, as in Alabama. *Biennial Laws* of 1882 and 1884. A conservative common-law code, limited in scope, resembling that of Virginia.

**Missouri (Mo.).** *Constitution* of 1875, as printed in the Revised Statutes of 1879; cited by article and section, as in Alabama. *Statutes*: Revised Statutes of 1879 (2 vols.); cited by continuous section number, as in Alabama. *Biennial Laws* of 1881 and 1883. A compilation of laws resembling those of Maryland, Virginia, or Tennessee, but more comprehensive; several statutes are copied from those of New York or Illinois.

**Montana (Mon.).** *Statutes*: Revised Statutes of 1879, containing a Code of Civil Procedure (*C. Civ. P.* or *Civ. C.*), a Probate Code (*Prob. C.*), a Criminal Practice Act (*C. Crim. P.*), a Code of Criminal Law (*Crim. C.*), and the General Laws (cited *G.L.*, or by continuous section number without other citation). *Biennial Laws* of 1879 (*Ex.*), 1881, 1883, and 1885. The laws of Montana are generally founded on those of California or Dakota.

**Nebraska (Neb.).** *Constitution* of 1875, as printed in Annual Laws of 1883; cited by article and section, as in Alabama. *Statutes*: Compiled Statutes of 1881, by Guy A. Brown; cited by part, chapter, and section, or by part, chapter, article, and section; thus, 1,2,4,10: Part 1, Chapter 2, Article 4, § 10. *Biennial Laws* of 1882, 1882 Extra Session (*Ex.*), 1883, and 1885. In the second volume of this work, the Compiled Laws of 1885 will be referred to. A compilation resembling those of Iowa and Kansas.

**Nevada (Nev.).** *Constitution* of 1864, as printed in the Compiled Laws of 1873; cited by article and section, as in Alabama. *Statutes*: Compiled Laws of 1873 (2 vols.); cited by continuous section number, as in Alabama. *Biennial Laws* of 1875, 1877, 1879, 1881, 1883, and 1885. A brief collection of common-law statutes, based on those of the Northwestern states, with a few from California.

**New Hampshire (N.H.).** *Constitution* of 1792, as printed in the General Laws of 1878; cited by part and article; thus, 2,100: Part 2, Article 100. *Statutes*: General Laws of 1878; cited by chapter and section, as in Delaware. *Biennial Laws* of 1879, 1881, 1883, and 1885. The least exhaustive and most conservative system of laws of all the New England states, resembling those of Maine and Massachusetts.

**New Jersey (N.J.).** *Constitution* of 1844, as printed in the Revision of 1877; cited by article and paragraph section, or by article, section, and paragraph section; thus, 4,8,1: Article 4, Section 8, § 1. *Statutes*: Revision of 1877 (2 vols.); cited by title of chapter and section, as the laws are arranged alphabetically by subjects; thus, *Conveyances*, 4. *App.* stands for Appendix; *Add.*, for Addenda. *Annual Laws* of 1878, 1879, 1880, 1881, 1882, 1883, 1884, and 1885. A conservative common-law system, resembling that of Pennsylvania. There is no revision, and consequently all laws are in force that have ever been enacted, if not repealed.

**New Mexico (N.M.).** *Statutes*: Compiled Laws of 1884, printed both in Spanish and English, cited by continuous section number, as in Alabama. *Biennial Laws* of 1884. The law of New Mexico is founded on the Spanish or Mexican civil law, and on the Kearney Code, the treatise of Don Pedro Murillo de Lorde, and other law formerly in force in the territory; to which occasional common-law statutes have been added, the

result being frequently confusing ; particularly, as the territorial legislatures seem seldom to have understood the laws they were enacting.

**New York (N.Y.).** *Constitution of 1846*, as printed in Vol. I. of Banks and Brothers' Revised Statutes ; cited by article and section, as in Alabama. *Statutes*: Banks and Brothers' Revised Statutes, 7th edition (4 vols.) ; cited by part, chapter, and section, or part, chapter, title, and section ; thus, 1,8,1,8 : Part 1, Chapter 8, Title 1, § 8. The arrangement of New York laws leaves much to be desired ; there is no late revision, so that all laws are in force unless repealed, as in New Jersey and Pennsylvania ; and old annual statutes are scattered throughout the volumes according to their subject-matter, so that much time must be lost in finding them, as they can only be cited by chapter and year. Volume IV. contains the Code of Civil Procedure (*Civ. C.*), cited by continuous section number, and the Code of Criminal Procedure (*Crim. C.*), cited in the same way. *Annual Laws of 1882, 1883, 1884, and 1885.* The New York laws are very comprehensive in scope, and have been largely copied throughout the country.

**North Carolina (N.C.).** *Constitution of 1868*, amended 1876, as printed in the code of 1883 ; cited by article and section, as in Alabama. *Statutes*: The Code of 1883 (2 vols.) ; cited by continuous section number, as in Alabama. *Biennial Laws of 1885.* The code of North Carolina resembles the statutes of Virginia and Maryland, but is more comprehensive.

**Ohio (O.).** *Constitution of 1851*, as printed in the Revised Statutes of 1880 ; cited by article and section, as in Alabama. *Statutes*: Revised Statutes of 1880 (2 vols.) ; cited by continuous section number, as in Alabama. *Annual Laws of 1882, 1883, 1884, 1885* (each legislature having two sessions, one regular and one adjourned). The Ohio statutes form a comprehensive and logically arranged common-law code ; many of them have been copied in other Western states. Many of them are founded on the laws of New York and the New England states.

**Oregon (Ore.).** *Constitution of 1857*, as printed in the General Laws of 1872 ; cited by article and section, as in Alabama. *Statutes*: The General Laws of 1872, containing the Code of Civil Procedure (*C. Civ. P. or Civ. C.*), cited by continuous section number ; the Criminal Code (*Crim. C.*), cited in the same way ; and the Miscellaneous Laws (*M. L. or no special citation*), cited by chapter and section. *Biennial Laws of 1874, 1876, 1878, 1880, 1882, and 1885.* A brief compilation, resembling in some respects those of Ohio or Vermont.

**Pennsylvania (Pa.).** *Constitution of 1874*, Buckalew's edition ; cited by article and section, as in Alabama. *Statutes*: Brightly's Purdon's Digest of 1872-3 (2 vols.) is referred to down to p. 438 of this work ; thereafter, the reference is in all cases to the edition of 1883. Both digests are cited by the titles of chapters, which are arranged alphabetically, as in New Jersey. There is no systematic revision of the statutes in Pennsylvania ; see New Jersey, above. *Biennial Laws of 1877-8, 1879, 1881, 1883, 1885*, cited as in other states. Purdon's Annual Digest (*Ann. Dig.*) contains the laws from 1873 to 1878. The Pennsylvania statutes form a conservative common-law collection, and have occasionally been copied by New Jersey, Maryland, and Delaware. Their unscientific arrangement is much to be deplored, as is the custom of passing later statutes wholly or partially identical with former ones, and not repealing the earlier ones. The same statutes are often repeated under different heads.

**Rhode Island (R.I.).** *Constitution of 1842*, as printed in the Public Statutes of 1882 ; cited by article and section, as in Alabama. *Statutes*: Public Statutes of 1882, cited by chapter and section, as in Delaware. *Annual Laws of 1882, 1883, 1884, and 1885* ; there are two volumes (two sessions) each year, and all the chapters are numbered continuously from those of the Public Statutes. The Rhode Island laws resemble those of the other New England states.

**South Carolina (S.C.).** *Constitution of 1868*, as printed in the General Statutes of 1882 ; cited by article and section, as in Alabama. *Statutes*: General Statutes of 1882 ;



cited by continuous section number, as in Alabama, and containing the Code of Civil Procedure (*Civ. C.* or *C. Civ. P.*). *Annual Laws* of 1883, 1884, and 1885. The most conservative and least comprehensive system of all the states in the Union.

**Tennessee (Tenn.).** *Constitution* of 1870, as printed in the Code of 1884; cited by article and section, as in Alabama. *Statutes*: Milliken and Vertrees' Code, 1884; cited by continuous section number, as in Alabama. *Biennial Laws* of 1885. The Tennessee statutes resemble those of North Carolina.

**Texas (Tex.).** *Constitution* of 1876, as printed in the Revised Statutes of 1879; cited by article and section, as in Alabama. *Statutes*: Revised Statutes of 1879; cited by continuous section number, as in Alabama, and containing a Penal Code (*P. C.*) and a Code of Criminal Procedure (*C. Crim. P.*). *Biennial Laws* of 1879, 1881, 1882 Extra Session, 1883, 1884 (*Ex.*), and 1885. The laws of Texas resemble those of Missouri, but are more comprehensive, and have many statutes resembling those of California or of the civil law of Louisiana.

**United States (U.S.).** As a rule, the United States statutes form no part of this work. See District of Columbia, and §§ 1, 4.

**Utah (Uta.).** *Statutes*: Compiled Laws of 1876 (*C. L.*, or with no title citation); cited by continuous section number; *Biennial Laws* of 1878, containing as Chapter 13 the Criminal Code (*Crim. C.*); of 1880; of 1882; and of 1884, in which Chapter 55 is frequently cited as the Code of Civil Procedure (*Civ. C.* or *C. Civ. P.*), and Chapter 56 as the Probate Code (*Prob. C.*). The codes are cited by continuous section number; but many of the other chapters in the laws are again subdivided into titles or chapters and sections, and cited accordingly. Many Utah laws are copied from California.

**Vermont (Vt.).** *Constitution* of 1793, as printed in the Revised Laws of 1880; cited by chapter and article. *Statutes*: Revised Laws of 1880; cited by continuous section number, as in Alabama. *Biennial Laws* of 1882 and 1884. The Vermont laws are rather different from those of the other New England states, showing occasionally the influence of New York.

**Virginia (Va.).** *Constitution* of 1870, as printed in the Acts of 1876-7; cited by article and section, as in Alabama. *Statutes*: Code of 1873; cited by chapter and section, as in Delaware. *Annual Laws* of 1873-4, 1874-5, 1875-6, 1876-7, 1877-8, 1878-9, 1879 Special Session (cited *Ex.*), 1879-80, 1880-1, 1881-2, 1882 Extra Session (cited *Ex.*), 1883-4, 1884 Extra Session. The annual laws are always cited by the *later* year in the title. The Virginia statutes form a conservative common-law system, and have been much copied in the Southwestern states.

**Washington [Territory] (Wash.).** *Statutes*: Code of 1881; cited by continuous section number, as in Alabama. *Biennial Laws* of 1883; cited by page and section number, as in Idaho. The laws often resemble those of Oregon.

**West Virginia (W.Va.).** *Constitution* of 1872, as printed in the Laws of 1883; cited by article and section, as in Alabama. *Statutes*: Kelly's Revised Statutes, 1878 (2 vols.). *Biennial Laws* of 1879, 1881, 1882 (Adjourned Session), 1883, and 1885. Most of the statutes are founded upon or copied from those of Virginia.

**Wisconsin (Wis.).** *Constitution* of 1848, as printed in the Revised Statutes of 1878; cited by article and section, as in Alabama. *Statutes*: Revised Statutes of 1878, as amended by Sanborn and Berryman's Supplement of 1883 (cited *Am.* simply); cited by continuous section number, as in Alabama. *Biennial Laws* of 1885. The statutes resemble those of Michigan, but are not quite so comprehensive; founded chiefly upon New York laws.

**Wyoming (Wy.).** *Statutes*: Compiled Laws (*C. L.*) of 1876; cited by chapter and section, or chapter, article, and section, without other title. Chapter 13 is the Civil Code (*Civ. C.*); Chapter 15, the Criminal Code (*Crim. C.*). *Biennial Laws* of 1877, 1879, 1882, and 1884. The statutes resemble those of Montana.

## TABLE OF ABBREVIATIONS.

[For States, see Table of Citations.]

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<i>Amt.</i> — Amendment.	<i>Div.</i> — Division.
<i>App.</i> — Appendix.	<i>Eng. Stat.</i> — English Statute.
<i>Art.</i> — Article.	<i>Ex.</i> — Extra Session.
<i>B. Rts.</i> — Bill of Rights.	<i>Ib.</i> — Ibidem ; same citation as that preceding.
<i>C.</i> — Constitution.	<i>P.</i> — Part.
<i>Chap.</i> — Chapter.	<i>P. C.</i> — Penal Code.
<i>Civ. C.</i> — Civil Code, or Code of Civil Procedure.	<i>Pol. C.</i> — Political Code.
<i>C. Civ. P.</i> — Code of Civil Procedure.	<i>Prob. C.</i> — Probate Code.
<i>C. Cr. Pr.</i> or <i>C. Crim. P.</i> — Code of Criminal Procedure.	<i>Sched.</i> — Schedule.
<i>Crim. C.</i> — Criminal Code.	<i>T.</i> — Title.
	<i>V.</i> — Volume.

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## GENERAL SCHEME.

In this Volume :

### PART I. CONSTITUTIONAL LAW :

DIVISION I. THE BILL OF RIGHTS.

DIVISION II. POLITICAL PROVISIONS.

### PART II. PRIVATE CIVIL LAW :

DIVISION I. NORMAL LAW.

Title I. Preliminary and General.

Title II. Real Property.

Title III. Successions.

Title IV. Administration.

Title V. Personal Property.

Title VI. Contracts.

DIVISION II. ABNORMAL LAW.

Title I. Contract Relations.

Title II. Natural Relations.

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In the forthcoming Volume :

### PART III. PUBLIC LAW :

DIVISION I. PRIVATE CORPORATIONS.

DIVISION II. MUNICIPAL CORPORATIONS.

### PART IV. ADJECTIVE LAW :

DIVISION I. PROBATE CODE.

DIVISION II. CIVIL PROCEDURE.

### PART V. CRIMINAL LAW.



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# AMERICAN STATUTE LAW.

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## PART I.

### THE STATE CONSTITUTIONS.

§ 1. **Note to Part I.** Throughout Part I. the sign \* means that the provision is not a constitutional provision, but a statute, in the State or Territory noted.

Of the contents of the various State Constitutions, a threefold division may roughly be made: they usually contain, *first*, the Declaration of Rights; *second*, the political constitution and organization of the State; and *third*, very varied and miscellaneous restrictions and injunctions concerning legislation. It has been deemed best to incorporate all constitutional provisions in this Part, excepting only a few detailed provisions, not of general interest, concerning minor administrative offices and municipal government. Of course, in many cases, legislation has been had on the same subjects; when such is the case, and the subject falls within the general scope of this work as defined by the Preface, a reference may be made to the other Parts of the book. It must always be borne in mind that this Part incorporates constitutional provisions only, and not statute provisions, except in a few cases specially noted, where an exception has been made for the sake of complete presentation of a subject, and in the case of territories below referred to.

All the thirty-eight States have Constitutions; not so the Territories, or the District of Columbia. But such important and general provisions in the laws of the Territories as correspond to the constitutional provisions of the States are also noted in this Part, as well as similar acts of the United States concerning the Territories; for others, the reader is referred to the United States Laws, which, as a general thing, form no part of this work.

It may generally be said that the Constitutions of the Western States are more elaborate, more cumbersome, and more frequently amended than those of the Eastern. One reason for this is, that in the West the State Constitution is frequently made the instrument for enacting laws which are in most States unconstitutional; another, that in the West many things are put in the Constitution which are elsewhere left to the legislature. The constitutional provisions are, of course, much more stable than ordinary laws.

For the date of the latest State Constitutions and where they may be found, see the Table of Citations. For abbreviations, see the Table of Abbreviations. States are always cited in the same order as explained in the Preface.

§ 2. **Interpretation of the State Constitutions.** The provisions of the Constitution of California are declared mandatory and prohibitory, except where otherwise declared by express words: Cal. C. 1,22.

## DIVISION I.

## BILL OF RIGHTS.

§ 3. **Note to Part I; Division I.** The Bill of Rights of the English Statute 1 W. & M. Sess. 2, has been largely adopted in the States of the Union, somewhat modified and largely amplified by the addition of new provisions of a similar nature, founded on Magna Charta, the Declaration of Independence and the Constitution of the United States, and old Province charters.

Where statutes of the Territories contain any of these provisions they are duly incorporated into this Division, with the constitutional provisions of the States.

§ 4. **Bill of Rights.**<sup>a</sup> In nine states, to guard against transgression of the high powers delegated to the legislature by the Constitution, everything in the Bill of Rights is declared to be excepted out of the general powers of Government, and shall forever remain inviolate; and all laws contrary to the Bill of Rights are void: Vt. C. 2,42; R.I. C. Preamble; Pa. C. 1,26; Del. Art. 1, *ad fin.*; Va. C. 1,21; Ky. C. 13,30; Tenn. C. 11,16; Ark. C. 2,29; Tex. C. 1,29; N.M.\* 1851, July 12, § 20.

So in Arizona the Bill of Rights is the supreme law of the land, subject only to the United States Constitution and laws: Ariz.\* B. Rts. 32. And it cannot be amended or altered but by the concurrence of a majority of all the members elected to the legislature, the vote to be taken by yeas and nays and entered on the journal.

The Constitutions of three states declare that some rights cannot be surrendered by men when they enter into a state of society, but are inalienable, because no equivalent can be given for them: N.H. C. 1,4; Va. C. 1,1; W.Va. C. 3,1. As, for example, (1) rights of conscience: N.H.; (2) other natural rights (§§ 12,13,14,15): Va., W.Va.

NOTE. — <sup>a</sup> Compare U.S. C. Amts. 9, 10.

§ 5. **Construction of Bills of Rights.** By the Constitutions of twenty-three states it is declared that this enumeration of rights shall not be construed to impair or deny others retained by the people:<sup>a</sup> Me. C. 1,24; R.I. C. 1,23; N.J. C. 1,21; O. C. 1,20; Io. C. 1,25; Minn. C. 1,16; Kan. C. B. Rts. 20; Neb. C. 1,20; Md. Decln. Rts. 45; Va. C. 1,21; N.C. C. 1,37; Mo. C. 2,32; Ark. C. 2,29; Cal. C. 1,23; Ore. C. 1,33; Nev. C. 1,20; Col. C. 2,28; S.C. C. 1,41; Ga. C. 1,5,2; Ala. C. 1,39; Miss. C. 1,32; Fla. C. Decln. Rts. 24; La. C. 13.

And in eight states the Constitution declares that a frequent recurrence to fundamental principles is necessary to preserve the blessings of liberty: N.H. C. 1,38; Vt. C. 1,18; Mass. C. 1,18; Ill. C. 2,20; Wis. C. 1,22; Va. C. 1,17; W.Va. C. 3,20; N.C. C. 1,29.

NOTE. — <sup>a</sup> Founded on U.S. C. Amt. 9.

## CHAPTER I.

## BILL OF RIGHTS: CIVIL.

§ 6. **Note to Part I., Section I., Chapter I.** This division of the declaration of rights into *civil* and *criminal* is purely one of convenience, and has no precedent, either in the statute of William and Mary or in the various State Constitutions.



## Article 1. Natural Rights.

§ 10. **Freedom.**<sup>a, b</sup> The Constitutions of eighteen states have a provision that men are free.

(A) Thus, in two states the Constitution declares that all men are born free and independent: Mass. C. 1,1; S.C. C. 1,1. (B) In seven, that they are by nature free and independent: N.J. C. 1,1; O. C. 1,1; Ill. C. 2,1; Io. C. 1,1; Cal. C. 1,1; Nev. C. 1,1; Fla. C. Decln. Rts. 1. (C) In one, that they are equally free and independent: Ala. C. 1,1. (D) In seven, that they are born equally free and independent: N.H. C. 1,1; Me. C. 1,1; Vt. C. 1,1; Pa. C. 1,1; Wis. C. 1,1; Neb. C. 1,1; Ark. C. 2,2. (E) In two, that they are by nature equally free and independent: Va. C. 1,1; W.Va. C. 3,1.

NOTES. — <sup>a</sup> Compare also § 12. <sup>b</sup> This paragraph is founded on the Declaration of Independence.

§ 11. **Equality.**<sup>a</sup> The Constitutions of twenty-six states declare, (A) in eight, that men are born equal: N.H. C. 1,1; Mass. C. 1,1; Me. C. 1,1; Vt. C. 1,1; Ind. C. 1,1; Neb. C. 1,1; N.C. C. 1,1; S.C. C. 1,1.

This seems to be implied in three other states: Pa. C. 1,1; Ark. C. 2,2; Wis. C. 1,1. See also § 10, C; § 20. (B) In three, that they are by nature equal: Io. C. 1,1; Nev. C. 1,1; Fla. C. Decln. Rts. 1. And so, in one, that they are equal before the law: Ark. C. 2,3. And this seems implied in the Constitutions of six other states: O. C. 1,2; Kan. C. B. of Rts. 1; Va. C. 1,1; W.Va. C. 3,1; Ga. C. 1,1,2; Ala. C. 1,1. See § 10 C, D, E; § 12; § 20; § 184. (C) In four, that all men have equal rights when they form a social compact: Ct. C. 1,1; Ky. C. 13,1; Tex. C. 1,3; Ore. C. 1,1; N.M.\* 1851, July 12, § 2.

(D) In Rhode Island, that all laws should be made for the good of the whole; and the burdens of the State ought to be fairly distributed among its citizens: R.I. C. 1,2.

NOTE. — <sup>a</sup> See § 10, note <sup>b</sup>.

§ 12. **Life and Liberty.**<sup>a</sup> The Constitutions of twenty-six states declare that all men have a natural, inherent, and inalienable right to enjoy and defend life and liberty: N.H. C. 1,2; Mass. C. 1,1; Me. C. 1,1; Vt. C. 1,1; N.J. C. 1,1; Pa. C. 1,1; O. C. 1,1; Ind. C. 1,1; Ill. C. 2,1; Wis. C. 1,1; Io. C. 1,1; Kan. C. Bill of Rts. 1; Neb. C. 1,1; Del. C. Preamble; Va. C. 1,1; W.Va. C. 3,1; N.C. C. 1,1; Ky. C. Preamble; Mo. C. 2,4; Ark. C. 2,2; Cal. C. 1,1; Nev. C. 1,1; Col. C. 2,3; S.C. C. 1,1; Ala. C. 1,1; Fla. C. Decln. Rts. 1; La. C. 1; Ariz.\* Preamble B. Rts.

NOTE. — <sup>a</sup> See § 10, note <sup>b</sup>. Compare also § 184.

§ 13. **Happiness.**<sup>a</sup> And in all the above states, except Missouri, that they have such natural right to pursue happiness.

NOTE. — <sup>a</sup> See § 10, note <sup>b</sup>. Also § 184.

§ 14. **Safety.**<sup>a</sup> And in fourteen of the above states, that they have such natural right to obtain safety: Mass., Me., Vt., N.J., O., Io., Va., W.Va., Ky., Cal., Nev., Col., S.C., Fla., as cited in § 12.

NOTE. — <sup>a</sup> See § 10, note <sup>b</sup>. Compare also § 184.

§ 15. **Property.** In twenty-seven states the Constitution declares, (A) in eighteen, that all men have a natural right to acquire, possess, and protect property: N.H. C. 1,2; Mass. C. 1,1; Me. C. 1,1; Vt. C. 1,1; N.J. C. 1,1; Pa. C. 1,1; O. C. 1,1; Io. C. 1,1; Del. C. Preamble; Va. C. 1,1; W.Va. C. 3,1; Ky. C. Preamble; Ark. C. 2,2; Cal. C. 1,1; Nev. C. 1,1; Col. C. 2,3; S.C. C. 1,1; Fla. Decln. of Rts. 1; Ariz.\* Preamble B. Rts.

(B) It seems the right of property is also recognized in other states by the provisions of § 184: Ill. C. 2,1; Mo. C. 2,4; Ga. C. 1,1,2; Ala. C. 1,37; Preamble; La.

C. 1., and in Dak.\* and Wy.\* by U.S. R. S. 1925. (C) So, in two, that all men have such right to the enjoyment of the fruits of their own labor: N.C. 1,1; Mo. (D) So the Constitution of two states declares that the right of property is before and higher than any constitutional sanction: Ky. C. 13,3; Ark. C. 2,22; and see § 90.

§ 16. **Reputation.** In three states the Constitution declares that men have a natural right to acquire, possess, and protect reputation: Pa. C. 1,1; Del. C. Preamble; Ark. C. 2,2.

§ 17. **Special or Exclusive Privileges.**<sup>a</sup> (A) The Constitutions of seven states prohibit to the legislature any grant of special privileges or immunities to any citizen or class of citizens: Mass. C. 1,6; Ind. C. 1,23; Io. C. 1,6; Tenn. C. 11,8; Ark. C. 2,18; Cal. C. 1,21; Ore. C. 1,20.

(B) So, in six, that no man or set of men is entitled to exclusive public emoluments or privileges from the community: Vt. C. 1,7; Ct. C. 1,1; Va. C. 1,6; N.C. C. 1,7; Ky. C. 13,1; Tex. C. 1,3; N.M. \* 1851, July 12, § 2.

*Except* (in all these thirteen except Connecticut) in consideration of public services.

(C) And in eleven states the Constitution provides that no special privileges or immunities shall be granted that may not be altered or revoked by the legislature: Pa. C. 1,17; O. C. 1,2; Ill. C. 2,14; Kan. C. B. of Rts. 2; Neb. C. 1,16; Mo. C. 2,15; Tex.<sup>a</sup> C. 1,17; Cal.<sup>a</sup> C. 1,21; Col.<sup>a</sup> C. 2,11; Ga. C. 1,3,2; Ala. C. 1,23.

In Kansas no such special privilege or immunity can be granted except by the legislature.

And in three states the operation of a general law cannot be suspended by the legislature for the benefit of any individual, corporation, or association:<sup>a</sup> Tenn. C. 11,8; Ark. C. 5,25; Ala. C. 4,23.

NOTE. — <sup>a</sup> Compare §§ 394,395,20,21; and see U.S. C. 1,9.

§ 18. **Hereditary Privileges.**<sup>a</sup> In ten states the Constitution declares (A) that no hereditary emoluments, privileges, or honors can be granted: Mass. C. 1,6; Me. C. 1,23; Ct. C. 1,20; O. C. 1,17; Kan. C. B. of Rts. 19; W.Va. C. 3,19; N.C. C. 1,30; Tenn. C. 1,30; Ark. C. 2,19; Ala. C. 1,30.

(B) So, in eight, no hereditary distinctions: Me.; Pa. C. 1,24; Ind. C. 1,35; Md. Decln. Rts. 42; Del. C. 1,19; Ky. C. 13,28; Ore. C. 1,29; Ala. (C) In three, no hereditary offices: N.H. C. 1,9; Mass.; Va. C. 1,6. (D) In seven, no title of nobility: Pa.; Ind.; Md.; Ky.; Ore.; S.C. C. 1,39; Ala. (E) In two others, no hereditary emolument: S.C.; Ala.

NOTE. — <sup>a</sup> Compare U.S. C. 1,9. See also § 212.

§ 19. **Pensions** cannot, by the Constitution of one state, be granted but in consideration of public services; and not for more than one year at a time: N.H. C. 1,36. In Maryland the legislature are forbidden to establish any general pension system: Md. C. 3,59.

## Art. 2. Civil Rights.

§ 20. **General Provisions.**<sup>a</sup> The Constitution of Georgia provides that the social status of the citizen shall never be the subject of legislation: Ga. C. 1,1,18. So, in South Carolina, that no person shall be disqualified as a witness, nor be prevented from acquiring, holding, and transmitting property, nor be hindered in acquiring education, nor be liable to any other punishment for any offence, nor be subject in law to any other restraints or disqualifications in regard to any personal rights, than such as are laid upon others under like circumstances: S.C. C. 1,12. In three states, that all citizens of the State possess equal civil and political rights and public privileges: Va. C. 1,20; S.C. C. 1,31; Ala. C. 1,2. So, in West Virginia, that every citizen is entitled to equal representation in the Government: W.Va. C. 2,4. In Arizona, "that the civil rights of the people shall not be abridged." Ariz.\* Bill Rts. 6.

NOTE. — <sup>a</sup> Compare §§ 11,17,184.

§ 21. **Color Distinction.**<sup>a</sup> By the Constitution of Arkansas no citizen shall ever be deprived of any right, privilege, or immunity, nor exempted from any burden or duty, on account of race, color, or previous condition : Ark. C. 2,3.

So, in Maryland, as to the right of being a witness in a court of law : Md. C. 3,53. So, in four states, as to the right of suffrage and holding office : Nev. C. 18,1 ; Ala. C. 1,38 ; Fla. C. 14,1 ; La. C. 188 ; Terr. U.S. 1860. And in three, distinction on account of race or color in any case whatever is prohibited, and all classes of citizens shall enjoy equally all common, public, legal, and political privileges : Va. C. 12,2 ; S.C. C. 1,39 ; Fla. C. 16,28. So, in two, it is specially provided that all the public schools should be free and open, without regard to race or color :<sup>b</sup> Col. C. 9,8 ; S.C. C. 10,10.

In Mississippi the Constitution provides that the right of all citizens to travel upon all public conveyances shall not be infringed : Miss. C. 1,24.

NOTES. — <sup>a</sup> Compare U.S. C. Amts. 14,15, which of course apply in all the States ; and see §§ 240, 241. <sup>b</sup> For statutes on this point, see further in Part III.

§ 22. **Exceptions.** By the Constitutions of seven states the right of voting is confined to whites :<sup>a, b</sup> O. C. 5,1 ; Kan. C. 5,1 ; Md. C. 1,1 ; Del. C. 4,1 ; Ky. C. 2,8 ; Ore. C. 2,2.

By the Constitutions of seven states white and colored children shall not be taught in the same [public] schools :<sup>c</sup> W.Va. C. 12,8 ; N.C. C. 9,2 ; Tenn. C. 11, 12 ; Mo. C. 11,3 ; Tex. C. 7,7 ; Ga. C. 8,1,1 ; Ala. C. 13,1.

By that of Oregon no Chiuaman can hold real estate, or hold or work a mining claim :<sup>c</sup> Ore. C. 15,8. And by that of two States no native of China can vote :<sup>c</sup> Cal. C. 2,1 ; Ore. C. 2,6. The Constitution of Mississippi legitimates all children, born before or after its adoption [1868], of persons not married, but cohabiting as husband and wife on Dec. 1, 1869 : and such persons are to be taken as married :<sup>a</sup> Miss. C. 12,22. So in Virginia the children of parents, one or both of whom were slaves at or during the period of cohabitation, and who were recognized by the father as his children, and whose mother was recognized by such father as his wife, and was cohabited with as such, shall be capable of inheriting from such father as if born in lawful wedlock : Va. C. 11,9. In South Carolina no person shall be disfranchised for felony or other crimes committed while a slave : S.C. C. 8,12.

The Constitutions of two states provide that the legislature shall pass laws prohibiting free negroes from coming to or living in the State, and making such action felony :<sup>c</sup> Ky. C. 10,2 ; Ore. C. 1,35. And by the Constitutions of two, the intermarriage of white persons with negroes or mulattoes,<sup>e</sup> or their cohabitation as husband and wife, is forbidden : N.C. C. 14,8 ; Tenn. C. 11,14.

By that of California the legislature is to prescribe all necessary regulations for the protection of the State and the counties, cities, and towns thereof from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the well-being or peace of the State, and to impose conditions upon which such persons may reside in the State, and to provide the means and mode of their removal from the State upon failure or refusal to comply with such conditions ; and no corporation shall employ directly or indirectly in any capacity any Chinese or Mongolian, and the legislature shall pass laws to enforce this provision ; and no Chinese shall be employed in any State, municipal, or other public work except as a punishment for crime : Cal. C. 19, 1-3. And further the presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State ; and the legislature is to discourage their immigration by all means within its power ; and Asiatic coolieism is declared a form of human slavery, and prohibited, and all contracts for coolie labor are void ; and the legislature may prescribe penalties for companies or corporations formed in any country for the importation of such coolie labor ; and the legislature is to delegate all necessary powers to cities and towns for the removal of Chinese, or their location in prescribed portions of such towns ; and also to provide legislation to prohibit the introduction of Chinese into the State. Cal. C. 19,4.

NOTES. — <sup>a</sup> See also Art. 24 for the provisions in full concerning the right of voting. <sup>b</sup> This provision is abrogated by U.S. C. Amt. 15. <sup>c</sup> *Quere*, how far this is constitutional under the



United States Constitution. <sup>d</sup> This provision is meant to apply to the case of negroes, among whom legal marriage was not common before 1865. For further statutory provisions, see Part II., Div. II.

<sup>e</sup> See Glossary, *Mulatto*.

§ 23. **Sex Distinctions: Voting.**<sup>a</sup> The Constitutions of all the states specify that the elective franchise is confined to males: N.H. C. 2,28; Mass. C. 2,1,3,4; Amt. 3; Me. C. 2,1; Vt. C. 2,8; R.I. C. 2,1; Ct. C. 6,2; N.Y. C. 2,1; N.J. C. 2,1; Pa. C. 8,1; O. C. 5,1; Ind. C. 2,2; Ill. C. 7,1; Mich. C. 7,1; Wis. C. 3,1; Io. C. 2,1; Minn. C. 7,1; Kan. C. 5,1; Neb. C. 7,1; Md. C. 1,1; Del. C. 4,1; Va. C. 3,1; W.Va. C. 4,1; N.C. C. 6,1; Ky. C. 2,8; Tenn. C. 4,1; Mo. C. 8,2; Ark. C. 3,1; Tex. C. 6,2; Cal. C. 2,1; Ore. C. 2,2; Nev. C. 2,1; Col. C. 7,1; S.C. C. 8,2; Ga. C. 2,1,2; Ala. C. 8,1; Miss. C. 7,2; Fla. C. 14,1; La. C. 185.

But in Colorado the legislature may at any time enact a law to extend the right of suffrage to women of lawful age, otherwise qualified; and such enactment shall take effect if approved by a majority of the electors at a general election. Col. C. 7,2. And in some territories women vote. See Art. 24.

And in two states the Constitution provides that women of the age of twenty-one may vote at any election of school officers, or upon any measure relating to schools.<sup>b</sup> Minn. C. 7,8; Col. C. 7,1.

NOTES. — <sup>a</sup> § 22, note <sup>a</sup>. <sup>b</sup> So, by statute, in several states.

§ 24. **Sex Distinctions: Schools.**<sup>a</sup> The Constitution of Kansas declares that the legislature, in providing for the formation and regulation of schools, shall make no distinction between the rights of males and females. Kan. C. 2,23.

And in four states, that women may hold any office pertaining solely to the management of schools: Pa. C. 10,3; Minn. C. 7,8; Col. C. 7,1; La. C. 232.

NOTE. — <sup>a</sup> For similar statute provisions, see in Part III.

§ 25. **Sex Distinctions: Occupation.** The Constitution of California provides that no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession. Cal. C. 20,18.

In Missouri the Constitution specifies that the Governor and members of the legislature must be male: Mo. C. 4,4 & 6; 5,5.

§ 26. **Sex Distinctions: Property.** In fourteen states there are constitutional provisions concerning the property of married women: Mich. C. 16,5; Kan. C. 15,6; Md. C. 3,43; W.Va. C. 6,49; N.C. C. 10,6; Ark. C. 9,7; Tex. C. 16,15; Cal. C. 20,8; Ore. C. 15,5; Nev. C. 4,31; S.C. C. 14,8; Ga. C. 3,11,1; Ala. C. 10,6; Miss. C. 1,16; Fla. C. 4,26.

In detail: in eleven states the real and personal property of a female acquired before marriage remains her estate and property, and is not liable for the debts of the husband; and may be devised and bequeathed by her as if unmarried; and so also all property to which she may become entitled after marriage, by gift, grant, devise, or descent: Mich., N.C., Ark., Tex., Cal., Ore., Nev., S.C., Ga., Ala., Fla. In five, the legislature shall provide for the protection of the rights of women in acquiring and possessing property, real, personal, and mixed, separate and apart from the husband: Kan., Md., W.Va., Nev., Miss. And in four, the legislature are to provide for the registration of such separate property: Ark. C. 9,8; Tex.; Ore.; Nev.

But in South Carolina it is provided that no gift or grant from the husband to the wife shall be prejudicial to the just claims of his creditors. So, in Mississippi, that property so acquired since marriage must be "acquired in good faith."

§ 27. **Sex Distinctions: Custody of Children.** In Kansas the Constitution provides that the legislature shall provide for women equal rights with the husband in the possession of their children: Kan. C. 15,6.

### Art. 3. Slavery and Apprenticeship.

§ 30.<sup>a</sup> **Slavery Prohibited.** (A) In twenty-five states slavery and involuntary servitude are not permitted by the Constitution: Vt. C. 1,1; R.I. C. 1,4; O. C. 1,6; Ind. C. 1,37; Mich. C. 18,11; Wis. C. 1,2; Io. C. 1,23; Minn. C. 1,2; Kan. C. Bill of Rts. 6; Neb. C. 1,2; Va. C. 1,19; N.C. C. 1,33; Tenn. C. 1,33; Mo. C. 2,31; Ark. C. 2,27; Cal. C. 1,18; Ore. C. 1,34; Nev. C. Ordinance 3 & C. 1,17; Col. C. 2,26; S.C. C. 1,2; Ga. C. 1,1,17; Ala. C. 1,33; Miss. C. 1,19; Fla. C. Decln. of Rts. 18; La. C. 5; N.M.\* 76, 1; Ariz.\* B. Rts. 20.

*Except* (1) in twenty-three, as a punishment for crime whereof the party has been duly convicted: O., Ind., Mich., Wis., Io., Minn., Kan., Neb., Va., N.C., Tenn., Mo., Ark., Cal., Ore., Nev., Col., S.C., Ga., Ala., Miss., Fla., La., Ariz.\* So, in Vermont, (2) when bound by law for the payment of debts, damages, fines, costs, and the like: Vt.

(B) And in Maryland there is a constitutional provision that slavery shall not be re-established: Md. Decln. Rts. 24. So, in Tennessee, the legislature can make no law recognizing the right of property in man: Tenn. C. 1,34. (C) But in Kentucky the Constitution declares that the right of the owner of a slave to such slave and its increase is the same, and as inviolable, as any right of property whatever: <sup>a</sup> Ky. C. 13,3.

There are other provisions recognizing slavery in the Constitution of Kentucky: <sup>a</sup> C. 10,1-3.

NOTE. — <sup>a</sup> Slavery is prohibited in all the states by the U.S. C. Amt. 13.

§ 31. **Compensation for Slaves.** In three states the Constitution provides that the legislature shall have no power to make compensation for emancipated slaves: Md. C. 3,37; N.C. C. 1,6; Miss. C. 12,21.

Nor, in Mississippi, to claim such compensation from the National Government. But in Maryland the Constitution declares that, slavery having been abolished by the authority of the United States, compensation is due the State from the National Government: Md. Decln. Rts. 24. In two states all contracts relating to slaves are declared void: S.C. C. 4,34; Fla. C. 16,26.

§ 32 **Apprenticeships.** In Vermont service by indentures and apprenticeships is allowed, but must expire at the age of twenty-one in males and eighteen in females: Vt. C. 1,1.

In Indiana no indenture of any negro or mulatto made out of the State is valid: Ind. C. 1, 37.

§ 33. **Terms of Service** over the age prescribed in § 32 are forbidden by the Constitution of Vermont unless entered into with the full consent of the party serving: Vt. C. 1,1.

### Art. 4. Religious Rights.

§ 40. **General Rights of Conscience.**<sup>a</sup> In all the states except Alabama it is provided by the Constitution, (A) in twenty-six States, that every man may worship God according to his own conscience: N.H. C. 1,5; Mass. C. 1,2; Me. C. 1,3; Vt. C. 1,3; R.I. C. 1,3; Ct. C. 7,1; N.J. C. 1,3; Pa. C. 1,3; O. C. 1,7; Ind. C. 1,2; Minn. C. 1,16; Kan. C. B. Rts. 7; Neb. C. 1,4; Md. Decln. Rts. 36; Del. C. Preamble; Va. C. 1,18; W.Va. C. 3,15; N.C. C. 1,26; Ky. C. 13,5; Tenn. C. 1,3; Mo. C. 2,5; Ark. C. 2,24; Tex. C. 1,6; Ore. C. 1,2; S.C. C. 1,9; Ga. C. 1,1,12; N.M.\* 95,1; 1851, July 12, § 4.

(B) So, in eleven states, that the free enjoyment of all religious sentiments and the different modes of worship shall ever be held sacred: Ct. C. 1,3; N.Y. C. 1,3; Ill. C. 2,3; Mich. C. 4,39; Wis. C. 1,18; Io. C. 1,3; Cal. C. 1,4; Nev. C. Ordinance 3 & C. 1,4; Col. C. 2,4; Miss. C. 1,23; Fla. C. Decln. of Rts. 4; La. C. 4. (C) And further, in five states, that it is the duty of the legislature to pass suitable laws to protect every religious community in the peaceable enjoyment of its own mode of worship: O.; Neb.; Ark. C. 2,25; Tex.; S.C. C. 1,10; N.M.\* 1851, July 12, § 4. (D) And in nineteen, that no human authority or law ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion: Vt.; Pa.; O.; Ind. C.



1,3; Mich.; Wis.; Io. C. 1,3; Minn.; Kan.; Neb.; Del. C. 1,1; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Ore. C. 1,3; Ga. (E) And in nine, that no person ought to be molested in person or estate on account of his religious persuasion: N.H.; Mass.; Me.; R.I.; Md.; Va. C. 5,14; W.Va.; Nev.; Ga. C. 1,1,13; N.M.\*

NOTE. — <sup>a</sup> Compare U.S. C. Amts. 1.

§ 41. **Limitations.** But the provisions of §§ 40, 45 are not, (A) in thirteen states, to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State: Ct. C. 1,3; N.Y. C. 1,3; Ill. C. 2,3; Minn. C. 1,16; Md. Decln. Rts. 36; Mo. C. 2,5; Cal. C. 1,4; Nev. C. 1,4; Col. C. 2,4; S.C. C. 1,9; Ga. C. 1,1,13; Miss. C. 1,23; Fla. C. Decln. Rts. 4; Ariz. \* B. Rts. 13.

Nor, (B) in four states, to excuse disturbance of the public peace: N.H. C. 1,5; Mass. C. 1,2; Me. C. 1,3; Md.

This provision would also seem implied in Neb., Ark., Tex., S.C. See also § 40, C.

Nor, (C) in three, to justify practices inconsistent with the rights of others: Mo., Md., Va. So, in three states, no person is to disturb others in their religious worship: N.H., Mass., Me., N.M.\*

§ 42. **Compulsory Support of Churches.** The Constitutions of twenty-four states provide (A) that no man can be compelled, against his consent, to support or attend any church: Vt. C. 1,3; R.I. C. 1,3; Ct. C. 7,1; Pa. C. 1,3; O. C. 1,7; Ind. C. 1,4; Ill. C. 2,3; Mich. C. 4,39; Wis. C. 1,18; Io. C. 1,3; Minn. C. 1,16; Kan. C. B. of Rts. 7; Neb. C. 1,4; Md. Decln. Rts. 36; Del. C. 1,1; Va. C. 5,14; W.Va. C. 3,15; Ky. C. 13,5; Tenn. C. 1,3; Mo. C. 2,6; Ark. C. 2,24; Tex. C. 1,6; Col. C. 2,4; Ala. C. 1,4.

(B) And in New Hampshire, that no person of one particular sect shall be compelled to contribute to the support of ministers of another sect: N.H. C. 1,6. So, in New Jersey, he cannot be compelled to support or attend any church contrary to his own faith: N.J. C. 1,3.

§ 43. **Established Church.**<sup>a</sup> The Constitutions of five states provide (A) that there shall be no established church: N.J. C. 1,4; Io. C. 1,3; S.C. C. 1,10; Ala. C. 1,4; La. C. 4.

(B) <sup>a</sup> And in twenty-nine states, that there shall be no preference shown any one sect: N.H. C. 1,6; Mass. C. Amt. 11; Me. C. 1,3; Ct. C. 1,4; N.Y. C. 1,3; N.J.; Pa. C. 1,3; O. C. 1,7; Ind. C. 1,4; Ill. C. 2,3; Wis. C. 1,18; Minn. C. 1,16; Kan. C. B. Rts. 7; Neb. 1,4; Del. C. 1,1; Va. C. 5,14; W.Va. C. 3,15; Ky. C. 13,5; Tenn. C. 1,3; Mo. C. 2,7; Ark. C. 2,24; Tex. C. 1,6; Cal. C. 1,4; Nev. C. 1,4; Col. C. 2,4; Ala.; Miss. C. 1,23; Fla. C. Decln. Rts. 23; La. C. 51; N.M.\* 1851, July 12, § 4.

Nor, in three states, any subordination of one sect to another: N.H., Mass., Me.

But the Constitutions of two states declare that every sect ought to observe the Lord's day (in Vt.), and to keep up some sort of religious worship: Vt. C. 1,3; Del. C. 1,1.

NOTE. — <sup>a</sup> Founded on U.S. C. Amt. 1.

§ 44. **State Support.** By the Constitutions of fourteen states no money can be taken from the public treasury in aid of any church, sect, or sectarian institution: Pa. C. 3,18; Ind. C. 1,6; Ill. C. 8,3; Mich. C. 4,40; Wis. C. 1,18; Minn. C. 1,16; Mo. C. 2,7; Tex. C. 1,7; Cal. C. 4,30; Ore. C. 1,5; Col. C. 9,7; Ga. C. 1,1,14; Miss. C. 1,21; La. C. 51. Directly or indirectly: Mo., Cal., Ga., La.

Nor, in seven states, from any municipal corporation: Ill.; Va. C. 5,14; W.Va. C. 3,15; Mo. C. 11,11; Cal.; Col.

Nor, in six, can property of the State ever be appropriated for such purpose: Ill., Mich., Mo., Tex., Cal., Col.

Nor, in four, property of any municipality: Ill., Mo., Cal., Col.

Nor, in two, shall money be appropriated for religious services in the legislature: Ore.; Mich. C. 4,24.

But by the Constitution of New Hampshire the legislature may authorize towns or parishes to provide at their own expense for the support of Protestant ministers: N.H. C. 1,6. And in Mass. (C. Amt. 11) and Mo. parishes may do so. So in Maine, religious societies: Me. C. 1,3. But in Va. and W.Va., it is expressly provided to the contrary.

For religious corporations and their support, see also § 323.

**§ 45. Religious Test.** By the Constitutions of twenty-seven states (A) no religious test is required as a qualification for office: <sup>a</sup> Mass. C. Amt. 7; Me. C. 1,3; R.I. C. 1,3; N.Y. C. 12,1; N.J. C. 1,4; O. C. 1,7; Ind. C. 1,5; Ill. C. 5,25; Mich. C. 18,1; Wis. C. 1,19; Io. C. 1,4; Minn. C. 1,17; Kan. C. B. of Rts. 7; Neb. C. 1,4; Md. C. Decln. Rts. 37; Del. C. 1,2; Va. C. 5,14; W.Va. C. 3,11 and 15; Tenn. C. 1,4; Mo. C. 2,5; Ark. C. 2,26; Tex. C. 1,4; Cal. C. 20,3; Ore. C. 1,4; Ga. C. 1,1,13; Ala. C. 1,4; Miss. C. 1,23; N.M.\* 95,1; 1851, July 12, § 3.

Nor, in eighteen, for any public trust under the State: Me., N.J., Ind., Mich., Wis., Io., Minn., Kan., N.J., Md., Del., Tenn., Mo., Tex., Cal., Ore., Ga., Ala.

Nor, in four, for voting: Minn., Kan., Ark., W.Va.

Nor, in six, for serving on juries: Md. C. Decln. Rts. 36; W.Va.; Tenn. C. 1,6; Mo.; Cal. C. 1,4; Ore. C. 1,6.

Nor, in seventeen, for being a witness in a court of law: N.Y. C. 1,3; O.; Ind. C. 1,7; Mich. C. 6,34; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Mo.; Ark.; Tex. C. 1,5; Cal.; Ore.; Nev. C. 14; Fla. C. Decln. Rts. 4.

Nor, in Oregon, can he be questioned in a court as to his religious belief, in order to shake his credit: Ore. C. 1,6.

(B) And by the Constitutions of eleven states no man can be deprived of any civil right as a citizen on account of his religious sentiments: <sup>b</sup> Vt. C. 1,3; R.I. C. 1,3; N.J.; Ill. C. 2,3; Mich. C. 4,41; Io. C. 1,3; Va. C. 5,14; W.Va. C. 3,15; Ky. C. 13,6; Col. C. 2,4; Ala. C. 1,4; Ariz. \* B. Rts. 13.

NOTES. — <sup>a</sup> This paragraph is founded on the U.S. C. 6,3. <sup>b</sup> This provision would seem to apply generally to the rights of voting, holding office, serving on juries, or being witnesses. Compare § 40, E.

**§ 46. Limitations.** But by the Constitution in five states (A) a man cannot hold office who denies the being of Almighty God or the existence of a Supreme Being: N.C. C. 6,5; Ark. C. 19,1; Tex. C. 1,4; S.C. C. 14,6; 3,2; Miss. C. 12,3.

Nor, in Arkansas, is he competent as a witness. Nor, it seems, in two states, can a man hold office unless he believes in God and a future state of rewards and punishments: Pa. C. 1,4; Tenn. C. 9,2. Nor, in Maryland, unless he believes in the existence of God: Md. Decln. Rts. 37.

And in two, a man who does not believe in God and a future state of retribution will be deemed incompetent as a witness or juror: Md. Decln. Rts. 36; Ark.

**§ 47. Oaths and Affirmations.** It is in five states provided by the Constitution that the provisions of § 40 shall not be construed to dispense with oaths or affirmations: O. C. 1,7; Ill. C. 2,3; Neb. C. 1,4; Ark. C. 2,26; Col. C. 2,4.

And it is in five states declared by the Constitution that the mode of administering an oath shall be such as is most binding upon the person sworn: Ind. C. 1,8; Md. Decln. Rts. 39; Ky. C. 8,7; Tex. C. 1,5; Ore. C. 1,7.

And in Kentucky the general form is to be such as shall be deemed by the legislature the most solemn appeal to God. In two, an affirmation may be made, instead of an oath, by Quakers: N.H. C. 2,84; Mass. C. Amt. 6.

Any oath or affirmation, taken as above, in the several states respectively, renders the person liable for perjury, if falsely taken, as if the oath were in the ordinary form: N.H., Mass., Tex.

§ 48. **Sundays and Sabbaths.** By the Constitution of Tennessee no person shall, in time of peace, be required to perform any service to the public on any day set apart by his religion as a day of rest: Tenn. C. 11.15.

## Art. 5. Education.

§ 50. **General Right.** In twenty states the Constitution declares (A) that the people have a right to education, which it is the duty of the State to guard and maintain: N.C. C. 1,27; Fla. C. 8,1.

So, in eleven, that a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature (1) to encourage the promotion of intellectual, scientific, moral, social, and agricultural improvement: N.H. C. 2,83; Mass. C. 5,2; Ind. C. 8,1; Mich. C. 13,11; Io. C. 9,2,3; Kan. C. 6,2; Md. C. Decln. Rts. 43; W.Va. C. 12,12; Cal. C. 9,1; Nev. C. 11,1; Miss. C. 8,1.

And in three (2) to cherish the interests of literature and the sciences: N.H., Mass., Tenn. C. 11,12.

And in eight (3) to encourage schools and the means of instruction: N.H.; Mass.; Me. C. 8,1; R.I. C. 12,1; O. C. 1,7; Neb. C. 1,4; N.C. C. 9,1; Tex. C. 7,1.

So, in one, that all religious societies or bodies of men, united or incorporated for the advancement of religion or learning, or other pious or charitable purposes, ought to be encouraged and protected in the enjoyment of the rights, immunities, and estates which they in justice ought to enjoy, under such regulations as the legislature direct: Vt. C. 2,41.

§ 51. **Free Schools.** By the Constitutions of all the states except N.H. and Del., (A) the legislature shall provide a system of free schools: Me. C. 8,1; Vt. 2,41; N.J. C. 4,7,6; Pa. 10,1; O. C. 6, 2; Ind. C. 8,1; Ill. C. 8,1; Mich. C. 13,4; Wis. C. 10,3; Io. C. 9,1,12; Minn. C. 8,3; Kan. C. 6,2; Neb. C. 8,6; Md. C. 8,1; Va. C. 8,3; W.Va. C. 12,1; N.C. C. 9,2; Mo. C. 11,1; Ark. C. 14,1; Tex. C. 7,1; Cal. C. 9,5; Ore. C. 8,3; Nev. C. 11,2; Col. C. 9,2; S.C. C. 10,3; Ga. C. 8,1,1; Ala. C. 13,1; Miss. C. 8,1; Fla. C. 8,2; La. C. 224.

So, (B) in most states there is provided by the Constitution a school fund which is to be used for that purpose: R.I. C. 12,2; Ct. C. 8,2; N.Y. C. 9,1; N.J. C. 4,7,6; Pa.; O. C. 6,1; Ind. C. 8,2; Ill. C. 8,2; Mich. C. 13,2; Wis. C. 10,2; Io. C. 9,2,1; Minn. C. 8,2; Kan. C. 6,3; Neb. C. 8,3; Md. C. 8,3; Va. C. 8,7; W.Va. C. 12,4; N.C. C. 9,4,5; Ky. C. 11,1; Tenn. C. 11,12; Mo. C. 11,6-8; Ark. C. 14,2; Tex. C. 7,2; Cal. C. 9,4; Ore. C. 8,2; Nev. C. 11,2; Col. C. 9,3; S.C. C. 10,11; Ga. C. 8,1,1; Ala. C. 13,2 and 3; Miss. C. 8,6, and Amt. 2; Fla. C. 8,4; La. C. 229.

§ 52. **Time of Holding.** The schools must be held, in three states, at least six months a year in every district: Cal., Nev. C., S.C.

In three others, at least four months: Mo. C. 11,7; Miss. C. 8,5; N.C. C. 9,3.

And in eight, at least three months a year: Mich. C. 13,5; Wis. C. 10,5; Ia. C. 9,1, 12; Kan. C. 6,4; Col.; Neb. C. 8,7; Mo. C. 11,2; Fla. C. 8,8.

To be held, in Vermont, one or more schools in each town, and one or more grammar schools in each county: Vt. 2,41.

Public schools are to be held in each township, in Minnesota: Minn. C. 8,3.

§ 53. **Age of Scholars.** In six states the free schools must provide instruction for all persons between the ages of 5 and 21: Io. C. 9,2,7; Kan. ; Neb. C. 8,6; Minn. C. 8,2; Va. C. 8,8; Miss. So, 6 and 21: Pa., N.C., Ark., Col. So, 4 and 20: Ore. C. 8,4; Wis. C. 10,3. So, 5 and 18: N.J. So, 6 and 18: Nev. C. 11,3; La. So, 6 and 20: Mo. C. 11,1. So, 7 and 21: Ala. So, 4 and 21: Fla. C. 8,7. [See § 51 for citations.]

§ 54. **Unsectarian Schools.** <sup>a, b</sup> (A) By the Constitutions of thirteen states, no public money shall ever be appropriated for the support of any sectarian or denominational school: N.H. C. 2,83; Mass. C. Amts. 18; Pa. C. 10,2; Ill. C. 8,3; Mich. C. 4,40; Wis. C. 1,18; Minn. C. 8,3; Tex. C. 7,5; Mo. C. 11,11; Cal. C. 9,8; Col. C. 9,7; Ala. C. 13,8; La. C. 228.

And the same would follow from § 44 in four other states: Ind., Ore., Ga., Miss.

Nor, in Nebraska, can the State accept or grant a bequest to be used for sectarian purposes: Neb. C. 8,11.

(B) And further, in four states, no public money can be appropriated for any school not under the exclusive control of the State or its school department: Mass.; Me. C. 8,1; Pa. C. 3,17; Cal.

So, in four states, no sect shall ever have any exclusive right to, or control of, the State school fund: O. C. 6,2; Kan. C. 6,8; S.C. C. 10,5, Amt.; Miss. C. 8,9. In three, the school fund is for "the equal benefit of the people:" Ct. C. 8,2; N.J.; Tenn. C. 11,12.

(C) And, in six, no sectarian instruction is permitted, directly or indirectly, in any of the State schools: Wis. C. 10,3; Neb. C. 8,11; Cal.; Nev. C. 11,9; Col. C. 9,8; S.C.

And in Colorado no teacher or student shall ever be required to attend or participate in any religious service whatever.

NOTES. — <sup>a</sup> See also § 44. <sup>b</sup> For sex distinctions, color distinctions, etc., in schools, see § 24.

§ 55. **Compulsory Attendance.** By the Constitutions of four states, the legislature may enact laws requiring the attendance at a free school (A) of all persons between six and eighteen years of age for a term of at least sixteen months in all: N.C.<sup>a</sup> C. 9,15.

(B) So, in two states, of all persons between six and sixteen (or in Col., eighteen), for a term of at least (1) twenty-four months: S.C. C. 10,4; (2) three years: Col. C. 9,11. (C) So, in Nevada, the legislature may enact laws to insure general attendance: Nev. C. 11,2. (D) And in Virginia, "such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy:" Va. C. 8,4.

NOTE. — <sup>a</sup> Unless educated by other means.

§ 56. **Universities.** The Constitutions of eighteen states provide for a State university: Mich. C. 13,6–8; Wis. C. 10,6; Io. C. 9,1,11; Minn. C. 8,4; Kan. C. 6,7; Neb. C. 8,10; N.C. C. 9,6,7; Mo. C. 11,5; Tex. C. 7,10; Cal. C. 9,9; Ore. C. 8,1; Nev. C. 11,4; Col. C. 9,12; S.C. C. 10,9; Ga. C. 8,6,1; Ala. C. 13,9; Fla. C. 8,2; La. C. 230.

So, in Massachusetts, Harvard College is specially recognized by the Constitution and provided for: Mass. C. 5,1; and in Connecticut, Yale: Ct. C. 8,1.

And in nine states the Constitution provides specially for free normal schools or academies: Me. C. 8,1; N.Y. C. 9,1; Pa. C. 3,17; Wis. C. 10,2; Kan. C. 6,2; Cal. C. 9,6; Va. C. 8,5; W.Va. C. 12,11; N.C. C. 9,14; Nev. C. 11,5; S.C. C. 10,6.



And in nine others for an agricultural school or schools: Mich. C. 13,11; Va.; N.C. C. 9,14; Tex. C. 7,13; Cal.; Nev.; S.C.; Ala. C. 13,9; Miss. C. 8,8.

And in two, for a School of Mines: N.C.; Col. C. 8,5. In three, for a mechanical school: N.C., Tex., Ala.

§ 57. **The Language** taught in the schools is, by the Constitutions of three states, to be English: Mich. C. 13,4; Ga. C. 8,1,1; La. C. 226.

But in Louisiana the instruction may be given in French.

§ 58. **Libraries.** The Constitutions of two states provide that there shall be at least one public library in each township: Ind. C. 13,12; Mich. C. 13,12. So, in Iowa, the State school fund may be applied to the establishment of libraries: Io. C. 9,2,4.

## Art. 6. Miscellaneous Rights.

§ 60. **Freedom of Speech.**<sup>a</sup> By the Constitutions of twenty-eight states, (A) every man is given the right freely to write, speak, and publish his opinions on all subjects, being responsible for the abuse of that privilege: Me. C. 1,4; Ct. C. 1,5; N.Y. C. 1,8; N.J. C. 1,5; Pa. C. 1,7; O. C. 1,11; Ind. C. 1,9; Ill. C. 2,4; Mich. C. 4,42; Wis. C. 1,3; Io. C. 1,7; Minn. C. 1,3; Kan. C. B. Rts. 11; Neb. C. 1,5; Md. Decln. Rts. 40; Va. C. 1,14; Ky. C. 13,9; Tenn. C. 1,19; Mo. C. 2,14; Ark. C. 2,6; Tex. C. 1,8; Cal. C. 1,9; Ore. C. 1,8; Nev. C. 1,9; Col. C. 2,10; S.C. C. 1,7; Ga. C. 1,1,15; Ala. C. 1,5; Fla. C. Decln. Rts. 9; N.M.\* 95,1; July 12, 1851, § 5; Ariz.\* B. Rts. 16.

(B) And by eighteen state Constitutions it is provided that no law shall ever be passed to abridge or restrain freedom of speech and of the press:<sup>b</sup> Ct. C. 1,6; N.Y.; N.J.; O.; Ind.; Mich.; Wis.; Io.; Va. C. 5,14; W.Va. C. 3,7; Tex.; Cal.; Ore.; Nev.; S.C.; Ga.; Miss. C. 1,4; Fla.; La. C. 4; N.M.\* Ariz.\*

(C) In eight, there is a declaration that the liberty of the press ought to be maintained: N.H. C. 1,22; Vt. C. 1,13; Mass. C. 1,16; Minn.; Kan.; Md.; Va.; N.C. C. 1,20.

And so, in four other states, that the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government; and no law shall ever be made to restrain the right thereof: Pa. C. 1,7; Del. C. 1,5; Ky.; Tenn.

So, in two, that any man may publish his sentiments on any subject, being responsible for the abuse of that liberty: R.I. C. 1,20; Del.

(D) And in seven, that no law shall ever be passed to restrain the freedom of the press: Mass., Me., Pa., Del., Ky., Tenn., Ark.

(E) But in North Carolina, that everybody shall be answerable for the abuse of the same.

(F) In two states, that no law shall be passed impairing freedom of speech: Mo., Col.

(G) So, in Vermont, the general right (A) only extends to freedom of speech, and freedom to publish matters relating to the government or officers thereof: Vt. C. 1,13.

**Limitations.** But the Constitution of West Virginia specifies that the legislature may (1) restrain the sale of obscene books, etc.; and (2) that they may provide for the punishment of libel and defamation.

NOTES. — <sup>a</sup> For speech in the legislature, see § 272. <sup>b</sup> Founded in U.S. C. Amt. 1. See also Eng. Stat. W. & M. S. 2, C. 2.

§ 61. **Libel.**<sup>a</sup> The Constitutions of twelve states provide that (A) in all civil and criminal trials for libel the truth may be given in evidence: Ct. C. 1,7; Ind. C. 1,10; Kan. C. B. Rts. 11; W.Va. C. 3,8; Mo. C. 2,14; Nev. C. 1,9; Col. C. 2,10; Ga. C. 1,2,1; Fla. C. Decln. Rts. 9; La. C. 168.



[This would seem implied in certain cases by the Constitutions of three other states : R.I., Ill., Neb. Compare C.]

So, in seven others, when the matter published is proper for public information, or in prosecutions for libels on officers or men in a public capacity: Me. C. 1,4; Del. C. 1,5; Ky.\* C. 13,10; Tenn. C. 1,19; Tex. C. 1,8; S.C. C. 1,8; Ala. C. 1,13; N.M.\* 1851, July 12, § 6.

(B) So, in eight, in criminal trials only: N.Y. C. 1,8; N.J. C. 1,5; O. C. 1,11; Mich. C. 6,25; Wis. C. 1,3; Io. C. 1,7; Ark. C. 2,6; Cal. C. 1,9; Ariz.\* B. Rts. 16; Ida.\* Cr. C. 126; Dak.\* P. C. 313; Wash.\* 1233; Uta.\* 1957.

[This would seem implied by the Constitutions of three other states: Wis., Kan., Fla. Compare D, E.]

(C) And in eight, that truth, in all<sup>b</sup> civil and criminal trials for libel, is a sufficient defence: Ind. C. 1,10; (1) in the absence of malice: R.I. C. 1,20; (2) when published with good motives and for justifiable ends: Ill. C. 2,4; Kan.; Neb. C. 1,5; W.Va.; Nev.; Fla.

(D) But in eight states the truth is a sufficient defence only in indictments for libel, (1) when the libellous matter was published with good motives and for justifiable ends: N.Y.; N.J.; O.; Mich.; Wis.; Io. C. 1,7; Ark. C. 2,6; Cal. C. 1,10; Wash.\*; Dak.\*; Ida.\*; Ariz.\*; Uta.\*

(2) In Indiana the provision is simply that the truth may be given in justification in "all prosecutions for libel:" Ind. C. 1,10. (3) And in Pennsylvania that no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, when the jury find that such publication was not maliciously or negligently made: Pa. C. 1,7.

(E) In nineteen states, however, the jury are to determine the law and the facts, under direction of the court, in all indictments for libel: Me.; Ct.; N.Y.; N.J.; Pa.; Mich.; Wis.; Del.; Ky.; Tenn.; Mo.; Tex.; Cal.; Col.; S.C.; Ga.; Ala.; Miss. C. 1,4; La.; N.M.\*; Ariz.\*; Ida.\*

(F) And so, in three, also in civil suits: Ct.,<sup>b</sup> Mo., Col.

(G) The Constitution of California provides that indictments or informations for libels by newspapers are to be tried either in any county where the paper is published or in that of the plaintiff's residence, unless the venue is changed for good cause: Cal. C. 1,9.

NOTES. — <sup>a</sup> In cases where the truth would be a defence; see below. <sup>b</sup> The wording is, however, ambiguous.

§ 62. **Arms.**<sup>a</sup> The Constitutions of twenty-four states provide (A) that the people shall have the right to bear arms in defence of themselves and the State: Mass. C. 1,17; Me. C. 1,16; Vt. C. 1,16; Ct. C. 1,17; Pa. C. 1,21; Ind. C. 1,32; Mich. C. 18,7; Ky. C. 13,25; Tenn. C. 1,26; Mo. C. 2,17; Ark. C. 2,5; Tex. C. 1,23; Ore. C. 1,27; Col. C. 2,13; S.C. C. 1,28; Ala. C. 1,27; Fla. C. Decln. Rts. 22; N.M.\* July 12, 1851, § 13; Ariz.\* B. Rts. 5.

(This is perhaps implied in three other states; see § 290: N.H. C. 1,24; Md. C. Decln. Rts. 28; Va. C. 1,15.

(B) But in three states, in defence of themselves only: O. C. 1,4; Kan. C. B. Rts. 4; Miss. C. 1,15.

(C) And in four others the provision is simply that they have the right to bear arms: R.I. C. 1,22; N.C. C. 1,24; Ga. C. 1,1,22; La. C. 3.

But in Georgia the legislature may prescribe the manner in which arms are to be borne.

And so, "with a view to prevent crime," in Tennessee and Texas.

So, in five, the legislature may forbid the carrying of concealed weapons: N.C., Ky., Mo., Col., La.

NOTE. — <sup>a</sup> Compare Eng. Stat. W. & M. S. 2, C. 2.

§ 63. **Assemblies.<sup>a</sup>** In all the states except Minnesota and Virginia, the Constitution declares that the people have a right to assemble peaceably, consult together, and (1) petition the legislature for the redress of grievances: N.H. C. 1,32; Mass. C. 1,19; Me. C. 1,15; Vt. C. 1,20; R.I. C. 1,21; Ct. C. 1,16; N.Y. C. 1,10; N.J. C. 1,18; Pa. C. 1,20; O. C. 1,3; Ind. C. 1,31; Ill. C. 2,17; Mich. C. 18,10; Wis. C. 1,4; Io. C. 1,20; Kan. C. B. Rts. 3; Neb. C. 1,19; Md. Decln. Rts. 13; Del. C. 1,16; W.Va. C. 3,16; N.C. C. 1,25; Ky. C. 13,24; Tenn. C. 1,23; Mo. C. 2,29; Ark. C. 2,4; Tex. C. 1,27; Cal. C. 1,10; Ore. C. 1,26; Nev. C. 1,10; Col. C. 2,24; S.C. C. 1,6; Ga. C. 1,1,24; Ala. C. 1,26; Miss. C. 1,6; Fla. C. Decln. Rts. 10; La. C. 4; N.M.\* 95,1; 1851, July 12, § 18; Ariz.\* Bill Rts. 15.

(2) And in eighteen, to instruct their representatives: N.H., Mass., Me., Vt., N.J., O., Ind., Ill., Mich., Io., Kan., W.Va., N.C., Tenn., Cal., Ore., Nev., Fla., Ariz.\*

(3) And in seven, "for other proper purposes:" R.I., Ct., Pa., Del., Ky., Tenn., Ala.

But in one, secret political societies are declared dangerous to liberty, and should not be tolerated: N.C.

NOTE. — <sup>a</sup> Founded on U.S. C. Amts. 1. Compare also Eng. Stat. W. & M. S. 2, C. 2.

§ 64. **Emigration.<sup>a</sup>** In six states the Constitution declares (A) that all persons have a right to emigrate from the state: Pa. C. 1,25; Ind. C. 1,36; Ky. C. 13,29; Ore. C. 1,30; Ala. C. 1,31.

(B) That they have a right to emigrate from one state to another: Vt. C. 1,19.

NOTE. — <sup>a</sup> Founded on the Declaration of Independence, and U.S. C. 1,9.

§ 65. **Immigration.<sup>a</sup>** The Constitutions of two states declare that immigration shall be encouraged: Ala. C. 1,31; Fla. C. 7,9.

But by the Constitution of Oregon the legislature has power to restrain and regulate the immigration into the State of persons not qualified to become citizens of the State: <sup>a</sup> Ore. C. 1,32.

In five states there is, by the Constitution, (A) a Commissioner of Immigration: Md. C. 10,3; Miss. C. 12,23; Fla.

A Department of Immigration: N.C. C. 3,17. In Virginia the legislature is given power to establish a Board of Agriculture and Immigration: Va. C. 4,16.

(B) In Texas they are forbidden to create such a department: see § 325.

NOTE. — <sup>a</sup> Compare § 22. See § 64, note <sup>a</sup>.

## Art. 7. Rights at Law.<sup>a</sup>

§ 70. **General Rights.<sup>b</sup>** (A) In the following thirty states the Constitution declares that every person ought to have a certain remedy at law for all injuries to the person, property, or character; and to obtain justice (1) freely without being obliged to purchase it, completely and without denial, promptly and without delay: N.H. C. 1,14; Mass. C. 1,11; Me. C. 1,19; Vt. C. 1,4; R.I. C. 1,5; Ct. C. 1,12; Pa. C. 1,11; Ind. C. 1,12; Ill. C. 2,19; Wis. C. 1,9; Minn. C. 1,8; Md.<sup>c</sup> Decln. Rts. 19; Del. C. 1,9; W.Va. C. 3,17; N.C. C. 1,25; Ky. C. 13,15; Tenn. C. 1,17; Mo. C. 2,10; Ark. C. 2,13; Ore. C. 1,10; Col. C. 2,6; Ala. C. 1,14; Miss. C. 1,28; N.M.\* 95,1.

(2) By due course of law: N.H.; Mass.; Me.; Vt.; R.I.; Ct.; Pa.; Ind.; Ill.; Wis.; Minn.; Tex. C. 1,13; Kan. C. B. Rts. 18; Md.; Del.; W.Va.; N.C.; Ky.; Tenn.; Ark.; Ore.; S.C. C. 1,15; Ala.; Miss.; N.M.\* 1851, July 12, § 11; (3) promptly and without delay: Kan., S.C.; (4) by due course of law, without denial or delay: O. C. 1,16; La. C. 11; Neb. C. 1,13.

(B) And in nineteen states that all courts shall be open: Vt. C. 2,4; Ct.; Pa.; O.; Ind.; Neb.; Del.; W.Va.; N.C.; Ky.; Tenn.; Mo.; Tex.; Ore.; Col.; S.C.; Ala.; Miss.; La.; N.M.\*

So, in three, no person can be deprived of his right to prosecute or defend his own cause in any of the courts of the State:<sup>a</sup> Ga. C. 1,1,4; Ala. C. 1,11; Miss. C. 1,30.

NOTES. — <sup>a</sup> For laws bearing on this article, see Part IV. <sup>b</sup> This provision is founded on Magna Charta. <sup>c</sup> Nothing is here said about *character*. <sup>d</sup> See § 121.

§ 71. **Arrest and Search.**<sup>a</sup> In all the states but New York the Constitution declares that the people have a right to hold themselves, their houses and possessions without unreasonable search and seizure; consequently, (A) no warrant of search or seizure ought to be issued but upon probable cause supported by oath: N.H. C. 1,19; Mass. C. 1,14; Me. C. 1,5; Vt. C. 1,11; R.I. C. 1,6; Ct. C. 1,8; N.J. C. 1,6; Pa. C. 1,8; O. C. 1,14; Ind. C. 1,11; Ill. C. 2,6; Mich. C. 6,26; Wis. C. 1,11; Io. C. 1,8; Minn. C. 1,10; Kan. C. B. Rts. 15; Neb. C. 1,7; Del. C. 1,6; W.Va. C. 3,6; Ky. C. 13,11; Mo. C. 2,11; Ark. C. 2,15; Tex. C. 1,9; Cal. C. 1,19; Ore. C. 1,9; Nev. C. 1,18; Col. C. 2,7; S.C. C. 1,22; Ga. C. 1,1,16; Ala. C. 1,6; Miss. C. 1,14; Fla. C. Decln. Rts. 19; La. C. 2; N.M.\* 95,1; 1851, July 12, § 7; Ariz.\* Bill Rts. 7. And in all these states except Alabama the warrant must describe the thing or person to be seized.<sup>a</sup>

(B) So, in five states, general warrants whereby an officer may be commanded to search suspected places without evidence of the act committed, or to seize a person not named, or whose offence is not particularly described and supported by evidence, are grievous and ought not to be granted: Vt.; Md. Decln. Rts. 26; Va. C. 1,12; Tenn. C. 1,7; N.C. C. 1,15.

NOTE. — <sup>a</sup> Founded on U.S. C. Amt. 4.

§ 72. **Trial by Jury.**<sup>a</sup> In twenty-seven states there is a general provision in the Constitution that the right to trial by jury shall remain inviolate: R.I. C. 1,15; Ct. C. 1,21; N.Y. C. 1,2; N.J. C. 1,7; Pa. C. 1,6; O. C. 1,5; Ill. C. 2,5; Mich. C. 6,27; Wis. C. 1,5; Io. C. 1,9; Minn. C. 1,4; Kan. C. B. Rts. 5; Neb. C. 1,6; Md. Decln. Rts. 5; Del. C. 1,4; Ky. C. 13,8; Tenn. C. 1,6; Mo. C. 2, 28; Ark. C. 2,7; Tex. C. 1,15; Cal. C. 1,7; Nev. C. 1,3; S.C. C. 1,11; Ga. C. 6,18,1; Ala. C. 1,12; Miss. C. 1,12; Fla. C. Decln. Rts. 3; N.M.\* 95,1; 1851, July 12, § 12; Ariz.\* B. Rts. 8.

In three this provision applies only to civil cases: Ind. C. 1,20; W.Va. C. 3,13; Ore. C. 1,17. So, in five, only to controversies concerning property and suits between two or more persons [*i. e.* civil suits]: N.H. C. 1,20; Mass. C. 1,15; Me. C. 1,20; Va. C. 1,13; N.C. C. 1,19. And in two it is provided that the right shall only in civil cases exist when an issue of fact proper for a jury is joined in a court of law: Vt. C. 1,12; Md. C. 15,6.

In Texas the Constitution provides that the legislature shall pass laws to regulate trial by jury, and maintain its purity and efficiency.

NOTE. — <sup>a</sup> Founded on the Declaration of Independence and U.S. C. Amt. 7.

§ 73. **Exceptions.** (A) In three states there is no constitutional right to trial by jury when the amount in controversy does not exceed a certain sum; <sup>a</sup> as in detail \$5: Md. C. 15,6; \$20: W.Va. C. 3,13; \$100: N.H. C. 1,20. [For citations, see also § 72.]

In one there is no jury in civil cases before a justice: W.Va. But in one the right always

exists when the title to real estate is involved: N.H. And in three the right is expressly declared to extend to all cases at law, without regard to the amount in controversy: <sup>b</sup> Wis., Minn., Ark.

(B) The Constitutions of nine states make an exception to the right to a jury "in cases heretofore used and practised:" N.H., Mass., Me., N.Y., Pa.,<sup>c</sup> Ill.,<sup>c</sup> Md., Del., Mo.

(C) In two the legislature may alter the law trial by jury as to causes arising on the high seas, or concerning mariners' wages: N.H., Mass.

(D) In four the legislature may in civil cases authorize a trial by a jury of less than twelve men: Mich. C. 4,46; Col. C. 2,23; Fla. C. 6,12; La. C. 116. So, in eight states, in inferior courts [as before a justice of the peace]: Ill.; Io.; N. C. (six men) C. 4,27; Neb.; W.Va.; Mo.; Tex. C. 5,17 (six men in the county court); Ga. (but not less than five men). So, in New Jersey, in civil suits involving less than \$50, by a jury of six men. And in California, the parties may agree on a jury less than twelve in number. In West Virginia no jury is allowed in cases tried before a justice of the peace, except on appeal therefrom.

(E) And by the Constitutions of three states, in civil actions, three fourths of a jury may render a verdict: Tex. C. 5,13; Cal.; Nev.

NOTES. — <sup>a</sup> See § 72, note <sup>a</sup>. <sup>b</sup> This would seem to follow from the silence of the Constitution in other states. <sup>c</sup> The wording is, however, ambiguous.

§ 74. **Waiver.**<sup>a</sup> By the Constitutions of eleven states the right to a trial by jury may be waived by the parties in all civil cases in the manner prescribed by law: Vt. C. 2,31; N.Y. C. 1,2; Pa. C. 5,27; Wis. C. 1,5; Minn. C. 1,4; Md. C. 4,1,8; N.C. C. 4,13; Ark. C. 2,7; Cal. C. 1,7; Nev. C. 1,3; Fla. C. Decln. Rts. 3; Ariz.\* B. Rts. 82.

And by that of two states the right shall be deemed waived, in all civil cases, unless demanded by the parties, or one of them, in the manner prescribed by law: Mich. C. 6,27; Tex. C. 5,10.

So, in one state, the Constitution only provides that the right shall be preserved if required by either party: W.Va. C. 3,13.

NOTE. — <sup>a</sup> For criminal cases, see § 132.

§ 75. **Suits against the State.**<sup>a</sup> In thirteen states the Constitution provides that the legislature shall direct a method by which citizens having claims against it may sue the State: Pa. C. 1,11; Ind. C. 4,24; Wis. C. 4,27; Neb. C. 6,22; Del. C. 1,9; Ky. C. 8,6; Tenn. C. 1,17; Cal. C. 20,6; Ore. C. 4,24; Nev. C. 4,22; S.C. C. 14,4; Miss. C. 4,21; Fla. C. 4,19.

No special act authorizing such suit can, however, be passed: Ind., Ore., Nev., Fla.<sup>b</sup>

In North Carolina the Supreme Court has, by the Constitution, jurisdiction of claims against the State, but its decisions are merely recommendatory: N.C. C. 4,9.

And in five the State can never be made defendant in a court of law or equity: <sup>b</sup> Ill. C. 4,26; Va. C. Amt.; W.Va. C. 6,35; Ark. C. 5,20; Ala. C. 1,15.

In one the Constitution provides that the Secretary, Treasurer, and Commissioner of Lands of the State shall constitute a board of State auditors, to examine and adjust all claims against the State not otherwise provided for by general law: Mich. C. 8,4. And in one they are examined by the auditor, and approved by the Secretary of State, with appeal to the District Court: Neb. C. 9,9.

NOTES. — <sup>a</sup> For the method of prosecuting claims against the State, in the courts, see also § 553. <sup>b</sup> This would seem to be the case in other states where the laws are silent.

§ 76. **The Common Law.**<sup>a</sup> By the Constitution of Maryland the people are declared entitled to the common law of England: Md. Decln. Rts. 5. So, in New York, such parts of



the common law as formed the law of the colony, April 19, 1775, are declared in force, if not repugnant: N.Y. C. 1,17.

So, in four states, to such parts of the common law as were in force in the territory, or previously to the adoption of the present Constitution in the state, if not inconsistent with the State Constitution: N.J. C. 10,1; Mich. C. Sched. 1; Wis. C. 14,13; W.Va. C. 8,36.

So, in Maryland, such English statutes as existed July 4, 1776, and are, or have been found, applicable. In New York grants of land made by the King after Oct. 14, 1775, are invalid: N.Y. C. 1,18.

NOTE. — <sup>a</sup> See also § 1003.

§ 77. **Law previously in force.** By the Constitutions of all the states but Vermont and South Carolina, such laws of the colony (in the original thirteen) or territory (in the others) or state, as were in force previous to the Constitution, remain in force afterwards unless repugnant to it, or repealed by the legislature: N.H. C. 2,90; Mass. C. 6,6; Me. C. 10,1; R.I. C. 14,1; Ct. C. 10,3; N.Y. C. 1,17; N.J. C. 10,1; Pa. C. Sched. 2; O. Sched. 1; Ind. C. Sched. 1; Ill. C. Sched. 1; Mich. C. Sched. 1; Wis. C. 14,2; Io. C. 12,2; Minn. C. Sched. 2; Kan. C. Sched. 4; Neb. C. 18,1; Md. Decln. of Rts. 5; Del. C. 7,9; Va. C. Sched. 1; W.Va. C. 8,36; N.C. C. 4,19; Ky. C. Sched. 1; Tenn. C. 11,1; Mo. C. Sched. 1; Ark. C. Sched. 1; Tex. C. 16,48; Cal. C. 22,1; Ore. C. 18,7; Nev. C. 17,2; Col. C. Sched. 1; Ga. C. 12,1,3; Ala. C. Sched. 1; Miss. C. Sched. 2; Fla. C. 15,2; La. C. 258.

So, in Florida, particularly, of laws passed by the State while seceded: Fla. C. 15,3. And, in Kentucky, all laws, not local, which were in force in Virginia, June 1, 1792, are valid in the former state if not repugnant to its Constitution: Ky. C. 8,8. And in Maine all Massachusetts laws in force Dec. 6, 1819: Me. C. 10,1. And in West Virginia all land titles are valid which existed under the laws of Virginia up to 1863: W.Va. C. 13,1.

§ 78. **Miscellaneous Rights at Law.**<sup>a</sup> In Nebraska the Constitution provides that the right in all civil cases to be heard in the court of last resort by appeal, etc., shall not be denied: <sup>b</sup> Neb. C. 1,24.

NOTES. — <sup>a</sup> For the right to counsel, see § 134. <sup>b</sup> See also § 559.

## Art. 8. Debtors.

§ 80. **Imprisonment for Debt.** In many states the Constitution provides (A) that there shall be no imprisonment for debt: Ind. C. 1,22; Minn. C. 1,12; Kan. C. B. Rts. 16; Md. C. 3,38; N.C. C. 1,16; Mo. C. 2,16; Tex. C. 1,18; Ore. C. 1,19; Nev. C. 1,14; S.C. C. 1,20; Ga. C. 1,1,21; Ala. C. 1,21; Miss. C. 1,11; Fla. C. Decln. Rts. 15.

(B) That there shall be no imprisonment for debt (1) in any civil action on mesne or final process, in seven states: O. C. 1,15; Io. C. 1,19; Neb. C. 1,20; Tenn. C. 1,18; Ark. C. 2,16; Cal. C. 1,15; Ore. C. 1,15; Ariz.\* B. Rts. 18.

(2) In any action or judgment founded upon contract, in three states: N.J. C. 1,17; Mich. C. 6,33; Wis. C. 1,16.

(C) In six, that there shall be no person imprisoned for debt in any civil action when he has delivered up his property for the benefit of creditors in the manner prescribed by law: Vt. C. 2,33; R.I. C. 1,11; Pa. C. 1,16; Ill. C. 2,12; Ky. C. 13,19; Col. C. 2,12.

**Exceptions.** But the above principles are subject to the following exceptions in the several states respectively: thus, (1) a debtor may be imprisoned in criminal actions: Tenn. So, (2) for the non-payment of fines or penalties imposed by law: Mo.



So, (3) generally, in civil or criminal actions, for fraud: Vt., R.I., N.J., Pa., O., Ind., Ill., Mich., Io., Minn., Kan., Neb., N.C., Ky., Ark., Cal., Ore., Nev., Col., S.C., Fla., Ariz.\*

And so, in two, the legislature has power to provide for the punishment of fraud and for reaching property of the debtor concealed from his creditors: Ga. C. 1,2,6; La. C. 223. So (4) absconding debtors may be imprisoned: Ore. Or debtors (5) in cases of libel or slander: Nev. (6) In civil cases of tort generally: Cal., Col. (7) In cases of malicious mischief: Cal. (8) Or of breach of trust: Mich., Ariz.\* (9) Or of moneys collected by public officers, or in any professional employment: Mich., Ariz.\*

§ 81. **Debtor Exemption Laws.**<sup>a</sup> The Constitutions of nineteen states have provisions exempting certain property of resident debtors from attachment, execution, or sale by creditors: Ind., Ill., Mich., Wis., Minn., Md., Va., W.Va., N.C., Ark., Tex., Cal., Nev., Col., S.C., Ga., Ala., Fla., La.

Thus, in detail: in four states, that the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws exempting a reasonable amount of property: Ind. C. 1,22; Wis. C. 1,17; Minn. C. 1,12; Nev. C. 1,14. In two, that the legislature shall pass liberal exemption laws: Ill. C. 4,32; Col. C. 18,1. In two, that laws shall be passed protecting from forced sale a certain amount of the personal property of adults, male and female: Tex. C. 16,49; Cal.<sup>b</sup> C. 17,1. In three, that certain personal property, to be designated by law, to the value of \$500, shall be exempted: Mich. C. 16,1; Md. C. 3,44; S.C.<sup>b</sup> C. 2,32 and Amt.

In West Virginia, that personal property (of any nature) to the value of \$200, in the hands of a husband, a parent, or the infant children of deceased parents, shall be exempted: W.Va. C. 6,48. So, in North Carolina, personal property of any nature, to be selected by the debtor, to the value of \$500: N.C. C. 10,1. So, in Alabama, to the value of \$1,000: Ala. C. 10,1. So, in Arkansas, personal property of a resident not married or the head of a family, to the value of \$200 and his clothing, and personal property of the head of a family to the value of \$500, besides their clothing, are exempt from any process on a debt founded on contract: Ark. C. 9,1,2. In Florida, \$1,000 worth of personal property owned by the head of a family: Fla. C. 9,1.

**Exceptions.** By the Constitutions of two states these exemptions do not prevail against artisans' liens on the property claimed as exempt: N.C. C. 10,4; Ala. C. 10,4.

Nor, in two, against a debt for the purchase money of the exempt property, in the hands of the vendee: Ark., W.Va. Nor, in three, against a levy for taxes: S.C., Fla., W.Va.

**Waiver.** In Alabama the Constitution provides that these exemptions may be waived by an instrument in writing: Ala. C. 10,7.

NOTES. — <sup>a</sup> See Part IV. And also, for states where the exemptions of real and personal property are not kept distinct, see §§ 83 et seq. <sup>b</sup> The debtor being a head of a family.

§ 82. **Insurance.**<sup>a</sup> By the Constitution of North Carolina a husband may insure his life for the sole use and benefit of his wife and children, and at his death the claim shall be paid to the widow and children, or their guardian, for their use, free from all liabilities of the husband or claims of his representatives: N.C. C. 10,7.

NOTE. — <sup>a</sup> See Parts III. and IV.; also Part II., Div. 1, T. 4.

§ 83. **Homestead.**<sup>a</sup> The Constitutions of sixteen states have provisions concerning the homestead exemption: Ill., Mich., Kan., Va., W.Va., N.C., Tenn., Ark., Tex., Cal., Nev., Col., S.C., Ga., Ala., Fla.

In detail: in two states, that the legislature shall pass liberal homestead laws: Ill. C. 4,32; Col. C. 18,1.

In South Carolina, that a reasonable amount of property, as a homestead, shall be exempt from seizure or sale for debts: S.C. C. 1,20. In Michigan, that every homestead, if not exceeding 40 acres of land, and the dwelling house thereon, and the appurtenances to be selected by the owner thereof, and not included in any town; or instead thereof, at the option of the

owner, any lot in any city, village, or recorded town plat, or such parts of lots as shall be equal thereto, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the state, not exceeding in value \$1,500, shall be exempt from sale under legal process: Mich. C. 16,2. In Kansas, that a homestead to the extent of 160 acres of farming land, or one acre in a town or city, occupied as a residence by the family of the owner, with all improvements, be so exempt: Kan. C. 15,9. In North Carolina, that every homestead and buildings thereon, to be selected by the owner, or in lieu thereof a town lot and buildings thereon, owned and occupied by a resident of the state, not exceeding in value \$1,000, shall be so exempt: N.C. C. 10,2. In Virginia, that every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt his real or personal property, or either, to the value of \$2,000, to be selected by him: Va. C. 11,1.

So, in three states, a homestead in the possession of each head of a family, and improvements thereon to the value, in all, of \$1,000, is exempt: Tenn. C. 11,11; W.Va. C. 6,48; S.C. C. 2,32.

In Arkansas, the homestead of a resident who is married or the head of a family, not exceeding 160 acres of land outside of a town, with improvements thereon, nor exceeding in value \$2,500, but not less than 80 acres, without regard to value; or, if in a town, not exceeding one acre, nor \$2,500 in value, but not less than one quarter acre, is exempt: Ark. C. 9,3-5. In Texas, the homestead of a family, 200 acres in extent, with improvements, or, in a town, lots to the value of \$5,000, exclusive of improvements, with the improvements thereon (provided the same be used for the purposes of a home, or as a place of business of the head of the family), is exempt: Tex. C. 16,50,51.

In two states the Constitution merely prescribes that there shall be a homestead exempt, as provided by law: Cal. C. 17,1; Nev. C. 4,30.

In Alabama, every homestead not exceeding 80 acres, with improvements thereon, to be selected by the owner, or, in a town, any lot with improvements, not in all exceeding \$2,000 in value, owned and occupied by a resident, is exempt: Ala. C. 10,2. In Georgia there is exempt from levy or sale of the property of every head of a family, or guardian or trustee of a family of minor children, or any aged or infirm person, or person having the care and support of dependent females of any age, who is not the head of a family, realty or personalty, or both, to the aggregate value of \$1,600 besides improvements (and besides this, the Constitution recognizes a species of homestead previously existing called *short* homestead: see Part IV.): Ga. C. 9,1,1; 9,4,1. In Florida, a homestead to the extent of 160 acres of land, or half an acre in a town, and improvements thereon, owned by the head of a family residing in the State, is exempt: Fla. C. 9,1. A married woman is entitled to a homestead, her husband not having sufficient property to constitute one: S.C. Amt. 1880, 2,32. And in Georgia the debtor may waive all the right to exempt such property in writing (except as to wearing apparel and three hundred dollars' worth of household furniture and provisions, to be selected by himself and his wife; this can only be sold under order of court, and then the proceeds must be reinvested to the same use); and a homestead in realty can only be sold under order of court, and the proceeds must be reinvested as above: Ga. C. 9,3,5 and 9; In Louisiana, of every head of a family, or person having a mother or father, or person or persons dependent on him for support, there is exempt the homestead *bona fide* owned by the debtor and occupied by him, consisting of lands, buildings, and appurtenances, whether rural or urban; also one work-horse, one wagon, one yoke of oxen, two cows and calves, twenty-five head of hogs, or one thousand pounds of bacon or its equivalent in pork, and on a farm the necessary corn and fodder for a year, and farming implements to the value of \$2,000; if the homestead exceed \$2,000 in value, the beneficiary is entitled to that amount in case a sale of the homestead under legal process realize more than that sum; but no husband is entitled to a homestead whose wife was and is in the actual enjoyment of property to the value of \$2,000: La. C. 219.

NOTE. — <sup>a</sup> See also, generally, for homestead laws, Part IV.

§ 84. **Exceptions.** The homestead exemption does not, by the Constitutions of four states, avail as against (1) any mortgage or pledge thereon, lawfully obtained: Mich. C. 16,2; Va. C. 11,3; Nev. C. 4,30; Ala. C. 10,2. Or, in three, as against any lien: Kan. C. 15,9; Ark. C. 9,3; Nev.

(2) Nor, in twelve states, against any obligation or debt contracted for the purchase

of the premises (or property) : Kan. ; Va. C. 11,1 ; W.Va. C. 6,48 ; N.C. C. 10,2 ; Tenn. C. 11,11 ; Ark. ; Tex. ; Nev. ; S.C. C. 2,32 ; Ga. C. 9,2,1 ; Fla. C. 9,1 ; La. C. 220. Or contracted for improvements thereon : Kan., W.Va., Tenn., Tex.,<sup>a</sup> Nev., S.C., Ga., Fla., La.

(3) Nor, in eleven, against a sale for taxes : Kan., Va., W.Va., N.C., Tenn., Ark., Tex., Nev., S.C., Ga., Fla., La.

(4) Nor, in three, against a claim for services thereon by a laboring person or mechanic : Va., Fla., La. So, in four others, not against laborers' or mechanics' liens thereon : N.C. C. 10,4 ; Ark. ; Ga. ; Ala. C. 10,4.

(5) Nor, in three, against a debt incurred by a public officer, fiduciary, or attorney-at-law : Va., Ark., La.

Or trustee of an express trust : Ark.

(6) Nor, in Virginia, against a claim for rent ; nor against a claim for the legal fees of an officer.

(7) Nor, in Georgia, against a debt contracted for the removal of incumbrances thereon.

NOTE. — <sup>a</sup> Such claims for work or materials used in improvements must, in the noted states, be evidenced by written contract with the consent of the wife given as in a deed of the homestead.

§ 85. **Alienation.**<sup>a</sup> By the Constitutions of seven states, a homestead cannot be alienated or mortgaged without the joint consent of husband and wife: Mich. C. 16,2 ; Kan. C. 15,9 ; N.C. C. 10,8 ; Tenn. ; Tex. ; Nev. C. 4,30 ; Ala. ; Fla. C. 9,1.

And instruments of waiver of homestead rights, besides being so signed, must, in Alabama, be attested by one witness : Ala. C. 10,7.

And by those of two states, no mortgage, trust-deed, or other lien on the homestead is ever valid, except for the purchase-money therefor or improvements thereon, as in § 84, whether such mortgage, etc., is created by the husband alone or together with his wife ; and all pretended sales of the homestead involving any condition of defeasance are void : <sup>b</sup> Tex. C. 16,50 ; La. C. 222. In one no waiver of homestead rights is valid : <sup>b</sup> La.

In Georgia, all homestead rights may be waived by the debtor in writing except \$300 worth of household furniture and provisions, and wearing apparel : Ga. C. 9,3,1.

And in Texas that no temporary renting shall change the character of a homestead, no other homestead having been acquired : Tex. C. 16,51.

NOTES. — <sup>a</sup> See Part IV. <sup>b</sup> These are surprising innovations.

§ 86. **Recording.** The Constitutions of two states provide that laws shall be enacted requiring homesteads to be recorded : Nev. ; La. C. 219, 220.

§ 87. **Duration.**<sup>a</sup> (A) By the Constitutions of six states the homestead estate continues exempt from the owner's debts after his death, during the minority of any of his children : Mich. C. 16,3 ; N.C. C. 10,3 ; Tenn. ; Ark. C. 9,6 and 10 ; W.Va. C. 6,48 ; Ala. C. 10,3 ; La. C. 219.

So it would seem to be implied in Texas, where the Constitution provides "that on the death of the husband, wife, or both, the homestead descends and vests like other real property of the deceased, and shall be governed by the same laws of descent and distribution, but shall not be partitioned among the heirs of the deceased during the lifetime of the husband or widow, or so long as he or she occupy or use the same as a homestead, or the guardian of minor children be permitted so to do by order of court." Tex. C. 16,52.

(B) And in two, during the life and widowhood of his widow, unless she be the owner of a homestead in her own right : Mich. C. 16,4 ; N.C. C. 10,5. So, in three more, it is provided in general terms that it shall inure to the benefit of the widow : Tenn. ; Ala. C. 10,5 ; La.

So, in Arkansas, during her natural life (whether she marry or not), unless she be the owner of a homestead in her own right. In Florida the homestead exemption "accrues to the heirs" of the party enjoying it: Fla. C. 9,3.

NOTE. — <sup>a</sup> See Part IV.

§ 88. **Stay Laws.** By the Constitution of Virginia no law staying the collection of debts can be passed: Va. C. 11,4.

§ 89. **Garnishment.** By the Constitution of Texas no current wages for personal service shall ever be subject to garnishment: Tex. C. 16,28.

## Art. 9. Eminent Domain.<sup>a, b</sup>

§ 90. **General Principles.** (A) In two states private property is declared by the Constitution to be inviolate: <sup>a</sup> O. C. 1,19; Ark. C. 2,22. But, in four, subservient to public welfare when necessity demands it: Mass. C. 1,10; Me. C. 1,21; Vt. C. 1,2; O.

(B) But it cannot be taken by law <sup>c</sup> without just compensation being made: <sup>d</sup> Mass.; Ind. C. 1,21; Fla. C. Decln. Rts. 8; N.M.\* 95,1.

NOTES. — <sup>a</sup> See also § 15, and Art. 114. <sup>b</sup> Kansas, Florida, and North Carolina have no constitutional provisions covering this article. <sup>c</sup> *i. e.* either for public or private use; compare §§ 91,92. <sup>d</sup> See also §§ 91,93.

§ 91. **Taking for Public Use.** The Constitutions of twenty-six states prescribe specially that no man's property shall be taken, damaged, or destroyed for public <sup>a</sup> use (A) without just compensation being made: <sup>b</sup> Mass. C. 1,10; Me. C. 1,21; <sup>b</sup> Vt. C. 1,2; R.I. C. 1,16; Ct. C. 1,11; N.Y. C. 1,7; N.J. C. 1,16; <sup>d</sup> 4,7,8; O. C. 1,19; Ill.<sup>d</sup> C. 2,13; Mich. C. 18,14; Wis. C. 1,13; Io.<sup>b</sup> C. 1,18; Minn.<sup>b</sup> C. 1,13; Neb. C. 1,21; Va. C. 5,14; W.Va. C. 3,9; Mo. C. 2,21; Ark. C. 2,22; Cal. C. 1,14; Ore. C. 1,18; Nev.<sup>b</sup> C. 1,8; Col. C. 2,15; Ga. C. 1,3,1; Ala. C. 1,24; Miss. C. 1,10; La. C. 156; Ariz.\* B. Rts. 14. See also § 90.

(B) In three, not without the owner's consent or just compensation: Md. C. 3,40; Tex. C. 1,17; S.C. C. 1,23; N.M.\* 1851, July 12, § 14.

(C) In four, not without the consent of the owner's representatives <sup>c</sup> and just compensation: Pa.<sup>b, d</sup> C. 1,10; Ky. C. 13,14; Tenn. C. 1,21; Del. C. 1,8.

(D) In three, not without his own consent or that of the representative body of the people: N.H. C. 1,12; Mass.; Vt. 1,9.

NOTES. — <sup>a</sup> *i. e.*, by the State or by a municipal corporation, or, perhaps by a quasi-public corporation; see note <sup>d</sup>. <sup>b</sup> Or, in several states, "secured to be made." <sup>c</sup> *i. e.* the legislature. <sup>d</sup> In these states the words "public use" extend, by the context, to takings by a private corporation for a public use; and probably the same is true of other states.

§ 92. **Taking by Private Parties.**<sup>a</sup> (A) In three states private property cannot constitutionally be taken for private use, or the use of corporations other than municipal, without the consent of the owner, except as below: Mo. C. 2,20; Col. C. 2,14; Ala. C. 1,24.

[And otherwise, and in other states, it would seem that property cannot be taken at all for private use, without the owner's consent; and it is so expressed in Missouri.]

But in eight states lands may be taken by private parties in a manner provided by law, (1) for ways of necessity: N.Y. C. 1,7; Ill. C. 4,30; Mich. C. 18,14; Mo.; N.J. C. 1,16; Col.; Ga.; Ala. (2) For drains across another's land,<sup>b</sup> in three states: Ill. C. 4,31; Mo.; Col. C. 16,7.

(3) For flumes and aqueducts across another's land,<sup>b</sup> in Colorado.



And in six states lands may be taken by private persons or corporations, (1) for a public way: N.J. C. 1,16; Minn. C. 10,4; Ark. C. 12,9; S.C. C. 1,23; Cal. C. 1,14; Ala.

(2) Or for works of internal improvement generally: S.C.; W.Va. C. 3,9. (3) Or for depots, stations, turnouts, etc., in South Carolina.

(B) In eleven states<sup>c</sup> the Constitution declares that no man's property can be taken for such private use<sup>c</sup> (1) without just compensation: N.Y.; N.J. C. 4,7,8; Pa. C. 16,8; O. C. 1,19; Mich.; Minn.; W.Va.; Col. C. 2,15; 16,7; Ala.; S.C.; Ga. C. 1,3,1; Mo. C. 2,21; Ark.

(C) In Alabama, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any corporations, except municipal.

(D) In five states, no right of way shall be appropriated to the use of a corporation until full compensation is paid or secured in money: O. C. 13,5; Kan. C. 12,4; Cal.; Nev. C. 8,7; S.C. C. 12,3.

And in two states, the fee of land taken for railroad tracks without the consent of the owners remains in them subject to the use for which it is taken: Ill. C. 2,13; Mo.

NOTES. — <sup>a</sup> So, in states having no provision under this section, the right of eminent domain can probably only be exercised under §§ 90,91; and land can never be taken for private use. <sup>b</sup> See Part II. <sup>c</sup> This is probably law in many other states, as included in the provisions of § 91. See § 91, notes. <sup>c</sup>

§ 93. **Compensation.** [For citations, see § 92.] The compensation must, in twenty-three states, always be paid<sup>b</sup> before the taking: <sup>c</sup> N.J. C. 4,7,8; Pa.<sup>b</sup> C. 16,8; O.<sup>a,b</sup> C. 1,19; Ind. C. 1,21; Mich.<sup>b</sup> C. 15,9; Io.;<sup>b</sup> Minn.; Kan.<sup>b</sup> C. 12,4; Md.; W.Va.;<sup>b</sup> Ky. C. 13,14; Ark.<sup>b</sup> C. 12,9; Tex.;<sup>b</sup> Cal. C. 1,14; Ore.<sup>b</sup> C. 11,4; 1,19; Nev.<sup>a,b</sup> C. 1,8; S.C.<sup>b</sup> C. 12,3; Ga.; Ala. C. 14,7; Miss. C. 1,10; La.

So, in two states, when the taking is for public improvements in towns: Pa.;<sup>b</sup> Mich.<sup>b,c</sup> C. 15,5. But not, in five states, when the taking is by the State: N.J. C. 1,16; Ind.; Mich.; W.Va.; Tex.; Cal.; Ore. C. 1,18. Nor, in three states, when the taking is by a municipal corporation: N.J., W.Va., Cal.

Until the compensation is paid, as above, the rights of the owner are not, in two states, divested: Mo. C. 2,21; Col. C. 2,15.

NOTES. — <sup>a</sup> Except in cases of war, riot, fire, or public peril, or, in Ohio, making or repairing public roads. <sup>b</sup> Or, in some states, secured to be paid by a deposit in money or bond; see § 91, note <sup>b</sup>. <sup>c</sup> Except, in the noted states, by the owner's consent. [This would seem to follow in all states, from general principles.]

§ 94. **Jury Trial.** (A) The amount of compensation for property so taken must, by the Constitutions of many states, be determined by a jury.<sup>a</sup>

(1) In cases of taking by the State: O.; Io. C. 1,18; Md.;<sup>b</sup> Mo.;<sup>a</sup> Col.<sup>a,c</sup>

(2) Or, in seven states, by public or municipal corporations: N.Y.<sup>a</sup> C. 1,7; O.; Mich. C. 15,15; 18,2; Ill. C. 2,13; Io.; Md.;<sup>b</sup> Mo.;<sup>a</sup> Col.<sup>a,c</sup>

(3) In cases of taking by private parties or corporations, under § 92, in twelve states: N.Y.;<sup>a</sup> O. C. 13,5; Ill.; Mich. C. 18,14; 18,2; Io.; Md.; W.Va.; Mo.;<sup>a</sup> Ark. C. 12,9; Cal.; Col.;<sup>a,c</sup> S.C. C. 12,3.

(4) When any corporation is interested for or against the right of taking, in two states: Ill. C. 11,14; Mo. C. 12,4.

(B) And in Wisconsin, the necessity of the taking must also be ascertained by a jury (1) in cases of taking by municipal corporations against the owner's consent: Wis. C. 11,2. (2) And so, in Michigan, in all cases where a jury trial is required by the Constitution. (See A.) (3) And so, in one State, in opening private roads: N.Y.

(C) So, in two states, the question whether the use alleged to be public is really so, must be determined by the court, any legislation asserting it to be public notwithstanding: Mo. C. 2,20; Col.



NOTES. — <sup>a</sup> Or, in these states, by commissioners, appointed by law. <sup>b</sup> Except when agreed upon by the parties. [This would seem to follow, in all states.] <sup>c</sup> Always by a jury when required by the owner; not, as above, by commissioners. For citations, see §§ 92,93.

§ 95. **The Amount of Compensation** must be determined without any reference to any benefit that may be conferred by betterment or otherwise, (1) in five states, in cases of taking of rights of way by a private corporation: O. C. 13,5; 1,19; Kan. C. 12,4; Ark. C. 12,9; Cal. C. 1,14; S.C. C. 12,3.

(2) In two states, in all cases of taking for public use; O. C. 1,19; Io. C. 1,18.

(3) And in Kansas, in cases of taking by a municipal corporation.

§ 96. **Appeal** from the preliminary assessment of damages [*i. e.*, by commissioners] can, in two states, never be denied in the case of taking by corporations; and on such appeal the amount must be determined by a jury: Pa. C. 16,8; Ala. C. 14,7.

§ 97. **The Exercise of the Right against Franchises.** The Constitutions of ten states provide that the right of eminent domain shall never be so construed as to prevent the legislature from taking the property or franchises of incorporated companies and subjecting them to public use the same as that of individuals: Pa. C. 16,3; Ill. C. 11,14; Neb. C. 11,6; W.Va. C. 11,12; Mo. C. 12,4; Ark. C. 17,9; Cal. C. 12,8; Col. C. 15,8; Ga. C. 4,2,2; Ala. C. 1,24.

[There would seem no constitutional reason why this should not be the case everywhere, so far as the property of corporations is concerned.]

## Art. 10. Citizens and Aliens. Language, etc.

§ 100. **Who are Citizens.** In five states, all citizens of the United States resident in the State are, by the Constitution, declared citizens of the State: <sup>a</sup> Vt. C. Amt. 1; W.Va. C. 2,3; Ga. C. 1,1,25; Ala. C. 1,2; Miss. C. 1,1.

So, in Alabama, all persons who have duly declared their intention to become citizens of the United States. But in Vermont there is an oath of allegiance required from persons wishing to become freemen: Vt. C. 2,21.

NOTE. — <sup>a</sup> Founded on U.S. C. Amts. 14,1. See also Article 24.

§ 101. **Forfeiture of Citizenship.** <sup>a</sup> By the Constitutions of two states temporary absence from the state does not forfeit a residence once obtained: S.C. C. 1,35; Ala. C. 1,32.

NOTE. — <sup>a</sup> See Article 24.

§ 102. **Aliens' Rights.** In Kansas the Constitution provides that (A) no distinction whatever can be made between citizens and aliens with respect to the possession, enjoyment, or descent of property, real or personal: Kan. C. B. Rts. 17.

(B) So, in Mississippi, between citizens and alien friends: Miss. C. 1,22.

(C) So, in twelve states, between citizens and aliens *bona fide* resident in the state: Mich. C. 18,13; Wis. C. 1,15; Io. C. 1,22; Neb. C. 1,25; W.Va. C. 2,5; Ark. C. 2,20; Cal. C. 1,17; Ore. C. 1,31; Nev. C. 1,16; Col. C. 2,27; Fla. C. B. Rts. 17; Ala. C. 1,36.

*Except* that in California a distinction may be made against such aliens as are not eligible to become United States citizens. And see § 21.

(D) So, in Vermont, persons of good character who have come to settle in the State, having first made oath of allegiance to the same, may take, hold, and transfer real estate: Vt. C. 2,39.

§ 103. **Language.** <sup>a</sup> By the Constitutions of four states the laws, public records, and written legislative and judicial proceedings shall be conducted,

promulgated, and preserved in the English language (only): Ill. C. Sched. 18; Mich. C. 18,6; Cal. C. 4,24; La. C. 154.

But in Colorado, laws are also to be published in Spanish and German: Col. C. 18,8. And in Louisiana, the legislature may provide for the publication of laws in the French language, and that judicial advertisements, in certain designated districts, may be made in French. So, in Missouri, certain charters, etc., in the German language: Mo. C. 9,16. So, in Maryland, proposed amendments to the Constitution, in German: Md. C. 14,1.

NOTE. — <sup>a</sup> See § 1001.

## CHAPTER II.

### BILL OF RIGHTS: CRIMINAL.

§ 120. **Note to Chapter.** See §§ 1,3, which apply equally to this chapter. The corresponding statutory provisions of the territories are set forth in this chapter, as these have no Constitutions; but for other laws, as well as all statutes of states, see Part V.

#### Art. 12. Rights before Trial.

§ 121. **To Hear Accusation.**<sup>a</sup> By the Constitutions of most of the states, persons accused of crime have the right to hear the nature and cause of the accusation: N.H. C. 1,15; Mass. C. 1,12; Me. C. 1,6; Vt. C. 1,10; R.I. C. 1,10; Ct. C. 1,9; N.J. C. 1,8; Pa. C. 1,9; O. C. 1,10; Ind. C. 1,13; Ill. C. 2,9; Mich. C. 6,28; Wis. C. 1,7; Io. C. 1,10; Minn. C. 1,6; Kan. C. Bill of Rts. 10; Neb. C. 1,11; Md. Decln. of Rts. 21; Del. C. 1,7; Va. C. 1,10; W.Va. C. 3,14; N.C. C. 1,11; Ky. C. 13,12; Tenn. C. 1,9; Mo. C. 2,22; Ark. C. 2,10; Tex. C. 1,10; Ore. C. 1,11; Col. C. 2,16; S.C. C. 1,13; Ala. C. 1,7; Miss. C. 1,7; La. C. 8; N.M.\* 50,7; 95,1; and in many they are to have a copy of the accusation furnished them: Me.; O.; Ind.; Ill.; Io.; Neb.; Md.; Tenn.; Ark.; Tex.; Ore.; Ala.; Ga. C. 1,1,5.

And in Georgia, also, to have a list of the witnesses on whose testimony the charge is founded.

NOTE. — <sup>a</sup> Compare U.S. C. Art. 6.

§ 122. **Bailable Offences.** The Constitutions of most of the states provide that all persons shall, before conviction, be admitted to bail, upon giving sufficient sureties, except (where proof of their guilt is evident or the presumption great) (1) for capital offences: Me. C. 1,10; Vt. C. 2,33; Ct. C. 1,14; N.J. C. 1,10; Pa. C. 1,14; O. C. 1,9; Ill. C. 2,7; Wis. C. 1,8; Io. C. 1,12; Minn. C. 1,7; Kan. C. Bill of Rts. 9; Del. C. 1,12; Ky. C. 13,18; Tenn. C. 1,15; Mo. C. 2,24; Ark. C. 2,8; Tex. C. 1,11; Cal. C. 1,6; Nev. C. 1,7; Col. C. 2,19; S.C. C. 1,16; Ala. C. 1,17; Miss. C. 1,8; Fla. C. Decln. of Rts. 7; La. C. 9; Dak.\* C. Cr. P. 553; Ida.\* Cr. Pr. 492; Mon.\* Cr. Pr. 98; Uta.\* Cr. Pr. 386; N.M.\* 95,1; 1851, July 12, § 9; Ariz.\* Bill of Rts. 11.

(2) For murder and treason: Ind. C. 1,17; Mich. C. 6,29; Neb. C. 1,9; Ore. C. 1,14.

Except (3) for offences punishable with death or imprisonment for life: R.I. C. 1,9.

Except (4) for murder in the first degree: Wash.\* 778.

§ 123. **Excessive Bail.**<sup>a</sup> The Constitutions of all the states but Illinois provide that excessive bail shall not be required: N.H. C. 1,33; Mass. C. 1,26; Me.

C. 1,9; Vt. C. 2,33; R.I. C. 1,8; Ct. C. 1,13; N.Y. C. 1,5; N.J. C. 1,15; Pa. C. 1,13; O. C. 1,9; Ind. C. 1,16; Mich. C. 6,31; Wis. C. 1,6; Io. C. 1,17; Minn. C. 1,5; Kan. C. Bill of Rts. 9; Neb. C. 1,9; Md. Decln. of Rts. 25; Del. C. 1,11; Va. C. 1,11; W.Va. C. 3,5; N.C. C. 1,14; Ky. C. 13,17; Tenn. C. 1,16; Mo. C. 2,25; Ark. C. 2,9; Tex. C. 1,13; Cal. C. 1,6; Ore. C. 1,16; Nev. C. 1,6; Col. C. 2,20; S.C. C. 1,16; Ga. C. 1,1,9; Ala. C. 1,17; Miss. C. 1,8; Fla. C. Decln. of Rts. 6; La. C. 9; N.M.\* 95,1; 1851, July 12, § 11; Ariz.\* Bill of Rts. 10.

NOTE. — <sup>a</sup> Compare Eng. Stat. 1 W. & M. Sess. 2; U.S. C. Amt. 8.

§ 124. **Imprisonment of Parties Accused.** In four states the Constitution provides that no person arrested shall be treated with unnecessary rigor: Ind. C. 1,15; Tenn. C. 1,13; Ore. C. 1,13; Ga. C. 1,1,9; Dak.\* C. Cr. P. 13; Ida.\* Cr. Pr. 12; Mon.\* Cr. Pr. 12; Ariz.\* 4,28.

So the Constitution of Rhode Island declares that every man is presumed innocent until proved guilty by the law; and consequently no act of severity not necessary to secure the accused should be permitted: R.I. C. 1,14; Uta.\* Cr. Pr. 9; and in Delaware their friends and counsel must be allowed access to the accused: Del. C. 1,12.

§ 125. **Witnesses.** In several states the Constitution provides that witnesses shall not be unreasonably detained: N.Y. C. 1,5; Mich. C. 6,31; Ark. C. 2,9; Cal. C. 1,6; Nev. C. 1,6; S.C. C. 1,38; Fla. C. Decln. of Rts. 6; Ariz.\* Bill of Rts. 10.

So, in Colorado, that he shall not be imprisoned longer than may be necessary for securing his deposition; and thereafter shall be discharged on his own recognizance: Col. C. 2,17. And in California that they shall not be confined in any room where individuals are actually imprisoned.

§ 126. **Habeas Corpus.** The Constitution of North Carolina declares that every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful: N.C. C. 1,18. And in two State Constitutions, the writ of habeas corpus is declared a writ of right: Vt. C. Amt. 12; Tex. C. 1,12. The Constitutions of two others declare that the writ or remedy ought not to be denied or delayed: Io. C. 1,13; N.C. So, in Vermont and Texas, the legislature are to enact laws to render the remedy speedy and effectual: Vt., Tex. In two others the privilege of the writ is to be enjoyed in the most easy, cheap, expeditious, and ample manner: N.H. C. 2,91; Mass. C. 2,6,7.

§ 127. **Suspension of Habeas Corpus.<sup>a</sup>** (A) By the Constitutions of most states, the writ can only be suspended where, in cases of invasion or rebellion, the public safety requires it: Me. C. 1,10; R.I. C. 1,9; Ct. C. 1,14; N.Y. C. 1,4; N.J. C. 1,11; Pa. C. 1,14; O. C. 1,8; Ind. C. 1,27; Ill. C. 2,7; Mich. C. 4,44; Wis. C. 1,8; Io. C. 1,13; Minn. C. 1,7; Kan. C. Bill of Rts. 8; Neb. C. 1,8; Del. C. 1,13; Va. C. 5,14; Ky. C. 13,18; Tenn. C. 1,15; Ark. C. 2,11; Cal. C. 1,5; Ore. C. 1,23; Nev. C. 1,5; Col. C. 2,21; S.C. C. 1,17; Miss. C. 1,3; Fla. C. Decln. of Rts. 5; La. C. 10; N.M.\* 95,1; 1851, July 12, § 10; Ariz.\* Bill of Rts. 9.

(B) And by the Constitutions of several others, it can never be suspended in any case: Vt. C. Amt. 12; Md. C. 3,55; W.Va. C. 3,4; N.C. C. 1,21; Mo. C. 2,26; Tex. C. 1,12; Ga. C. 1,1,11; Ala. C. 1,18.

(C) In two others it can only be suspended on the most urgent occasions, and for a limited time, not exceeding, in Massachusetts, twelve months, and in New Hampshire three months: N.H. C. 2,91; Mass. C. 2,6,7.

(D) The Constitutions of several provide that the writ can only be suspended by the legislature: R.I.,<sup>4</sup> Ct., Mich., Md., Tenn., Ark. In other states this is implied by the general provision of § 392.

(E) In one other state the manner of its suspension is left to the legislature to determine by law: Neb. (F) But in Florida the Governor may suspend the writ in cases of insurrection and rebellion: Fla. C. 5,21.

NOTE. — <sup>a</sup> Derived from U.S. C. 1,9. See § 150, note <sup>a</sup>.

§ 128. **Indictment.**<sup>a</sup> In most states, the Constitution provides that no person shall be held to answer for a capital crime [Me., R.I., Ct., N.Y., O., Nev. S.C., Fla., La., N.M.\*] or a crime punishable by imprisonment for life [Ct.], or infamous crime [all the states previously mentioned except Ct. and La.; and also in Mo., Cal., Col.], or any criminal offence [N.J., Ill., Io., Minn., Neb., W.Va., N.C., Ky., Tenn., Ark., Tex., Wash.,\* Dak.,\* Ida.,\* Mon.,\* N.M.,\* Uta.\*] except on indictment or presentment of a grand jury: Me. C. 1,7; R.I. C. 1,7; Ct. C. 1,9; N.Y. C. 1,6; N.J. C. 1,9; O. C. 1,10; Ill. C. 2,8; Io. C. 1,11; Minn. C. 1,7; Neb. C. 1,10; W.Va. C. 3,4; N.C. C. 1,12; Tenn. C. 1,14; Mo. C. 2,12; Ark. C. 2,8; Tex. C. 1,10; Nev. C. 1,8; Col. C. 2,8; S.C. C. 1,19; Fla. C. Decln. of Rts. 8; La. C. 5; Wash.\* 764; Dak.\* C. Cr. P. 7; Ida.\* Cr. Pr. 6; Mon.\* Cr. Pr. 5; Uta.\* Cr. Pr. 3; N.M.\* 50,6; 1851, July 12, § 8; Ariz.\* Bill of Rts. 14.

So, in five others, that no person, for any indictable offence, shall be proceeded against criminally, by information: Pa. C. 1,10; Del. C. 1,8; Ky. C. 13,13; Ala. C. 1,9; Miss. C. 1,31.

And in Wisconsin, that no person shall be held to answer for a criminal offence without due process of law: Wis. C. 1,8, and Amt. But in California, offences may be prosecuted either by indictment or by information after examination and commitment by a magistrate Cal. C. 1,8.

**Exceptions.** But in nearly all these states an exception to the above rules is made (1) in cases arising in the army or navy of the State, or militia in time of war or public danger: Me., R.I., Ct., N.Y., N.J., Pa., O., Ill., Io., Minn., Neb., Del., Ky., Mo., Ark., Tex., Nev., Col.; S.C., Ala., Miss., Fla., La., N.M.,\* Ariz.\*

So in N.Y., Wash.,\* Dak.,\* Ida.,\* and N.M.,\* of cases arising in the army, navy, or militia at any time.

And (2) in several, also in cases of impeachment: Me., R.I., N.Y., N.J., O., Ill., Minn., Neb., N.C., Tenn., Ark., Tex., Nev., Fla., Dak.,\* Ida.,\* N.M.,\* Ariz.\*

And (3) in nearly all, also in cases of inferior offences.

As in some, inferior offences generally: O., Ala., Miss.

Or, in others, petit larceny: N.Y., O., Nev., Ala., Miss., Fla.

Or, in several, cases cognizable by a justice of the peace: Me.; R.I.; N.J.; Io.;<sup>b</sup> Minn.; Del. C. 6,15; W.Va.; Ark.; Ala.; Miss.; Wash.\*; Dak.\*; Ida.\*; Mon.\*; Uta.\*; N.M.\*

Or, in Texas, by the county court: Tex. C. 5,17. Or police courts: Dak.,\* Uta.,\* D.C.\* 1064. Or probate courts: Ida.,\* Mon.\*

Or, in a few, in cases where the punishment is by fine, or by imprisonment not in the penitentiary: Ill., Neb., Tex., S.C.

And (4) in four states a person may be proceeded against by information, by leave of court, for oppression or misdemeanor while in office: Pa., Ky., Ala., Miss.

And (5) indictments are unnecessary in cases where the legislature may have dispensed with a grand jury (§ 129) and provided other process by law: Ill.; Io. C. Amt. 3 [v. L. 1884, Jut. Res. no. 13]; Neb.; Col.; Ala.; Miss.

In cases where indictments may be employed, indictment and information are declared concurrent remedies: Mo., Col., La.

NOTES. — <sup>a</sup> Compare U.S. C. Amt. 5. <sup>b</sup> Such offences are tried by *information*, in these states; and, by implication, so in all the others.

§ 129. **Grand Juries.** In some states the Constitution gives the legislature authority to make laws dispensing with a grand jury in any case: Ind. C. 7,17; Ill. C. 2,8; Io. C. Amt. 3; Neb. C. 1,10; Ore. C. 7,18; Col. C. 2,23.



And providing other process in criminal cases : Ala., Miss.

Thus, in Nebraska, the legislature may provide for holding persons to answer for criminal offences on the information of a public prosecutor.

By the Constitution of three, a grand jury shall consist of twelve men, any nine of whom may concur to find an indictment or true bill : Mo. C. 2,28 ; Tex. C. 5,13 ; Col.

In Oregon, of seven men of whom five may so concur. In Iowa, of any number from five to fifteen.

### Art. 13. Rights at Trial.

§ 130. **Rights to Law.** (A) In nearly all states, the Constitution provides that no person can be deprived of his life, liberty, or property, except (1) by due process of law : Ct. C. 1,9 ; N.Y. C. 1,6 ; Ill. C. 2,2 ; Mich. C. 6,32 ; Io. C. 1,9 ; Minn. C. 1,7 ; Neb. C. 1,3 ; N.C. C. 1,17 ; Mo. C. 2,30 ; Ark. C. 2,8 ; Tex. C. 1,19 ; Cal. C. 1,13 ; Nev. C. 1,8 ; Col. C. 2,25 ; Ga. C. 1,1,3 ; Ala. C. 1,7 ; Miss. C. 1,2 ; Fla. C. Decln. of Rts. 8 ; La. C. 6 ; N.M.\* 1851, July 12, § 15 ; Ariz.\* Bill of Rts. 14 ; or (2) by the law of the land or the judgment of his peers :<sup>a</sup> N.H. C. 1,15 ; Mass. C. 1,12 ; Me. C. 1,6 ; Vt. C. 1,10 ; R.I. C. 1,10 ; Pa. C. 1,9 ; Md. Decln. of Rts. 23 ; Del. C. 1,7 ; Va. C. 1,10 ; W.Va. C. 3,10 ; Ky. C. 13,12 ; Tenn. C. 1,8 ; S.C. C. 1,14 ; N.M.\* 95,1.

So, in Connecticut and South Carolina, no person shall be arrested, detained, and punished ; or, in Alabama, accused, arrested, or detained, except in cases clearly ascertained by law : Ct. C. 1,10 ; Ala. C. 1,8 ; S.C. And according to the forms by law prescribed : Ala.

(B) And in several states, no person shall be disfranchised or deprived of any rights and privileges as a citizen, unless as provided in (A) respectively : N.H. ; Mass. ; Me. ; N.Y.<sup>b</sup> C. 1,1 ; Minn.<sup>b</sup> C. 1,2 ; Md. ; N.C. ; Tenn. ; Ark.<sup>b</sup> C. 2,21 ; Tex. ; S.C. ; N.M.\*<sup>c</sup>

NOTES. — <sup>a</sup> This provision is founded on Magna Charta, C. 29. Compare also §§ 70,72. <sup>b</sup> As provided in A (2). <sup>c</sup> As provided in A (1).

§ 131. **Jury Trial.**<sup>a</sup> (A) In most states, the Constitution provides that all persons so accused shall have a speedy public trial by an impartial jury : Me. C. 1,6 ; Vt. C. 1,10 ; R.I. C. 1,10 ; N.J. C. 1,8 ; Pa. C. 1,9 ; O. C. 1,10 ; Ind. C. 1,13 ; Ill. C. 2,9 ; Mich. C. 6,28 ; Io. C. 1,10 ; Minn. C. 1,6 ; Kan. C. Bill of Rts. 10 ; Neb. C. 1,11 ; Md. Decln. of Rts. 21 ; Del. C. 1,7 ; Va. C. 1,10 ; Mo. C. 2,22 ; Ark. C. 2,10 ; Tex. C. 1,10 ; Ore. C. 1,11 ; Col. C. 2,16 ; S.C. C. 1,13 ; Ga. C. 1,1,5 ; La. C. 7 ; N.M.\* 95,1 ; 1851, July 12, § 8.

So, in several, all persons prosecuted by indictment or information : Ct. C. 1,9 ; Wis. C. 1,7 ; Ky. C. 13,12 ; Miss. C. 1,7 ; N.M.\* 50,7. And in two states, all persons prosecuted by indictment (or presentment) : Tenn. C. 1,9 ; Ala. C. 1,7 ; Wash.\* 766.

In several, the provision is simply that the accused shall have a speedy and public trial : Cal. C. 1,13 ; Dak.\* C. Cr. P. 11 ; Ida.\* Cr. Pr. 10 ; Mon.\* Cr. Pr. 9 ; Uta.\* Cr. Pr. 7 ; Ariz.\* 426.

(B) And in three, the Constitution provides that (except as below) the legislature shall make no law subjecting a person to capital [or infamous, in Mass.] punishment without trial by jury : N.H. C. 1,16 ; Mass. C. 1,12 ; S.C. C. 1,14.

(C) In two, that the right to trial by jury shall remain inviolate in criminal cases : N.Y. C. 1,2 ; Col. C. 2,23 ; Fla. C. Decln. of Rts. 3. See also § 72, for other states.

(D) In several, that no person shall be convicted of any crime but by the verdict of a lawful jury in open court : W.Va. C. 3,14 ; N.C. C. 1,13 ; Wash.\* 767 ; Dak.\* C. Cr. P. 14 ; Ida.\* Cr. Pr. 13 ; Mon.\* Cr. Pr. 8 ; Uta.\* Cr. Pr. 10 ; N.M.\* 50,8 ; Ariz.\* 429.

(Except upon confession, demurrer, etc. : Wash.\* Dak.\* Ida.\* Uta.\* Mon.\* Ariz.\*)

**Exceptions.**<sup>b</sup> In two, the legislature may provide other means of trial (1) for offences not infamous.<sup>c</sup> See above, B. So, in two others, for petty offences : Del. C. 6,15 ; N.C. So,



in two others, all offences less than felony, and in which the penalty does not exceed \$100 or thirty days' imprisonment, shall be tried summarily before a justice of the peace: Io. C. 1,11; S.C. C. 1,19. So, in Tennessee, no fine of more than \$50 shall be imposed except by a jury: Tenn. C. 6,14. But in all such cases of trial without a jury there must be a right of appeal: Io., N.C., S.C.

(2) Laws may be made, in two states, for the government of the army and navy, without providing for trial by jury: <sup>b</sup> N.H., Mass.

**Waiver.** The Constitution of California provides that a jury may be waived by consent of both parties in all criminal cases not amounting to felony: Cal. C. 1,7.

So, in New Mexico, the accused may in all cases waive jury trial: 1851,\* July 12, § 8.

NOTES. — <sup>a</sup> For civil cases, see Art. 7. <sup>b</sup> In other states § 131 does not apply, probably, to cases of martial law; see § 128. <sup>c</sup> See Glossary. See also § 132.

§ 132. **Juries.**<sup>a</sup> By the Constitution of Florida the number of the jury may in all cases be fixed by the legislature: Fla. C. 6,12. So, in four other states, in courts not of record: Mich. C. 6,28; Io. C. 1,9; Mo. C. 2,28; Col. C. 2,23. So, in Louisiana, in cases not punishable by hard labor or death: La. C. 7. In Texas, juries in the county court consist of six men: Tex. C. 5,17. And in California, the parties may agree on a jury less than twelve in number, in cases of misdemeanor: Cal. C. 1,7. But in two, the usual number (twelve) is by the Constitution declared indispensable: Me. C. 1,7; W.Va. C. 3,14.

**The Verdict** of the jury, by the Constitutions of several states, must be unanimous to convict: Me. C. 1,7; Vt. C. 1,10; Md. Decln. of Rts. 21; Va. C. 1,10; N.C. C. 1,13.

But in Texas, nine members of the jury may concur to render a verdict in cases not amounting to felony: Tex. C. 5,13. By the Constitution of Louisiana, the accused is given the right to challenge peremptorily a number of jurors to be fixed by statute: La. C. 8.

And in four states the Constitution provides that in all criminal cases whatever <sup>b</sup> the jury shall have the right to determine the law and the facts: Ind. C. 1,19; Md. C. 15,5; Ore. C. 1,16; La. C. 168.

But in two, under the direction of the court, as to the law: Ore., La.

And, in Oregon, subject to the right of new trial, as in civil cases.

NOTES. — <sup>a</sup> See also § 73 for juries in civil suits. See § 150, note <sup>a</sup>. <sup>b</sup> For libel, see § 61, E.

§ 133. **Venue.** (A) The Constitutions of many states provide that the jury shall be of the county or district where the alleged offence was committed: N.H. C. 1,17; O. C. 1,10; Ind. C. 1,13; Ill. C. 2,9; Wis. C. 1,7; Minn. C. 1,6; Kan. C. Bill of Rts. 10; Neb. C. 1,11; W.Va. C. 3,14; Tenn. C. 1,9; Mo. C. 2,22; Ark. C. 2,10; Ore. C. 1,11; Col. C. 2,16; Miss. C. 1,7; La. C. 7; Wash.\* 780; Mon.\* Cr. Pr. 30; Wy.\* Cr. C. 115; N.M.\* 50,7.

And in two, that this county, etc., shall have been previously ascertained by law: Wis., Minn., N.M.\* So, in several, criminal offences must be tried by a jury of the vicinage: N.H.; Mass. C. 1,13; Me. C. 1,6; Pa. C. 1,9; Md. C. 1,20; Va. C. 1,10; Ky. C. 13,12.

(B) **Change of.** In several, the power to change the venue is vested in the courts: Pa.\* C. 3,23; Md. C. 4,8; Del. C. 1,9; W.Va.; Dak.\* C. Cr. P. 285; Mon.\* Cr. Pr. 225; Wy.\*; Uta.\* Cr. Pr. 210; Ariz.\* 11,285. It is to be exercised in such manner as the legislature provide: Pa.;<sup>a</sup> Ark.; Tex.\* C. 3,45; Col.\* C. 5,37; Ga.\* C. 6,17,1; Ala.\* C. 4,36.

In one, change of venue in criminal cases can only be directed by the legislature, on report of the judges of the Superior Court, in cases of insurrection: N.H.

The Constitutions of two states specially give to the legislature power to provide for change of venue: Ky. C. 2,38; La.\* C. 158.<sup>d</sup> In two others, the Constitution specifies that the legislature shall so provide in cases where an impartial trial cannot be had in the county where the crime was committed: S.C.\* C. 5,2; Miss. C. 12,4.

The legislatures are frequently forbidden to enact special or local laws for the change of venue in civil or criminal cases. See § 395.

In Vermont no person can be transported out of the state for trial for any offence committed within it: Vt. C. 1,21.

NOTE. — <sup>a</sup> In civil or criminal cases.

§ 134. **Counsel.** (A) The Constitutions of all the states provide either (1) that every person accused may defend by himself and counsel: N.H. C. 1,15; Me. C. 1,6; Vt. C. 1,10; R.I. C. 1,10; Ct. C. 1,9; N.Y. C. 1,6; Pa. C. 1,9; O. C. 1,10; Ind. C. 1,13; Ill. C. 2,9; Wis. C. 1,7; Del. C. 1,7; Ky. C. 13,12; Tenn. C. 1,9; Mo. C. 2,22; Ark. C. 2,10; Tex. C. 1,10; Cal. C. 1,13; Ore. C. 1,11; Nev. C. 1,8; Col. C. 2,16; S.C. C. 1,13; Ga. C. 1,1,4; Ala. C. 1,7; Miss. C. 1,7; Fla. C. Decln. of Rts. 8; Dak.\* C. Cr. P. 11; N.M.\* 95,1; 1851, July 12, § 8; Ariz.\* Bill of Rts. 14; or (2) that he may have the assistance of counsel in his defence: N.J. C. 1,8; Mich.<sup>a</sup> C. 6,28; Io. C. 1,10; Minn. C. 1,6; W.Va. C. 3,14; N.C. C. 1,11; La. C. 8; Mon.\* Cr. Pr. 9; or (3) that he may be allowed counsel: Md. Decln. of Rts. 21; N.C. C. 1,11; Ga. C. 1,1,5.

Or (B), by the Constitutions of many states, that he may be heard by himself or counsel: Mass. C. 1,12; Mich. C. 6,24; Wis.<sup>a</sup> C. 7,20; Kan. C. Bill of Rts. 10; Neb. C. 1,11; Nev. C. 1,8; Ala.<sup>a</sup> C. 1,11; Miss.<sup>a</sup> C. 1,30; Wash.\* 765; Ida.\* Cr. Pr. 10; Uta.\* Cr. Pr. 7; N.M.\* 50,7; Ariz.\* 426.

In several the above principle, as particularized respectively, extends to any suitor in a court of law, civil or criminal: Mich.; Wis.; Nev.; Ga.; Ala. C. 1,11; Miss.; Fla.; Dak.\*; Ida.\*

NOTE. — <sup>a</sup> In civil cases; see below.

§ 135. **Witnesses.** (A) By the Constitutions of most of the states every person accused is entitled either (1) to enforce by compulsory process the attendance of witnesses [in his favor]: Me. C. 1,6; Vt. C. 1,10; Ct. C. 1,9; N.J. C. 1,8; Pa. C. 1,9; O. C. 1,10; Ind. C. 1,13; Ill. C. 2,9; Mich. C. 6,28; Wis. C. 1,7; Io. C. 1,10; Minn. C. 1,6; Kan. C. Bill of Rts. 10; Neb. C. 1,11; Md. C. Decln. of Rts. 21; Del. C. 1,7; W.Va. C. 3,14; Ky. C. 13,12; Tenn. C. 1,9; Mo. C. 2,22; Ark. C. 2,10; Tex. C. 1,10; Cal. C. 1,13; Ore. C. 1,11; Col. C. 2,16; Ga. C. 1,1,5; Ala. C. 1,7; Miss. C. 1,7; La. C. 8; Wash.\* 766; Uta.\* Cr. Pr. 7; N.M.\* 50,7; 95,1; 1851, July 12, § 8; or (2), to call for evidence on his behalf: N.H. C. 1,15; Mass. C. 1,12; R.I. C. 1,10; Va. C. 1,10; N.C. C. 1,11; S.C. C. 1,13; Dak.\* C. Cr. P. 11; Ida.\* Cr. Pr. 10; Mon.\* Cr. Pr. 9; Ariz.\* 426.

In Maryland it is specially provided that the accused may examine all witnesses under oath. The legislature has power, in two states (except in cases of homicide: Cal.), to provide for the taking of depositions, in the presence of the person accused and his counsel, when there is reason to believe that the witness will not attend at the trial: Cal., Wash.\*

(B) The Constitutions of most states also provide that the accused shall be confronted with the witnesses against him: N.H.; Mass.; Me.; Vt.; R.I.; Ct.; N.J.; Pa.; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Del.; Va.; W.Va.; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Ore.; Col.; S.C.; Ga.; Ala.; Miss.; La.; Wash.\* 765; Dak.\*; Ida.\*; Mon.\*; Uta.\*; N.M.\* 50,7; 95,1; 1851, July 12, § 8; Ariz.\*

§ 136. **Criminating Evidence.** (A) The Constitutions of most of the states provide that no person accused shall be compelled to give evidence against himself: N.H. C. 1,15; Mass. C. 1,12; Me. C. 1,6; Vt. C. 1,10; Ct. C. 1,9; N.Y. C. 1,6; Pa. C. 1,9; O. C. 1,10; Ind. C. 1,14; Ill. C. 2,10; Mich. C. 6,32; Wis.

C. 1,8; Minn. C. 1,7; Kan. C. Bill of Rts. 10; Neb. C. 1,12; Md. Decln. of Rts. 22; Del. C. 1,7; Va. C. 1,10; W.Va. C. 3,5; N.C. C. 1,11; Ky. C. 13,12; Tenn. C. 1,9; Mo. C. 2,23; Ark. C. 2,8; Tex. C. 1,10; Cal. C. 1,13; Ore. C. 1,12; Nev. C. 1,8; Col. C. 2,18; S.C. C. 1,13; Ala. C. 1,7; Miss. C. 1,7; Fla. C. Decln. of Rts. 8; La. C. 6; Dak.\* C. Cr. P. 13; Ida.\* Cr. C. 12; Cr. Pr. 12; Mon.\* Cr. Pr. 11; Uta.\* Cr. Pr. 9; N.M.\* 95,1; 1851, July 12, § 8; Ariz.\* Bill of Rts. 14.

(B) And those of two others, that no person [whether accused or not, it seems] can be compelled to give evidence criminating himself in any court of law: R.I. C. 1,13; Ga. C. 1,1,6.

§ 137. **Twice in Jeopardy.** (A) In most states the general provision is found that no person, for the same offence, can be twice put (1) in jeopardy: N.Y. C. 1,6; O. C. 1,10; Ind. C. 1,14; Ill. C. 2,10; Kan. C. Bill of Rts. 10; Neb. C. 1,12; Cal. C. 1,13; Ore. C. 1,12; Nev. C. 1,8; Col. C. 2,18; Fla. C. Decln. of Rts. 8; Ariz.\* Bill of Rts. 14; (2) in jeopardy of life or limb: Me. C. 1,8; Pa. C. 1,10; Del. C. 1,8; Ky. C. 13,14; Tenn. C. 1,10; Ala. C. 1,10; N.M.\* 1851, July 12, § 12; (3) in jeopardy of life or liberty: W.Va. C. 3,5; Ark. C. 2,8; Tex. C. 1,14; Ga. C. 1,1,8; Miss. C. 1,5; La. C. 5; (4) in jeopardy of punishment: Wis. C. 1,8; Minn. C. 1,7.

But in Colorado it is provided that the accused shall not be deemed to have been in jeopardy if the jury disagree, or the judgment be reversed for error.

(B) But in several the provision is that no person shall, after an acquittal,<sup>a</sup> (1) be tried for the same offence: N.H. C. 1,16; R.I. C. 1,7; N.J. C. 1,10; Mich. C. 6,29; Io. C. 1,12; Tex.; Wash.\*<sup>a</sup> 768; Dak.\*<sup>a</sup> C. Cr. P. 12; Ida.\*<sup>a</sup> Cr. Pr. 11; Mon.\*<sup>a</sup> Cr. Pr. 10; Uta.\*<sup>a</sup> Cr. Pr. 8; N.M.\* 50,9; 95,1; Ariz.\* 427; (2) have his life or liberty again put in jeopardy for the same offence: Mo. C. 2,23; S.C. C. 1,18.

But in two it is specified that such acquittal must be upon the merits: Mich., N.M.\*

And in Texas, it must be in a court of competent jurisdiction. In Washington Territory, "by judgment upon the verdict."

**Exceptions.** But in two the person may be tried again on his own motion, after conviction: Ga., La. So, in three, in case of mistrial: Mo., Ga., La. Or, in two, if the jury disagree: Mo., Ark.

In Washington Territory, he cannot be prosecuted again, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place. But if acquitted by reason of variance, or upon exception to the form, or to the substance of the indictment, he may be indicted and tried again, except where the former charge was a capital offence: Wash.\* 769.

NOTE. — <sup>a</sup> Nor, in the noted states, after a conviction.

§ 138. **Attainder.**<sup>a</sup> Most states have a general constitutional provision that the legislature shall pass no bill of attainder: Me. C. 1,11; N.J. C. 4,7,3; Mich. C. 4,43; Wis. C. 1,12; Io. C. 1,21; Minn. C. 1,11; Neb. C. 1,16; Va. C. 5,14; W.Va. C. 3,4; Ark. C. 2,17; Tex. C. 1,16; Cal. C. 1,16; Nev. C. 1,15; S.C. C. 1,21; Ga. C. 1,3,2; Fla. C. Decln. of Rts. 16; N.M.\* 1851, July 12, § 14; Ariz.\* Bill of Rts. 19.

In several others, that no person can be attainted of treason or felony by the legislature: Mass. C. 1,25; Vt. C. 2,20; Ct. C. 1,15; Pa. C. 1,18; Md. Decln. of Rts. 18; Ky. C. 13,21; Mo. C. 2,13; Col. C. 2,9.

And so, in one, of treason alone: Ala. C. 1,20.

NOTE. — <sup>a</sup> Compare U.S. C. 1,9. This might be implied in other states from § 128.

§ 139. **Miscellaneous.** The Constitutions of two states forbid the issue of commissions of oyer and terminer and gaol delivery: Pa. C. 1,15; Del. C. 1,14. By that of Nebraska the

writ of error is declared a writ of right in all cases of felony : Neb. C. 1,23. So, in Wisconsin, the writ shall never be prohibited by law : Wis. C. 1,21. In Kentucky, the legislature are authorized to pass laws regulating writs of error in criminal or penal cases : Ky. C. 2,39. And also, laws regulating the right of challenge of jurors therein : Ky.

#### Art. 14. Rights after Trial.

§ 140. **Fines and Costs.**<sup>a</sup> The Constitutions of all states, except Illinois and Mississippi, provide that excessive fines shall not be imposed : N.H. C. 1,33 ; Mass. C. 1,26 ; Me. C. 1,9 ; Vt. C. 2,32 ; R.I. C. 1,8 ; Ct. C. 1,13 ; N.Y. C. 1,5 ; N.J. C. 1,15 ; Pa. C. 1,13 ; O. C. 1,9 ; Ind. C. 1,16 ; Mich. C. 6,31 ; Wis. C. 1,6 ; Io. C. 1,17 ; Minn. C. 1,5 ; Kan. C. Bill of Rts. 9 ; Neb. C. 1,9 ; Md. Decln. of Rts. 25 ; Del. C. 1,11 ; Va. C. 1,11 ; W.Va. C. 3,5 ; N.C. C. 1,14 ; Ky. C. 13,17 ; Tenn. C. 1,16 ; Mo. C. 2,25 ; Ark. C. 2,9 ; Tex. C. 1,13 ; Cal. C. 1,6 ; Ore. C. 1,16 ; Nev. C. 1,6 ; Col. C. 2,20 ; S.C. C. 1,38 ; Ga. C. 1,1,9 ; Ala. C. 1,16 ; Miss. C. 1,8 ; Fla. C. Decln. of Rts. 6 ; La. C. 9 ; N.M.\* 95,1 ; 1851, July 12, § 11 ; Ariz.\* Bill of Rts. 10.

Nor, in one, excessive costs : N.C.

And in two, that no person shall be compelled to pay costs except after conviction on final trial : N.C. C. 1,11 ; Ga. C. 1,1,10. So, in Delaware, no costs shall be paid by a person accused, the bill being returned *ignoramus*, or on acquittal by the jury : Del. C. 7,7. In Texas the legislature may by law require fines and costs in prosecutions for misdemeanors to be discharged by manual labor in default of payment : Tex. C. 16,3.

NOTE. — <sup>a</sup> See U.S. C. Amt. 8.

§ 141. **Punishments.**<sup>a</sup> The Constitutions of most states provide (A) that cruel or unusual punishments shall not be inflicted : N.H. C. 1,33 ; Mass. C. 1,26 ; Me. C. 1,9 ; R.I. C. 1,8 ; N.Y. C. 1,5 ; N.J. C. 1,15 ; Pa. C. 1,13 ; O. C. 1,9 ; Ind. C. 1,16 ; Mich. C. 6,31 ; Wis. C. 1,6 ; Io. C. 1,17 ; Minn. C. 1,5 ; Kan. C. Bill of Rts. 9 ; Neb. C. 1,9 ; Md. Decln. of Rts. 16 and 25 ; Del. C. 1,11 ; Va. C. 1,11 ; W.Va. C. 3,5 ; N.C. C. 1,14 ; Ky. C. 13,17 ; Tenn. C. 1,16 ; Mo. C. 2,25 ; Ark. C. 2,9 ; Tex. C. 1,13 ; Cal. C. 1,6 ; Ore. C. 1,16 ; Nev. C. 1,6 ; Col. C. 2,20 ; S.C. C. 1,38 ; Ga. C. 1,1,9 ; Ala. C. 1,16 ; Miss. C. 1,8 ; Fla. Decln. of Rts. 6 ; La. C. 9 ; N.M.\* 95,1 ; 1851, July 12, § 11 ; Ariz.\* Bill of Rts. 10.

(B) In eight, that all punishments and penalties should be proportioned to the offence : N.H. C. 1,18 ; Me. ; R.I. ; Ind. ; Ill. C. 2,11 ; Neb. C. 1,15 ; W.Va. ; Ore.

(C) And in five, reformation, not vindictive justice, is declared to be the principle of the penal code : N.H. ; Ind. C. 1,18 ; N.C. C. 11,2 ; Ore. C. 1,15 ; S.C. C. 5,3.

Further, in three, it is specially declared (1) that sanguinary laws shall not be passed : N.H. ; Me. ; Md. C. Decln. of Rts. 16.

(2) That whipping or corporal punishment shall not, in two, be inflicted : S.C. C. 1,16 ; Ga. C. 1,1,7.

(3) In one, that no mechanical trade shall be taught to convicts in the State prison, except the manufacture of those articles of which the chief supply for home consumption is imported from other states : Mich. C. 18,3. But in three, provision is made by the Constitution for punishment by hard labor : Vt. C. 2,37 ; N.C. C. 11,1 ; Cal. C. 10,6. In one, the Constitution forbids the letting out of convict labor by contract : Cal.

(4) In one, that no citizen shall be outlawed : Tex. C. 1,20.

(5) In nine, that banishment from the state or transportation shall not be allowed as a punishment for crime : O. C. 1,12 ; Ill. ; Kan. C. Bill of Rts. 12 ; Neb. ; W.Va. ; Ark. C. 2,21 ; Tex. ; Ga. C. 1,1,7 ; Ala. C. 1,31.

(6) In one, that the gaols shall be constructed with regard to the health of the prisoners : Del. So, in Tennessee, that the erection of secure and comfortable prisons, and the humane treatment of prisoners, shall be provided for : Tenn. C. 1,32. In North Carolina, the Con-



stitution provides that death, imprisonment, fines, removal from office, and disqualification for office, shall be the only punishments known to the laws; convict labor may be employed on public works, or farmed out; but no convict sentenced for murder, manslaughter, rape, or arson shall be farmed out; murder, arson, burglary, and rape may be made punishable by death: N.C. C. 11,1,2. In Vermont, that punishment for crimes not capital should be by hard labor: Vt. C. 2,37.

No person can be punished for an offence who has not been duly convicted: Wash.\* 770; Dak.\* C. Cr. P. 6; P. C. 8; Ida.\* Cr. Pr. 5; Uta.\* Cr. Pr. 2; N.M.\* 50,10.

NOTE. — <sup>a</sup> See U.S. C. Amt. 8.

§ 142. **Ex Post Facto Laws.**<sup>a</sup> These are, in most of the states, forbidden by the Constitution: N.H. C. 1,23; Mass. C. 1,24; Me. C. 1,11; R.I. C. 1,12; N.J. C. 4,7,3; Pa. C. 1,17; O. C. 2,28; Ind. C. 1,24; Ill. C. 2,14; Mich. C. 4,43; Wis. C. 1,12; Io. C. 1,21; Minn. C. 1,11; Neb. C. 1,16; Md. C. Decln. of Rts. 17; Va. C. 5,14; W.Va. C. 3,4; N.C. C. 1,32; Ky. C. 13,20; Tenn. C. 1,11; Mo. C. 2,15; Ark. C. 2,17; Tex. C. 1,16; Cal. C. 1,16; Ore. C. 1,21; Nev. C. 1,15; Col. C. 2,11; S.C. C. 1,21; Ga. C. 1,3,2; Ala. C. 1,23; Miss. C. 1,9; Fla. C. Decln. of Rts. 16; La. C. 155; N.M.\* 1851, July 12, § 14; Ariz.\* Bill of Rts. 19.

So, in two, no person can be punished but by virtue of a law already established or promulgated prior to the offence: S.C. C. 1,14; Ala. C. 1,8.

NOTE. — <sup>a</sup> The word *ex post facto* is here used as the equivalent of *retroactive* and *retrospective*; and the law is here applied only to *criminal* offences. For civil laws of a similar nature, see §§ 392,393, Laws impairing the obligations of contracts. For statutes, see § 1044.

§ 143. **Corruption of Blood.**<sup>a</sup> The Constitutions of most states provide that no conviction shall work corruption of blood or forfeiture of estate: Me. C. 1,11; Ct. C. 9,4; Pa. C. 1,19; O. C. 1,12; Ind. C. 1,30; Ill. C. 2,11; Wis. C. 1,12; Minn. C. 1,11; Kan. C. Bill of Rts. 12; Neb. C. 1,15; Md. Decln. of Rts. 27; Del. C. 1,15; W.Va. C. 3,18; N.C. C. 4,5; Ky. C. 13,22; Tenn. C. 1,12; Mo. C. 2,13; Ark. C. 2,17; Tex. C. 1,21; Ore. C. 1,25; Col. C. 2,9; S.C. C. 1,21; Ga. C. 1,2,3; Ala. C. 1,20; Dak.\* P. C. 766.

But in three, it seems that there may be forfeiture of estate during the life of the offender: Pa., Del., Ky.

NOTE. — <sup>a</sup> Compare U.S. C. 3,3. For statutes, see § 1162.

§ 144. **Suicides.** In three, the Constitution declares that the estates of suicides are not forfeit: N.H. C. 2,89; Vt. C. 2,38; Pa. C. 1,19. And in eight that such estates descend as in cases of natural death: N.H.; Vt.; Pa.; Del. C. 1,15; Ky. C. 13,23; Tenn. C. 1,12; Mo. C. 2,13; Tex. C. 1,21; Col. C. 2,9. See § 1162 and § 150, note <sup>a</sup>.

§ 145. **Deodands** are in seven states abolished by the Constitution: N.H. C. 2,89; Vt. C. 2,38; Pa. C. 1,19; Del. C. 1,1,5; Ky. C. 13,23; Tenn. C. 1,12; Mo. C. 2,13. See § 1162.

§ 146. **Appeals.** (See Art. 65.) By the Constitution of Texas, the State has no right of appeal in criminal cases: Tex. C. 5,26.

## Art. 15. Special Provisions concerning Criminal Offences.

§ 150. **Treason**<sup>a</sup> is by the Constitutions of most of the states declared to consist only in levying war against the state, adhering to its enemies, and giving them aid and comfort: Me. C. 1,12; Ct. C. 9,4; N.J. C. 1,14; Ind. C. 1,28-29; Mich. C. 6,30; Wis. C. 1,10; Io. C. 1,16; Minn. C. 1,9; Kan. C. Bill of Rts. 13;



Neb. C. 1,14; Del. C. 5,3; W.Va. C. 2,6; N.C. C. 4,5; Ky. C. 8,2; Mo. C. 2,13; Ark. C. 2,14; Tex. C. 1,22; Cal. C. 1,20; Ore. C. 1,24; Nev. C. 1,19; Col. C. 2,9; Ga. C. 1,2,2; Ala. C. 1,19; Miss. C. 1,26; Fla. C. Decln. of Rts. 20; La. C. 151.

And in all the above states there must be two witnesses to the same overt act, in order to convict, or a confession in open court.

NOTE. — <sup>a</sup> Contrary to the usual rule of Part I. (§§ 1 and 3), the corresponding statutory provisions of the territories are not inserted in this article.

§ 151. **Duelling.**<sup>a</sup> By the Constitutions of many states duelling is made a cause of disfranchisement and disqualification to hold office. See §§ 223,254,257.

In five, it is made, by the Constitution, a criminal offence: <sup>a</sup> Ky. C. 8,20; Tenn. C. 9,3; Ark. C. 19,2 a. C. 2,4,2; Ala. C. 4,47.

NOTE. — <sup>a</sup> See § 150, note <sup>a</sup>.

§ 152. **Bribery**<sup>a</sup> of an office-holder, whether accomplished or attempted, is made a felony (A) in the person giving or offering the bribe, by the Constitution of ten states: N.Y. C. 15,1 and 2; Pa. C. 3,30; Md. C. 3,50; W.Va. C. 6,45; Ark. C. 5,35; Tex. C. 16,41; Col. C. 5,41 and 42; Ala. C. 4,41 and 42; Fla.;<sup>b</sup> La.<sup>b</sup> C. 173.

(B) And in several, it is felony in the office-holder receiving or offering to receive the bribe: N.Y., Md., W.Va., Ark., Tex., Nev., La. So, of a member of the legislature (1) bribed: N.Y.; Pa. C. 3,29–31; Md.; W.Va.; Tex.; Cal. C. 4,35; Col. C. 12,6; Ala. C. 4,40; La. Or (2) offering a bribe or seeking to bribe: Ala.

(C) Bribery at elections is, by the Constitutions of several states, made a criminal offence in both parties: Tenn. C. 10,3; Ark. C. 3,6; Nev. C. 4,10; Fla. C. 4,9; La.

So, in one, fraud; or other wilful and corrupt violation of election laws: Ark.

And in many states bribery is cause of disfranchisement or disqualification for office. See §§ 223,255.

NOTES. — <sup>a</sup> See § 150, note <sup>a</sup>. <sup>b</sup> In these states, it is made a penal offence.

§ 153. **Lobbying** is declared a felony by the Constitutions of two states: Cal. C. 4,35; Ga. C. 1,2,5.

**Definition.** Lobbying is in California defined to be the seeking to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means.

**Evidence.**<sup>a</sup> By the Constitutions of several, any person may be compelled to testify in any investigation or proceeding to establish bribery or lobbying; but such testimony cannot be afterwards used against him, except to prove perjury: N.Y. C. 15,2; Pa. C. 3,32; Cal.; Md. C. 3,50; W.Va. C. 6,45; La. C. 174. See also § 239. And the person so testifying is exempted from punishment for his own offence: Md., W.Va.

NOTE. — <sup>a</sup> See § 150, note <sup>a</sup>.

§ 154. **Corrupt Legislation,**<sup>a</sup> etc. By the Constitutions of four, (A) no state officer or member of the legislature shall directly or indirectly receive a fee or be engaged as counsel, agent, or attorney (1) in the prosecution of any claim against the state: N.H. C. 2,7; Vt. C. 2,19; R.I. C. 4,4; Ore. C. 15,7.

(2) Or in advocating any bill or measure: Vt.

(B) So, in five, no member of the legislature can be interested directly or indirectly in any contract with the state or a county thereof authorized by a law passed (1) during his term: Ill. C. 4,15; Mich. C. 4,18; Neb. C. 3,13; W.Va. C. 6,15; Tex. C. 3,18. Or (2) within one year thereafter: Ill., Mich., Neb.

And in two, a member who has a personal or private interest in any measure or bill shall disclose the same to the house and not vote thereon: Pa. C. 3,33; Ala. C. 4,43.

So, in Texas, the governor is forbidden to receive any compensation or promise thereof for any service rendered or performed while governor, or to be rendered thereafter: Tex. C. 4,6.

The Constitution of Colorado provides that any member of the legislature who shall give, offer, or promise his vote in favor of or against any measure, in consideration that any other member shall give or promise his vote on another measure, shall be guilty of solicitation of bribery, or bribery [if the thing be accomplished]; and such member shall be expelled, and not thereafter be eligible for the legislature, and be liable to such further penalty as may be prescribed by law: Col. C. 5,40.

NOTE. — <sup>a</sup> See § 150, note <sup>a</sup>.

§ 155. **Barratry.** The Constitution of Texas provides that the legislature shall provide by law for defining and punishing barratry: Tex. C. 16,29.

§ 156. **Gambling** is by the Constitution of Louisiana declared to be a vice: La. C. 172.

§ 157.<sup>a</sup> **Embezzlement** of public funds or defalcation in public office or trust is, in four, declared a felony by the Constitution: Cal. C. 4,21; Nev. C. 4,10; S.C. C. 9,15; Fla. C. 4,9.

So, in one, misappropriation of the state or school funds: Minn. C. 9,12. In Texas it is a penal offence to borrow, or divert from its purpose, any state fund: Tex. C. 8,7.

So, in several, for a public officer to make a profit out of public money, or to use it for any purpose not authorized by law: Pa. C. 9,14; Ark. C. 16,3; Mo. C. 10,17; Cal. C. 11,17; Col. C. 10,13; Ga. C. 5,2,5; 7,9,1.

NOTE. — <sup>a</sup> See § 150, note <sup>a</sup>.

§ 158. **War Exemption.** By the Constitutions of three states, no person shall be prosecuted in any civil or criminal action for any act done by him during the war of secession under orders, or in pursuance of military authority vested in him by the United States, the Confederate States, or the State: W.Va. C. 8,35; Mo. C. 14,2; Fla. C. Sched.

§ 159. **Felony.**<sup>a</sup> The Constitution of Colorado defines felony to mean any criminal offence punishable with death or imprisonment in the penitentiary: Col. C. 18,4.

NOTE. — <sup>a</sup> See Glossary.

## Art. 16. Pardons.

§ 160. **Pardon Power.**<sup>a</sup> (A) By the Constitutions of most states, the governor has power to grant pardons and commutations of sentence after conviction: Vt.<sup>b</sup> C. 2,11; Amt. 8; N.Y.<sup>c</sup> C. 4,5; O.<sup>c</sup> C. 3,11; Ind.<sup>c</sup> C. 5,17; Ill.<sup>c</sup> C. 5,13; Mich.<sup>c</sup> C. 5,11; Wis.<sup>c</sup> C. 5,6; Io.<sup>c</sup> C. 4,16; Minn.<sup>b</sup> C. 5,4; Kan.<sup>b,c</sup> C. 1,7; Neb.<sup>b</sup> C. 5,13; Md.<sup>b</sup> C. 2,20; Del.<sup>c</sup> C. 3,9; Va. C. 4,5; W.Va. C. 7,11; N.C.<sup>c</sup> C. 3,6; Ky.<sup>b</sup> C. 3,10; Tenn.<sup>b</sup> C. 3,6; Mo.<sup>c</sup> C. 5,8; Ark.<sup>c</sup> C. 6,18; Tex. C. 4,11; Cal.<sup>c</sup> C. 7,1; Ore.<sup>c</sup> C. 5,14; Col.<sup>c</sup> C. 4,7; S.C.<sup>b</sup> C. 3,11; Ga.<sup>c</sup> C. 5,1,12; Ala. C. 5,12; Miss.<sup>b</sup> C. 5,10; Wash.\* 1136; Dak.\*<sup>c</sup> C. Cr. P. 545; Ariz.\*<sup>c</sup> 1093. And so in all the territories, by U.S. R. S. 1841.

(B) In three, the governor may grant pardons as above by and with the advice of the council: N.H.<sup>b</sup> C. 2,52; Mass.<sup>b</sup> C. 2,2,1,8; Me. C. 5,1,11.

(C) And in two, power to pardon, as above, is vested in the governor, judges of the

Supreme Court, and attorney-general, or a majority of them, of which the governor must be one: Nev.<sup>c</sup> C. 5,14; Fla.<sup>c</sup> C. 5,12.

(D) So, in one, the governor, by and with the consent of the senate: R.I.<sup>b</sup> C. Amt. 2.

(E) And in two others, a Court of Pardons, consisting of (1) the governor, judges of the Court of Appeals, and the chancellor, or a majority of them, of which the governor must be one: N.J.<sup>b</sup> C. 5,10; Pardons \* 1-5. (2) Such Board of Pardons consists of the governor, a judge of the Supreme Court of Errors, and four persons appointed by the legislature, one of whom must be a physician, and such board must be unanimous to grant a pardon: Ct.\* 1883, 108. There is also a Board of Pardons consisting of four members, two of each political party, and having advisory powers, in Michigan: Mich. 1885, 200.

(F) In one other, by the governor, upon written recommendation of the lieutenant-governor, secretary of state, secretary of internal affairs, and attorney-general, or any three of them: Pa. C. 4,9.

(G) So, in one, by the governor, upon the written recommendation of the lieutenant-governor, attorney-general, and presiding judge of the court where the person to be pardoned was convicted, or any two of them: La. C. 66.

**Exceptions.** But in California a person twice convicted of felony cannot be so pardoned by the governor without the written recommendation of a majority of the judges of the Supreme Court. And in Kentucky, a person who has participated in a duel may be pardoned only after the expiration of five years from the offence: Ky. C. 8,21.

NOTES. — <sup>a</sup> Compare U.S. C. 2,2. The statutory provisions of a few states are also inserted, to make the treatment of the subject complete. <sup>b</sup> Nothing is said about commutations of sentence. <sup>c</sup> "Under the regulations and restrictions prescribed by law."

§ 161. **What may be pardoned.**<sup>a</sup> In most states all offences may be pardoned according to § 160 (which see, for citations) except treason and in cases of impeachment: Vt., N.Y., O., Ind., Mich., Wis., Io., Neb., Md., Ky., Mo., Ark., Tex., Cal., Nev., Col., Ga., Ala., Miss., Fla., Dak.\*

In many, all offences may be pardoned, except only in cases of impeachment: N.H., Mass., Me., R.I., N.J., Pa., Minn., Md., Del., Va., W.Va., N.C., Tenn., S.C.

And in Oregon, except only treason. In Vermont, except also murder.

And by the Constitutions of some states, no exception is made of either treason or impeachment: Ct., Ill., Kan., La.

**Treason** may, in many states, be pardoned by the legislature; and the governor may suspend the sentence until the end of the session of the legislature next following conviction: Vt.; N.Y.; O.; Ind.; Mich.; Wis.; Io.; Neb.; Ky.; Cal.; Ore.; Nev.; Ga.; Ala.; Miss.; Fla. C. 5,11; La.; Dak.\* C. Cr. P. 546. So, in two more, except that this power to pardon is vested in the senate: Tex., Ark. So also, in Vermont, of murder.

NOTE. — <sup>a</sup> § 160, note <sup>b</sup>.

### § 162. **The Effect of a Pardon.**

In Alabama it does not relieve from civil or political disability unless so specifically expressed in the pardon.

In Connecticut, the legislature, by a two-thirds vote of each full house, may restore the privileges of an elector to a person convicted of crime: Ct. C. Amt. 17.

In Virginia, the governor may remove political disabilities consequent on conviction: Va. C. 4,5. And the legislature (by a two-thirds vote) may remove disabilities incurred by reason of duelling (§ 223): Va. C. 5,24.

§ 163. **Reprieves.**<sup>a</sup> By the Constitutions of most states, the governor has power to grant reprieves in the same cases (§ 161): Me.;<sup>b</sup> N.Y.; N.J. C. 5,9; Pa.<sup>c</sup> C. 4,9; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Neb.; Md.; Del.; Va.; W.Va.; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Cal.; Ore.; Nev.<sup>c</sup> C. 5,13; Col.; S.C.; Ga.; Ala.; Miss.; Fla.<sup>c</sup> C. 5,11; La.; Territories; Wash.\*; Dak.\*; Ariz.\*

Reprieves cannot, in two, be for more than sixty days: Nev., Fla. For the case of treason, see § 161. In two, the governor may grant reprieves, after conviction, except in cases of impeachment, until the end of the next session of the legislature: R.I. C. 7,4; Ct. C. 4,10.

In New Jersey, reprieves cannot be granted in cases of impeachment.

<sup>a</sup> NOTES. — See § 160 for citations. <sup>b</sup> As in § 160, B. <sup>c</sup> As in § 160, A.

§ 164. **Fines and Forfeitures** <sup>a</sup> may, by the Constitutions of most states, be remitted by the governor or other persons in whom the pardoning power is vested (see § 160): Me.; Vt. C. 2,11; N.J.; Pa. C. 4,9; Ind. C. 5,17; Io.; Md.; Del.; Va. C. 4,5; W.Va.; Ky.; Ark.; Tex.; Ore.; Nev.; S.C.; Ga.; Ala.; Miss.; Fla.; La.; Ariz.\*; Territories, U.S. R. S. 1841.

And in one, the governor may suspend their collection for a period not exceeding sixty days: Nev. So, in one, he may suspend the collection of fines and forfeitures: N.J. C. 5,9. But he may not remit other debts due the state: Md.

NOTE. — <sup>a</sup> See § 160 for citations.



## DIVISION II.

## POLITICAL PROVISIONS.

§ 180. **Note to Division 2.** For the statutes bearing on this division, see in Part III.; so, in many cases where states have no constitutional provisions, statutory ones will there be found. But where, in the laws of the territories (which have no constitution) provisions are found corresponding with the more important provisions set forth in the text, they are duly incorporated therewith, in this Chapter and in Chapter II. So also, in some few cases, state statutes are cited, if there is no constitutional provision, and the subject is one provided for in most states by the Constitution; as, for instance, the qualifications of voters (Art. 24).

## CHAPTER I.

## POLITICAL CONSTITUTION.

§ 181. **Note to Chapter.** Compare, generally, with this chapter the United States Constitution, after which the political systems of the newer states are generally modelled. Provisions of United States laws having a special application to the territories, and the laws of the territories themselves, which correspond to the more important provisions in the text, are incorporated with it; but the provisions of United States laws relating to the election of United States officers are omitted. See also § 180.

**Art. 18. Rights of Government.**

§ 182. **Authority derived from the People.** The Constitutions of all states except New York, Illinois, Michigan, Wisconsin, Nebraska, and Mississippi, declare (A) that all political power is inherent in the people: N.H. C. 1,1 and 8; Mass. C. 1,5 and 7; Me. C. 1,2; Vt. C. 1,6; R.I. C. 1,1; Ct. C. 1,2; N.J. C. 1,2; Pa. C. 1,2; O. C. 1,2; Ind. C. 1,1; Io. C. 1,2; Minn. C. 1,1; Kan. C. Bill of Rts. 2; Md. Decln. of Rts. 1; Del. C. Preamble; Va. C. 1,4; W.Va. C. 2,2; 3,2; N.C. C. 1,2; Ky. C. 13,4; Tenn. C. 1,1; Mo. C. 2,1; Ark. C. 2,1; Tex. C. 1,2; Cal. C. 1,2; Ore. C. 1,1; Nev. C. 1,2; Col. C. 2,1; S.C. C. 1,3; Ga. C. 1,1,1; Ala. C. 1,3; Fla. C. Decln. of Rts. 2; La. C. 1; N.M.\* 95,1; July 12, 1851, § 1.

(B) And so, in several, that Governments derive their just powers from the consent of the governed: N.H.; Ill. C. 2,1; Wis. C. 1,1; Neb. C. 1,1; Md.; Del.; N.C.; Ark. C. 1,2; Ga.; La.; Ariz.\* Bill of Rts. 1.

(C) And in others, that they are founded on the authority of those governed: Me., Ct., Pa., Ind., Kan., Ky., Tenn., Mo., Tex., Ore., Col., Ala., La., N.M.\*

And in most, that the people have at all times the right to make, alter, or reform the government: N.H. C. 1,10; Mass. C. Preamble, 1,7; Me.; Vt. C. 1,7; R.I.; Ct.; N.J.; Pa.; O.; Ind.; Io.; Minn.; Md.; Del.; Va. C. 1,5; W.Va. C. 3,3; N.C. C. 1,3; Ky.; Tenn.; Mo. C. 2,2; Ark.; Tex.; Cal.; Ore.; Nev.; Col. C. 2,2; S.C.; Ga. C. 1,5,1; Ala.; Fla.; N.M.\*; Ariz.\*



So, in three, the doctrine of non-resistance is declared to be wrong; and the people ought to reform or abolish the government when other means of redress fail: N.H.; Md. Decln. of Rts. 6; Tenn. C. 1,2.

§ 183. **Form of Government.** The Constitution of Texas declares that the faith of the people stands pledged to a republican form of government: Tex. C. 1,2; and that of Kentucky, that absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority: Ky. C. 13,2.

§ 184. **The Object of Government** is in many states declared to be for the security, benefit, and protection of the people: N.H. C. 1,10; Mass. C. 1,7; Vt. C. 1,7; R.I. C. 1,2; N.J. C. 1,2; O. C. 1,2; Io. C. 1,2; Minn. C. 1,1; Kan. C. Bill of Rts. 2; Va. C. 1,5; W.Va. C. 3,3; Ky. C. 13,4; Ark. C. 2,1; Cal. C. 1,2; Nev. C. 1,2; Fla. C. Decln. of Rts. 2.

So, in five, for their peace, safety, and happiness: Pa. C. 1,2; Ind. C. 1,1; Del. C. Preamble; Tenn. C. 1,1; Ore. C. 1,1.

So, in many, for their benefit, or "for the good of the whole:" Me. C. 1,2; R.I.; Ct. C. 1,2; Md. C. Decln. of Rts. 1; N.C. C. 1,2; Mo. C. 2,1; Tex. C. 2,2; Col. C. 2,1; Ga. C. 1,1,1; La. C. 1.

So, in several, to protect the citizen in the enjoyment of life, liberty, and property: N.H. C. 1,3; 1,12; Ill. C. 2,1; Wis. C. 1,1; Neb. C. 1,1; Mo. C. 2,4; Ark. C. 2,2; Ga. C. 1,1,2; Ala. C. 1,37; La.; Ariz.\* Bill of Rts. 1.

And in New Hampshire, also in the enjoyment of rights of conscience: N.H. C. 1,4. In Massachusetts, to protect them in the enjoyment of their natural rights generally: Mass. C. Preamble. When Government assumes other functions than as above, it is, by the Constitutions of two states, declared to be usurpation and oppression: Ala., La. So, in Missouri, when it fails of its objects as above, it fails of its chief design.

§ 185. **Officers.** [As a consequence of § 182] all officers are by the Constitutions of seven states declared to be accountable to the people as their trustees or servants: N.H. C. 1,8; Mass. C. 1,5; Vt. C. 1,6; Md. Decln. of Rts. 6; Va. C. 1,4; W.Va. C. 3,2; Ga. C. 1,1,1.

§ 186. **Representation** is, by the Constitutions of many states, required to be apportioned according to population: Me. C. Amt. 25; Minn. C. 4,2; Kan. C. 10,2; Neb. C. 3,2; W.Va. C. 2,4; Ky. C. 2,6; Tex. C. 3, 25 and 26; Nev. C. 1,13; Col. C. 5,45; S.C. C. 1,34; Ala. C. 9,2 and 4; Fla. C. Decln. of Rts. 14; La. C. 16 and 17; Ariz.\* Bill of Rts. 12.

So, in two, of representatives to Congress: Va. C. 5,12; W.Va. C. 1,4.

So, in two others, to be "founded on principles of equality:" N.H. C. 2,9; Mass. C. 2,1,3,1. And in one, to be "equal and uniform:" Ky.

So also, representation according to population, in both houses of the legislature, is in fact provided for in nearly all: N.H. C. 2,9 and 26; Mass. C. Amt. 21-22; Me. C. 4,1,2; Vt. C. 2,7; Ct. C. Amts. 2 and 18 and 23; N.Y. C. 3,4-5; Pa. C. 2,16-17; O. C. 11,2 and 6; Ind. C. 4,5; Ill. C. 4,6; Mich. C. 4,4; Wis. C. 4,3; Io. C. 3,35; W.Va. C. 6,4; 6,7; N.C. C. 2,4-5; Ky. C. 2,5 and 14; Tenn. C. 2,4-6; Mo. C. 4,2 and 5; Ark. C. 8,1,2; Cal. C. 4,6; Ore. C. 4,6; Miss. C. 4,34-35; Fla. C. 13,1; Wash.\* 2563-4; Dak.\* Pol. C. 48; Ida.\* 1874-75, p. 696; Wy.\* 75,2. Territories, U.S. R. S. 1849; 1880, C. 119. And so in others, but as to the lower house only: R.I. C. 5,1; N.J. C. 4,3,1; Md. C. 3,2-4; S.C. C. 2,4 and 8; Ga. C. 3,3,2-3.

**Art. 19. State Sovereignty.**

§ 190. **The United States Constitution,**<sup>a</sup> by the Constitutions of a few Southern states, is expressly declared the supreme law of the land : Md. C. Decln. of Rts. 2 ; Va. C. 1,3 ; W.Va. C. 1,1 ; N.C. C. 1,5 ; Mo. C. 2,2 ; Cal. C. 1,3 ; Nev. Prelim. Act ; Ga. C. 12,1,1 ; Ariz.\* Bill of Rts. 2.

So, in five, that the State is free and independent, subject only to the United States Constitution : N.H. C. 1,7 ; Mass. C. 1,4 ; Md. C. Decln. of Rts. 2-3 ; Tex. C. 1,1 ; Col. C. 2,2.

So, in three states, the United States Constitution is declared part of the State law, anything in the State Constitutions or laws to the contrary notwithstanding : Md. ; Va. ; Ga. 1,4,2 ; Territories, U.S. R. S. 1891. And so, also, in four, United States laws made under the Constitution : Md., Va., W.Va., Ga., Ariz.,\* Territories. And in three, treaties by the national government : Md., W.Va., Ga.

NOTE. — <sup>a</sup> Compare § 391.

§ 191. **Allegiance.** The Constitutions of five Southern states provide that the State shall always remain a member of the American Union : Va. C. 1,2 ; N.C. C. 1,4 ; Cal. C. 1,3 ; S.C. C. 1,5 ; Fla. C. Decln. of Rts. 21 ; Ariz.\* Bill of Rts. 2.

So, in six, that no law shall be passed in derogation of the paramount allegiance of the citizens of the State to the United States Government : <sup>a</sup> N.C. C. 1,5 ; Nev.<sup>a</sup> C. 1,2 ; S.C. C. 1,4 ; Miss. C. 1,20 ; Fla. C. Decln. of Rts. 2.

So, in two, it is declared that the State and United States Constitutions apply as well in war as in peace : Md. C. Decln. of Rts. 44 ; W.Va. C. 1,3.

NOTE. — <sup>a</sup> "In the exercise by the United States Government of the constitutional powers as defined by the U. S. Supreme Court : " [Nev.]

§ 192. **Secession.** The Constitutions of five Southern states declare that there is no right on the part of the state to secede or dissolve its connection with the Union : N.C. C. 1,4 ; Nev. C. 1,2 ; Ala. C. 1,35 ; Miss. C. 1,20 ; Fla. Decln. of Rts. 2.

And of six, that all attempts at secession ought to be resisted (1) by the State : Va. C. 1,2 ; N.C. ; S.C. C. 1,5 ; Fla. C. Decln. of Rts. 21. (2) By the Federal Government, and, if necessary, by force of arms : Nev.

§ 193. **State Rights.** But the right of local self-government belonging to the people of each state is in eleven of the older states declared a constitutional right which the national Government can never infringe : N.H. C. 1,7 ; Mass. C. 1,4 ; Vt. C. 1,5 ; Md. Decln. of Rts. 4 ; W.Va. C. 1,2 ; N.C. C. 1,3 ; Mo. C. 2,2 ; Tex. C. 1,1 ; Col. C. 2,2 ; Ga. C. 1,5,1.

So, in Virginia, that the people have a right to uniform government ; and therefore that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof : Va. C. 1,16.

And in four, that the powers not delegated to the United States by the United States Constitution, nor prohibited by it to the states, are reserved to the state : N.H. ; Mass. ; Md. Decln. of Rts. 3 ; W.Va. C. 1,2.

**Art. 20. Constitution of the State Governments.**

§ 200. **The Three Functions.** By the Constitutions of all, except New York, Pennsylvania, Ohio, Wisconsin, Kansas, and Delaware, the powers of Government are divided into three distinct departments, — the legislative, executive,

and judicial: N.H. C. 1,37; Mass. C. 1,30; Me. C. 3,1; Vt. C. 2,6; R.I. C. Art. 3; Ct. C. Art. 2; N.J. C. Art. 3; Ind. C. 3,1; Ill. C. 3,1; Mich. C. 3,1; Io. C. 3,1; Minn. C. 3,1; Neb. C. 2,1; Md. Decln. of Rts. 8; Va. C. 2,1; W.Va. C. 5,1; N.C. C. 1,8; Ky. C. 1,1; Tenn. C. 2,1; Mo. C. 3,1; Ark. C. 4,1; Tex. C. 2,1; Cal. C. 3,1; Ore. C. 3,1; Nev. C. 3,1; Col. C. 3,1; S.C. C. 1,26; Ga. C. 1,23; Ala. C. 3,1; Miss. C. 3,1; Fla. C. 3,1; La. C. 14.

And in most of these it is declared that no person or collection of persons exercising the functions of one department shall assume or discharge the functions of any other: N.H.; Mass.; Me. C. 3,2; Vt.; N.J.; Ind.; Ill.; Mich. C. 3,2; Io.; Minn.; Neb.; Md.; Va.; W.Va.; Ky. C. 1,2; Tenn. C. 2,2; Mo.; Ark. C. 4,2; Tex.; Cal.; Ore.; Nev.; Col.; S.C.; Ga.; Ala. C. 3,2; Miss. C. 3,2; Fla.; La. C. 15.

So, in Ohio, that the legislature can exercise no judicial power not expressly conferred by the Constitution: O. C. 2,32.

*Except* in cases expressly by the Constitution permitted: Me., Ind., Ill., Mich., Io., Minn., Neb., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., Ga., Ala., Miss., Fla., La.

§ 201. **Political Constitution.** There is in all the states and territories a *legislature* [in Vt., R.I., Ct., O., Pa., Ind., Ill., Io., Va., N.C., Ky., Tenn., Md., Del. Mo., Ark., Col., S.C., Ala., Ga., and La., it is called the *general assembly*; in Ore. and all the territories, the *legislative assembly*; and in N.H. and Mass., the *general court*], consisting of a *senate* [in the territories, a *council*] and a *house of representatives* [called in N.Y., Wis., Cal., Nev., Fla., the *assembly*; in Md., Va., W.Va., the *house of delegates*; and in N.J., the *general assembly*]: N.H. C. 2-3; Mass. C. 2,1,1,1; Me. C. 4,1,1; Vt. C. Amts. 2-3; R.I. C. 4,2; Ct. C. 3,1; N.Y. C. 3,1; N.J. C. 4,1,1; Pa. C. 2,1; O. C. 2,1; Ind. C. 4,1; Ill. C. 4,1; Mich. C. 4,1; Wis. C. 4,1; Io. C. 3,1; Minn. C. 4,1; Kan. C. 2,1; Neb. C. 3,1; Md. C. 3,1; Del. C. 2,1; Va. C. 5,1; W.Va. C. 6,1; N.C. C. 2,1; Ky. C. 2,1; Tenn. C. 2,3; Mo. C. 4,1; Ark. C. 5,1; Tex. C. 3,1; Cal. C. 4,1; Ore. C. 4,1; Nev. C. 4,1; Col. C. 5,1; S.C. C. 2,1; Ga. C. 3,1,1; Ala. C. 4,1; Miss. C. 4,1; Fla. C. 4,1; La. C. 19; U.S. R. S. 1846. Both the senate and the house are in all states elected by the people at the general election day: N.H. C. 2,12-27; Mass. C. Amts. 3-15; Me. C. 4,2,1; Vt. C. Amts. 5-24,2; R.I. C. 8,1; Ct. C. 3,3-4; N.Y. C. 3,2-5; N.J. C. 4,2,1; 4,3,1; Pa. C. 2,2; O. C. 2,2; Ind. C. 4,2; Ill.; Mich. C. 4,2; 4,3; Wis. C. 4,4-5; Io. C. 3,3 and 5; Minn. C. 4,24; Kan. C. 2,29; Neb. C. 16,13; Md. C. 3,2 and 6; Del. C. 2,2,3; Va. C. 5,2-3; W.Va. C. 4,7; N.C. C. 2; Ky. C. 2,5 and 15; Tenn.; Mo. C. 4,2 and 5; Ark. C. 5,2-3; Tex. C. 3,3-4; Cal. C. 4,3-4; Ore. C. 4,3; Nev. C. 4,3-4; Col.; S.C. C. 2,2 and 8; Ala. C. 4,3; Miss. C. 4,2 and 4; Fla. C. 4,3-4; Ga. C. 3,4,2; La. C. 191; Territories, U.S. R. S. 1846. And vacancies in either house are generally filled in the same way by special election: R.I. C. 8,9; N.J. C. 4,4,1; Pa.; O. C. 2,11; Ind. C. 5,19; Ill. C. 4,2; Mich. C. 5,10; Wis. C. 4,14; Io. C. 3,12; Minn. C. 4,17; Kan. C. 2,9; Md. C. 3,13; Del. C. 2,13; Va. C. 5,7; W.Va.; N.C. C. 2,13; Ky. C. 2,31; Tenn. C. 2,15; Mo. C. 4,14; Ark. C. 5,6; Tex. C. 3,13; Cal. C. 4,12; Ore. C. 5,17; Nev. C. 4,12; Col. C. 5,2; S.C. C. 2,29; Ga. C. 5,1,13; Ala. C. 4,9; Miss. C. 4,9; La. C. 21.

But in two states vacancies are so filled by election only in the house; a vacancy in the senate is filled by joint ballot of the legislature: N.H. C. 2,34; 2,16; Me. C. 4,2,5; 4,1,6. So, in Massachusetts, vacancies in the senate are

filled by special election upon the order of a majority of the senators elected : Mass. C. Amt. 24.

Each house of the legislature has, in four states, a negative on the other : " N.H., Mass., Me., Vt. So, in three others, the concurrence of both houses is necessary to the enactment of laws : " R.I. C. 4,2 ; N.Y. C. 3,15 ; Io. C. 3,15.

The District of Columbia has no legislature : U.S. 1874, 337,1.

NOTE. — " The same would follow in all other states from § 304.

§ 202. **Executive.**<sup>a</sup> (A) There is in all the states a governor : N.H. C. 2,41 ; Mass. C. 2,2,1,1 ; Me. C. 5,1,1 ; Vt. C. Amt. 8 ; R.I. C. 7,1 ; Ct. C. 4,1 ; N.Y. C. 4,1 ; N.J. C. 5,1 ; Pa. C. 4,1 ; O. C. 3,1 and 5 ; Ind. C. 5,1 ; Ill. C. 5,1 ; Mich. C. 5,1 ; Wis. C. 5,1 ; Io. C. 4,1 ; Minn. C. 5,1 ; Kan. C. 1,1 ; Neb. C. 5,1 ; Md. C. 2,1 ; Del. C. 3,1 ; Va. C. 4,1 ; W.Va. C. 7,1 ; N.C. C. 3,1 ; Ky. C. 3,1 ; Tenn. C. 3,1 ; Mo. C. 5,1 ; Ark. C. 6,1 ; Tex. C. 4,1 ; Cal. C. 5,1 ; Ore. C. 5,1 ; Nev. C. 5,1 ; Col. C. 4,2 ; S.C. C. 3,1 ; Ga. C. 5,1,1 ; Ala. C. 5,1 ; Miss. C. 5,1 ; Fla. C. 5,1 ; La. C. 58 ; and so in all the territories by U.S. R. S. 1841. A lieutenant-governor, in many : Mass. C. 2,2,2,1 ; Vt. ; R.I. ; Ct. C. 4,3 ; N.Y. ; Pa. ; O. ; Ind. C. 5,2 ; Ill. ; Mich. ; Wis. ; Io. C. 4,3 ; Minn. ; Kan. ; Neb. ; Va. C. 4,9 ; N.C. ; Ky. C. 3,15 ; Mo. ; Tex. ; Cal. C. 5,15 ; Nev. C. 5,17 ; Col. C. 4,1 ; S.C. C. 3,5 ; Miss. C. 5,14 ; Fla. C. 5,14 ; La.

A council, in three, consisting of eight *councillors* : Mass. C. Amt. 16 ; 2,2,3,1 ; so, in New Hampshire, there are five *councillors* : N.H. C. 2,60 ; in Maine, seven : Me. C. 5,2,1.

A cabinet, consisting of the " administrative " [executive] officers, in Fla. C. 5,17.

So, in North Carolina, the " council " consists of the secretary, auditor, treasurer, and superintendent of public instruction : N.C. C. 3,14.

For the District of Columbia, the President of the United States, by and with the consent of the Senate, appoints a commission of three persons who have general executive powers : U.S. 1874, 337,2 ; 1878, 180,2.

A secretary of state, in all : N.H. C. 2,67 ; Mass. C. 2,2,4,1 ; Amt. 17 ; Me. C. 5,3,1 ; Vt. C. Amt. 10 ; R.I. C. 7,12 ; Ct. C. 4,18 ; N.Y. C. 5,1 ; N.J. C. 7,2,4 ; Ind. C. 6,1 ; Mich. C. 8,1 ; Wis. C. 6,1 ; Io. C. 4,22 ; Md. C. 2,22 ; Del. C. 3,15 ; Va. C. 4,12 ; Ky. C. 3,21 ; Tenn. C. 3,17 ; Cal. C. 5,17 ; Ore. C. 6,1 ; Nev. C. 5,19 ; S.C. C. 3,28, Amt. ; Miss. C. 5,19 ; Fla. C. 5,17 ; Ariz.\* 1143 ; Territories, U.S. R. S. 1843 ; a treasurer, in all : Me. C. 5,4,1 ; Ct. C. 4,17 ; N.J. C. 7,2,3 ; Md. C. 6,1 ; Del. C. 2,16 ; Ky. C. 3,25 ; Tenn. C. 7,3 ; Miss. C. 5,20. For citations of other states, see above.

A comptroller, in eleven : Ct. C. 4,19 ; N.Y. ; N.J. ; Md. ; Tenn. ; Tex. ; Cal. ; Nev. ; S.C. ; Ga. ; Fla..

A commissary-general, in one : N.H.

An auditor, in many : Mass. ; Vt. C. Amt. 1882, p. 108 ; Pa. ; O. ; Ind. ; Ill. ; Mich. ; Io. ; Minn. ; Kan. ; Neb. ; Va. ; W.Va. ; N.C. ; Ky. ; Mo. ; Ark. ; Col. ; Ala. ; Miss. ; La.

An attorney-general, in most states : N.H. C. 2,46 ; Mass. ; Me. C. 9,11 ; R.I. ; N.Y. ; N.J. ; Pa. ; O. ; Ill. ; Mich. ; Wis. ; Io. C. 5,12 ; Minn. ; Kan. ; Neb. ; Md. C. 5,1 ; Del. C. 7,1 ; Va. C. 6,8 ; W.Va. ; N.C. ; Ky. ; Tenn. C. 6,5 ; Mo. ; Ark. ; Tex. ; Cal. ; Nev. ; Col. ; S.C. C. 4,28 ; Ga. C. 6,10,1 ; Ala. ; Miss. C. 6,25 ; Fla. ; La. C. 94 ; Territories, U.S. R. S. 1875.

A secretary of internal affairs, in Pennsylvania. A superintendent of public works, in N.Y. C. 5,3.

And in many, a superintendent of public instruction : Pa. ; Ind. C. 8,8 ; Ill. ; Mich. ; Wis. C. 10,1 ; Kan. ; Neb. ; Va. C. 8,1 ; W.Va. ; N.C. ; Ky. C. 11,2 ; Mo. ; Ark. C. 6,21 ; Ore. C. 8,1 ; Nev. C. 11,1 ; Col. ; S.C. C. 10,1 ; Ga. C. 8,2,1 ; Ala.



C. 13,7; Miss. C. 8,2; Fla. C. 8,3; La. C. 225. A superintendent of State prisons, in N.Y. C. 5,4.

A state board of education: Mich. C. 13,9; Io. C. 9,1,1; Neb.<sup>b</sup> C. 8,1; Va.<sup>b</sup> C. 8,2; N.C.<sup>b</sup> C. 9,8; Mo. C. 11,4; Tex. C. 7,8; Cal. C. 9,2; Col. C. 9,1; Miss. C. 8,3; Fla. C. 8,9.

A state engineer or surveyor: N.Y. C. 5,2; Cal.; Nev.

Commissioners of the land office: N.Y.<sup>b</sup> C. 5,5; Mich.; Neb.; Md. C. 7,4; Ark.; Tex.; Col. C.<sup>b</sup> 9,9.

Register of the land office: Ky.; a state librarian: Md. C. 7,3; a board of public works: Md.<sup>b</sup> C. 12,1; Va.<sup>b</sup> C. 4,17; a bureau of agriculture: La. C. 179; a superintendent of labor and agriculture: Md. C. 10,1; a commissioner of mines: Col. C. 16,1; a commissioner of immigration: Fla.; a board of railway commissioners: Neb.; a board of prison commissioners: Nev.<sup>b</sup> C. 5,21.

(B) All the executive officers are, as a general rule, in all the states, elected by the people at the general election: N.H.; Mass.; Me. C. 5,1,2; Vt. C. Amt. 1883, p. 107; R.I. C. 8,1; Ct. C. Amts. 4,5 and 6; N.Y. C. 5,1; Pa. C. 4,2; O. C. 3,1 and 18; Ind. C. 5,3; 6,1; Ill. C. 5,3; Mich. C. 5,3; 8,1; Wis. C. 5,3; 6,1; Io. C. 4,2 and 3 and 22; Minn.; Kan.; Neb.; Md. C. 2,2; Del. C. 3,2; Va. C. 4,2 and 9; W.Va. C. 7,2; N.C.; Ky. C. 3,2; Tenn. C. 3,2; Mo. C. 5,2; Ark. C. 6,3; Tex. C. 4,2; Cal.; Ore.; Nev.; Col. C. 4,3; S.C.; Ga. C. 5,1,3; 5,2,1; Ala. C. 5,3; 6,27; Miss.; Fla. C. 5,14; La. C. 76.

But in New Jersey the treasurer and comptroller are appointed by the legislature in joint session; and the attorney-general and secretary of state are nominated by the governor and confirmed by the senate: N.J. C. 7,2,3 and 4; so, in New York, the superintendents of public works, and of prisons. In Pennsylvania, the secretary of state and attorney-general are appointed by the governor and confirmed by the senate on a two-thirds vote; and so he appoints one superintendent of public instruction and all other officers whom he is given power to appoint: Pa. C. 4,8. In Maryland, the comptroller and attorney-general are elected by the people: the secretary of state, librarian, and commissioner of lands appointed by the governor; and the legislature in joint session elects the treasurer. In Delaware, the secretary of state is appointed by the governor: Del. C. 3,15; and the treasurer by the legislature: Del. C. 2,16. In three states, the secretary of state is appointed by the governor and confirmed by the senate: W.Va. C. 7,3; Ky.; Tex. C. 4,21; and in Florida, all but the lieutenant-governor are so appointed and confirmed. In Georgia, the school commissioner or superintendent is appointed by the governor. In several, the secretary and treasurer [and commissary] are elected by the legislature in joint ballot: N.H.; Me.; Va. C. 4,12; Tenn. C. 3,17; 7,3; so, in one, the auditor: Va.; the comptroller: Tenn.; so, in one, the attorney-general: Me. C. 9,11. In one, the attorney-general is appointed by the governor and council: N.H. C. 2,46. In one, the attorney-general is appointed by the Supreme Court: Tenn.

In the territories, the governor, secretary, and attorney-general are appointed by the President, and confirmed by the Senate of the United States: U.S. R. S. 1877.

In Maine, the council is elected by the legislature in joint ballot: Me. C. 5,2,2. So, in Virginia, the superintendent of public instruction: Va. C. 8,1.

(C) Vacancies in all executive offices [except the governor or lieutenant-governor (see § 282)] are, as a rule, filled either by election or appointment as originally provided<sup>a</sup> [§ 202. See also § 211].

But in many, they are filled by the governor (with the consent of the senate, if in session, except in Illinois and North Carolina): Ill. C. 5,20; Mich. C. 8,3; Minn. C. 5,4; Kan.<sup>c</sup> C. 1,14; Neb. C. 5,20; W.Va. C. 7,17; N.C.<sup>c</sup> C. 3,13; Ky. C. 8,26; Ark. C. 6,23; Col. C. 4,6; Ala. C. 5,23; La.<sup>a</sup> C. 76. See also § 511.

*Except*, in Massachusetts, vacancies of the council are filled by joint vote of the legislature, or, if not in session, by the governor and council: Mass. C. Amt. 25.

(D) In a few states, all state offices for the weighing, gauging, inspecting, or

measuring any merchandise or produce are forbidden: N.Y. C. 5,8; Pa. C. 3,27; Cal. C. 11,14; Ala. C. 4,38.

NOTES. — <sup>a</sup> Of course, many offices are in many of the states regulated by statutes, and not by the Constitution. See, for these, in Part III. <sup>b</sup> Such board of commissioners is composed of certain specific state officers. <sup>c</sup> Until the next general election. <sup>d</sup> The same process of election is had when the people have failed to elect by a majority vote. See § 232.

§ 203. **Terms of Office.** (A) A senator, by the Constitution of most states, is elected for four years: Pa. C. 2,3; Ind. C. 4,3; Wis. C. 4,5 and Amt.; Io. C. 3,5; Minn. C. 4,24; Kan. C. 2,29; Md. C. 3,2; Del. C. 2,3; Va. C. 5,3; W.Va. C. 6,3; Ky. C. 2,10; Mo. C. 4,5; Ark. C. 5,3; Tex. C. 3,3; Cal. C. 4,4; Ore. C. 4,4; Nev. C. 4,4; Col. C. 5,3; S.C. C. 2,8; Ala. C. 4,3; Miss. C. 4,4; Fla. C. 4,4; La. C. 22.

And in many others, for two years: N.H. C. 2,25; Me. C. Amt. 23; Vt. C. Amt. 24,4; Ct. C. Amt. 16,2; Amt. 27; N.Y. C. 3,2; O. C. 2,2; Ill. C. 4,2; Mich. C. 4,2; Neb. C. 3,4; N.C. C. 2,3; Tenn. C. 2,3; Ga. C. 3,4,1; Territories, U.S. R. S. 1846.

In two, for one year: Mass. C. Amt. 22; R.I. C. 8,1. In one for three years: N.J. C. 4,2,1.

Half the senators are, in many states, elected at each general election for them, the other half holding over: Ind.; Wis.; Io. C. 3,6; Minn.; Md. C. 3,7-8; Del. C. Amt. 1883,2 (if this amendment has been adopted, see Preface); Va.; W.Va.; Ky. C. 2,12; Mo. C. 4,10; Ark.; Tex.; Cal. C. 4,5; Ore.; Col. C. 5,5; S.C. C. 2,9; Ala. C. 4,9; Miss. C. 4,36; Fla.

So, in two, one third are elected at each general election, the others holding over: N.J. C. 4,2,2; Del. C. Sched. 3; C. 2,3.

(B) In Louisiana, a representative is elected for four years. But in most states, for two years: N.H. C. 2,9; Me.; Vt.; Ct. C. Amt. 27,1; Pa.; O.; Ind.; Ill.; Mich. C. 4,3; Wis. C. 4,4; Io. C. 3,3; Minn.; Kan.; Neb.; Md. C. 3,6; Del. C. 2,2; Va. C. 5,2; W.Va.; N.C. C. 2,5; Ky. C. 2,2; Tenn.; Mo. C. 4,2; Ark. C. 5,2; Tex. C. 3,4; Cal. C. 4,3; Ore.; Nev. C. 4,3; Col. C. 5,3; S.C. C. 2,2; Ga.; Ala. C. 4,3; Miss. C. 4,2; Fla. C. 4,3; Territories.\*

In four states, for one year: Mass. C. 2,1,3,1; R.I.; N.Y. C. 3,2; N.J. C. 4,3,1.

(C) In about half, the governor holds office for a term of two years: <sup>a</sup> N.H. C. 2,4,2; Me.; Vt. C. Amt. 24,3; Ct.; O. C. 3,2; Mich. C. 5,1; Wis. C. 5,1; Io. C. 4,2; Minn. C. 5,3; Kan. C. 1,1; Neb. C. 5,1; Tenn. C. 3,4; Ark. C. 6,1; Tex. C. 4,4; Col. C. 4,1; S.C. C. 3,2; Ga. C. 5,1,2; Ala. C. 5,5.

In most others, for four years: Pa. C. 4,3; Ind. C. 5,1; Ill. C. 5,1; Md. C. 2,1; Del. C. 3,3; Va. C. 4,1; W.Va. C. 7,1; N.C. C. 3,1; Ky. C. 3,2; Mo. C. 5,2; Cal. C. 5,2; Ore. C. 5,1; Nev. C. 5,2; Miss. C. 5,1; Fla. C. 5,2; La. C. 59; Territories, U.S. R. S. 1841.

In two, for one year: Mass. C. 2,2,1,2; R.I. In two, for three years: N.Y. C. 4,1; N.J. C. 5,3.

The other executive officers generally hold office for the same period as the governor in all the states.<sup>a</sup> But in New York, only the lieutenant-governor holds office for three years; the rest hold office for only two: N.Y. C. 5,1. In New Jersey, the treasurer and comptroller hold office for three years, and the attorney-general and secretary of state for five: N.J. C. 7, 2, 3 and 4. The term of the auditor-general is three years, and of the treasurer two: Pa. C. 4,21. In Ohio, the auditor holds office for four years. In Indiana, they all hold office two years, except the lieutenant-governor. In Minnesota, the auditor holds office four years: Minn. C. 5,5; Amt. 1883, C. 1. In Maryland, the attorney-general and the superintendent of labor, etc., hold office four years: Md. C. 5,1. In several, the treasurer holds office two years: Ill. C. 5,2; Del. C. 2,16; Ky. C. 3,25. In Virginia, all hold office two years; but the lieutenant-governor and the superintendent of instruction, four years. In Tennessee, the secretary of state holds office four years and the attorney-general, eight. In Nevada, the superintendent of instruction holds office two years: Nev. C. 11,1. For citations of other states, see above and § 202.

NOTE. — <sup>a</sup> See also § 212.

§ 204. **Special Qualifications for Senators.**<sup>a</sup> (A) By the Constitutions of many states, no person can be state senator who is not (1) a citizen of the United States: Ind. C. 4,7; Ill. C. 4,3; Mich. C. 4,5; Io. C. 3,5; Ky. C. 2,16; Tenn. C. 2,10; Mo. C. 4,6; Ark. C. 5,4; Tex. C. 3,6; Ore. C. 4,8; Col. C. 5,4; S.C. C. 2,10; Ga. C. 3,5,1.

(2) In Maine, he must have been five years a citizen of the United States: Me. C. 4,2,6.

(B) And in eight states, no person is eligible for state senator who has not been one year resident in the state: Me. C. 4,1,4; 4,2,6; Wis. C. 4,6; Io. C. 3,5; Minn. C. 4,25; S.C.; Miss. C. 4,5. In three, he must have been two years resident in the state: Ind.; N.C.<sup>b</sup> C. 2,7; Ark. In six, three years: Md. C. 3,9; Del.<sup>b</sup> C. 2,3; Tenn.; Mo.;<sup>c</sup> Cal.<sup>b</sup> C. 4,4; Ala. C. 4,4. In three, four years: N.J.<sup>b</sup> C. 4,1,2; Pa.<sup>b</sup> C. 2,5; Ga. In five, five years: Mass. C. 2,1,2,5; Amt. 22; Ill.; W.Va.<sup>b</sup> C. 4,4; Tex.; La. C. 22.

In one, six years: Ky. In one, seven years: N.H. C. 2,29.

In five states, he must be a qualified elector of the state: N.J.; Minn.; Neb. C. 3,5; Md.;<sup>b</sup> W.Va.; Mo.; Tex.; La.; Territories, U.S. R. S. 1846.

(C) And in ten states, to be eligible as state senator, a candidate must be resident in the senatorial district where chosen at the time of the election: N.H.; Mass.; Vt. C. Amt. 23; Ct. C. Amt. 3; Mich. C. 4,5; Wis.; Kan. C. 2,4; Neb.; Va. C. 5,5; Miss.; Territories. And in thirteen, if he cease to reside in such district, he vacates his office as senator: N.H.; Mass.; Me.; Pa.; Mich.; Neb.; Va.; W.Va. C. 6,12; Mo. C. 4,13; Tex. C. 3,23; Ga. C. 3,4,8; Ala.; La.

In one, he must have been sixty days resident in the district: Io. In two, three months: Me., S.C. In one, six months: Minn.

In most states, one year: N.J.; Pa.; O. C. 2,3; Ind.; Neb.; Md.; Del.; W.Va.; N.C.; Ky.; Tenn.; Mo. C. 4,6; Ark.; Tex.; Cal.; Ore.; Col.; Ga.; Ala.

In two, two years: Ill., La.

In six, he must be a qualified elector in his district: Mich.; Wis.; Kan.; Va.; Nev. C. 4,5; Fla. C. 4,5.

(D) By the Constitutions of many states no person is eligible as state senator who is not (1) in one, twenty-one years old at the time of his election:<sup>d</sup> Ore. (2) In many, twenty-five: Me. C. 4,2,6; Pa.; Ind.; Ill.; Io. C. 3,5; Md.; W.Va.; N.C.; Ark.; Col.; S.C.; Ga.; Miss.; La.

(3) In Texas, twenty-six. (4) In two, twenty-seven: Del., Ala. (5) In six, thirty: N.H. C. 2,29; Vt.; N.J.; Ky.; Tenn.; Mo.

(E) In Missouri he must have paid a state and county tax within one year of election.

(F) By the Constitution of Delaware, no person can be senator who is not possessed of a freehold estate of two hundred acres, or a personal or mixed estate of the value of £1,000.

NOTES. — <sup>a</sup> For religious qualifications, see §§ 46,47. <sup>b</sup> In these states, for "resident," etc., read *a citizen of*. <sup>c</sup> For "resident in" read *a qualified elector of the state*. <sup>d</sup> This would probably follow from other provisions in other states.

§ 205. **Special Qualifications for Representatives.**<sup>a</sup> (A) By the Constitutions of many states, no person can be a representative in the lower house of the state legislature who is not a citizen of the United States: Ind. C. 4,7; Ill. C. 4,3; Mich. C. 4,5; Io. C. 3,4; Ky. C. 2,4; Tenn. C. 2,9; Mo. C. 4,4; Ark. C. 5,4; Tex. C. 3,7; Ore. C. 4,8; Col. C. 5,4; S.C. C. 2,10; Ga. C. 3,6,1.

And in Maine, he must have been a citizen of the United States five years: Me. C. 4,1,4.

(B) And by that of many states no person is so eligible as representative who has not been resident in the state a certain period; as, in seven, one year: Me.; Wis. C. 4,6; Io.; Minn. C. 4,25; S.C.

In nine, two years: N.H. C. 2,14; Vt. C. 2,18; N.J.<sup>b</sup> C. 4,1,2; Ind.; Ky.; Mo.;<sup>c</sup> Ark.; Tex.; Ga. In five, three years: Md. C. 3,9; Del.<sup>b</sup> C. 2,2; Tenn.;<sup>b</sup> Cal.<sup>b</sup> C. 4,4; Ala. C. 4,4. In one, four years: Pa.<sup>b</sup> C. 2,5. In two, five years: Ill.; La. C. 22.



And in many, he must be a qualified elector of the state: N.J.; Minn.; Neb. C. 3,5; Md.;<sup>b</sup> N.C. C. 2,8; Mo.; Tex.; Miss. C. 4,3; La.; Territories.

(C) And who is not, in many, resident in the district from which he is chosen, at the time of his election:<sup>d</sup> N.H. C. 2,14; Mass.; Me.; Ct. C. 3,3; Mich.; Kan. C. 2,4; Neb.; Va. C. 5,5; Miss.; Territories, U.S. R. S. 1846.

And who has not been resident in such district or county, in Iowa, for sixty days before his election. In two, for three months before: Me., S.C. In Minnesota, for six months.

In many, for a year: Mass. C. Amt. 21; Vt.; N.J.; Pa.; O. C. 2,3; Ind.; Neb.; Md.; Del.; W.Va. C. 6,12; N.C.; Ky.; Tenn. C. 2,9; Mo.; Ark.; Tex.; Cal. C. 4,4; Ore.; Col.; Ga.; Ala. For two years: Ill., La.

And in many, he shall cease to be such representative if he ceases to reside in the district: N.H.; Mass. C. Amt. 21; Me.; Pa.; Mich.; Neb.; Va.; W.Va.; Mo. C. 4,13; Tex. C. 3,23; Ga. C. 3,4,8; Ala.; La.

In several, he must be a qualified elector in such district: Mich.; Wis.; Kan.; Va.; Nev. C. 4,5; Fla. C. 4,5.

(D) By the Constitutions of many states, no person is eligible as state representative who is not (1) twenty-one years old at his election:<sup>d</sup> Me., N.J., Pa., Ind., Ill., Io., Md., Tenn., Ark., Tex., Ore., S.C., Ga., Ala.

(2) Twenty-four years old, in three: Del., Ky., Mo. (3) Twenty-five years old, in Colorado.

(E) And in Missouri, he must have paid a state and county tax within one year before election: Mo.

NOTES. — <sup>a</sup> See § 204, note <sup>a</sup>. <sup>b</sup> See § 204, note <sup>b</sup>. <sup>c</sup> See § 204, note <sup>c</sup>. <sup>d</sup> See § 204, note <sup>d</sup>.

§ 206. **Miscellaneous Special Qualifications for the Legislature.** (See also Art. 22.) In Massachusetts, the Constitution forbids any property qualification for the state legislature or council: Mass. C. Amt. 13. See also § 222. In Nebraska, no person interested in a contract with, or an unadjusted claim against, the state, can hold a seat in the legislature (compare § 154): Neb. C. 3,6. In Delaware, no person concerned in any army or navy contract: Del. C. 2,12. In West Virginia, no salaried officer of a railroad: W.Va. C. 6,13. In two states, no person convicted of embezzlement or misuse of the public funds shall have a seat in the legislature: Kan. C. 2,6; Ga. C. 3,4,7. In Delaware no person who has served as state treasurer is eligible for the legislature before his accounts as treasurer are settled and discharged: Del. C. 2,16. In Georgia, no person who has not paid his legal taxes. In West Virginia, no person who has been convicted of bribery, perjury, or other infamous crime, shall be eligible to a seat in the legislature; so, also, no person who has collected or been entrusted with public money, and has not accounted for the same: W.Va. C. 6,14. In South Carolina, no person convicted of infamous crime: S.C. C. 2,10.

§ 207. **Special Qualifications for Governor.**<sup>a</sup> (A) By the Constitutions of many states, no person can be governor who is not a citizen of the United States: N.Y. C. 4,2; Pa. C. 4,5; Wis. C. 5,2; Minn. C. 5,3; Va. C. 4,3; Ky. C. 3,4; Tenn. C. 3,3; Ark. C. 6,5; Tex. C. 4,4; Ore. C. 5,2; Col. C. 4,4.

And in three, he must have been a citizen of the United States two years: Io. C. 4,6; Neb. C. 5,2; S.C. C. 3,3. In five, five years: Ind. C. 5,7; Ill. C. 5,5; Mich. C. 5,2; N.C. C. 3,2; Cal. C. 5,3. In one, nine years: Fla. C. 5,3; 16,22. In four, ten years: Va.;<sup>b</sup> Mo. C. 5,5; Ala. C. 5,6; La. C. 60. In one, twelve years: Del. C. 3,4. In one, fifteen years: Ga. C. 5,1,7. In two, twenty years: N.J. C. 5,4; Miss. C. 5,3. And in one, he must be a natural born citizen of the United States: Me. C. 5,1,4.

(B) In Maine, no person is eligible as governor who is not resident in the state at the time of his election.<sup>c</sup>

In Minnesota, he must have been resident in the state one year. In eight states, two years: Mich.; Io.; Neb.;<sup>b</sup> N.C.; Nev.<sup>d</sup> C. 5,3; Col.; S.C.; Miss. In three, three years: Va., Ore., Fla.<sup>d</sup> In one, four years: Vt. C. 2,30. In eight, five years: Me.; N.Y.; Ind.; Ill.;<sup>d</sup> Md. C. 2,5; W.Va.<sup>d</sup> C. 4,4; Tex.; Cal. In three, six years: Del., Ky., Ga. In eight, seven years: N.H. C. 2,42; Mass. C. 2,2,1,2; N.J.; Pa. C. 4,5; Tenn.;<sup>d</sup> Mo.;



Ark.; Ala.<sup>d</sup> In two, ten years: Md.,<sup>d</sup> La. And the Constitution provides that he shall continue to reside in the state during his term of office in Maine; so in the territories: U.S. R. S. 1841. And in six, he must be a qualified elector of the state: Ct. C. 4,1; Wis.; Md.; Ark.; Nev.; Fla.

(C) In three states, it is provided that the governor must be (1) twenty-five years old at the commencement of his term: Minn., Cal., Nev. In most states, (2) thirty years old: N.H., Me., Ct., N.Y., N.J., Pa., Ind., Ill., Mich., Io., Neb., Md., Del., Va., W.Va., N.C., Tenn., Ark., Tex., Ore., Col., S.C., Ga., Ala., Miss., La. And in two, (3) thirty-five: Ky., Mo.

(D) By the Constitutions of seven states, the governor is not eligible for re-election for any two successive terms (unless the office devolved upon him): N.J. C. 5,3; Pa. C. 4,3; Va. C. 4,1; W.Va. C. 7,4; N.C.; Ky. C. 3,3; Mo. C. 5,2.

In Delaware, he is not eligible a second time for the office: Del. C. 3,3. And in Tennessee he is not eligible for more than six years in any term of eight: Tenn. C. 3,4. So, in Indiana, for not more than four years in any term of eight: Ind. C. 5,1. So, in Oregon, for not more than eight years in any period of twelve years: Ore. C. 5,1. In Georgia, he is not eligible for four years after a second term: Ga. C. 5,1,2. (E) In Massachusetts, the governor must be possessed of a freehold estate in his own right, within the state, of the value of £1,000: Mass.

NOTES. — <sup>a</sup> See § 204, note <sup>a</sup>. <sup>b</sup> If of foreign birth. <sup>c</sup> See § 204, note <sup>d</sup>. <sup>d</sup> See § 204, note <sup>b</sup>.

§ 208. **Special Qualifications for other Executive Officers.** In most states, the lieutenant-governor must have the same qualifications as the governor (except, in most states, as to re-election): Mass. C. 2,2,2,1; Vt. C. 2,30; Ct. C. 4,3; N.Y. C. 4,2; Pa. C. 4,5; Ind. C. 5,7; Ill. C. 5,5; Mich. C. 5,2; Wis. C. 5,2; Io. C. 4,6; Minn. C. 5,3; Neb. C. 5,2; Va. C. 4,9; N.C. C. 3,2; Ky. C. 3,15; Mo. C. 5,15; Cal. C. 5,15; Nev. C. 5,17; Col. C. 4,4; S.C. C. 3,5; Miss. C. 5,14. [There are, however, some exceptions and special provisions.]

The treasurer is not, in four states, eligible for more than five successive years: Mass. C. 2,2,4,1; Me. C. 5,4,1; Pa. C. 4,21; Col. C. 4,21. In two, the auditor is eligible for two successive terms: Pa., Col. In two, the treasurer is not again eligible until two years after the end of two successive terms: Ill. C. 5,2; Neb. C. 5,3. In Missouri, the treasurer is not eligible for any two successive terms: Mo. C. 5,2. In Oregon, the treasurer and secretary are not eligible for more than eight years in any period of twelve: Ore. C. 6,1.

§ 209. **Pay of the State Legislature.** In most states provision is made by the Constitution that members of the legislature shall receive compensation: N.H. C. 2,15; Me. C. 4,3,7; R.I. C. 4,11; Ct. C. Amt. 27; N.Y. C. 3,6; N.J. C. 4,4,7; Pa. C. 2,8; O. C. 2,31; Ind. C. 4,29; Ill. C. 4,21; Mich. C. 4,15; Wis. C. 4,21; Io. C. 3,25; Minn. C. 4,7; Kan. C. 2,3; Neb. C. 3,4; Md. C. 3,15; Del. C. 2,11; Va. C. 5,8; W.Va. C. 6,33; N.C. C. 2,28; Ky. C. 2,24; Tenn. C. 2,23; Mo. C. 4,16; Ark. C. 5,16; Tex. C. 3,24; Cal. C. 4,23; Ore. C. 4,29; Nev. C. 4,33; Col. C. 5,6; S.C. C. 2,23; Ga. C. 3,9,1; Ala. C. 4,6; Miss. C. 4,20; Fla. C. 16,4; La. C. 27; Territories, U.S. R. S. 1853; 1878, 329; Ariz.\* 1139.

By the Constitutions of many states, the pay of members of the legislature cannot be increased nor diminished during the term for which they are elected: Me.; Ct. C. 4,4; O.; Ind.; Io.; Minn.; Del.; Ky.; Cal.; Col. C. 5,9; S.C.; Miss.

In four, it cannot be increased: Pa., Va., Ark., Nev. In two, it cannot be altered at all by the legislature, at any time, the amount being fixed by the Constitution: Mo., Tex. And so, in several, of the pay of members of the executive (§ 202): N.Y.; O. C. 2,19; Ill. C. 5,23; Kan.; N.C. C. 3,15; Ky. C. 3,7; Ark. C. 19,11; Cal. C. 5,19; Col.; Ala. C. 5,7.

So, in eight, of the pay of the governor or lieutenant-governor: Me. C. 5,1,6; Ct.; N.J. C. 5,5; Ind. C. 5,22; Del.; Ky.; Tenn.; S.C.; Ga. C. 5,1,2. And, in Rhode Island, the pay of the governor and lieutenant-governor cannot be diminished during his term.

**Art. 21. Of Offices in General.**

§ 210. **Appointment.**<sup>a</sup> (For the important executive officers and the members of the legislature, see Art. 20; for the judicial officers, see Art. 55.)

Other state officers are, by the Constitutions of twelve states (**A**) appointed by the governor: Vt. C. 2,11; N.J. C. 7,2,9; Pa. C. 4,8; Ill. C. 5,10; Minn. C. 5,4; Neb. C. 5,10; Md. C. 2,10; Del. C. 3,8; W.Va. C. 7,8; N.C. C. 3,10; Mo. C. 5,23; Col. C. 4,6; La. C. 68; Territories, U.S. R. S. 1857.

In three, (**B**) by the governor and council: N.H.<sup>b</sup> C. 2,46; Mass.<sup>c</sup> 2,2,1,9; 2,1,1,4; Me. C. 5,1,8.

But in many (**C**) the appointment must be confirmed by the senate: N.J., Pa.,<sup>d</sup> Ill., Minn., Neb., Md., W.Va., N.C., Col., La., Territories.

Other officers are (**D**) appointed or elected in a manner to be provided by the legislature: N.H. C. 2,5; Pa. C. 12,1; O. C. 2,27; Ind. C. 15,1; Wis. C. 13,9; Kan. C. 2,19; 15,1; Neb. C. 5,1; Amt. 1883, 107; W.Va. C. 4,8; Ky. C. 3,25; Tenn. C. 7,4; Mo. C. 14,9; Cal. C. 20,4; Ore. C. 6,7; Nev. C. 15,10; Fla. C. 4,27; Territories.

(**E**)<sup>e</sup> The following officers are, by the state Constitutions, to be elected by the people of their respective counties, towns, or districts: <sup>a</sup>—

(1) In most states, solicitors or district attorneys: N.H. C. 2,71; Mass. C. Amt. 19; Vt. C. Amt. 16; N.Y. C. 10,1; Ind. C. 7,11; Ill. C. 6,22; Mich. C. 10,3; Wis. C. 6,4; Io. C. 5,13; Md. C. 5,7; Va. C. 7,1; W.Va. C. 9,1; N.C. C. 4,23; Ky. C. 6,1; Ark. C. 7,24; Tex. C. 5,21; Cal. C. 11,5; Ore. C. 7,17; Nev. C. 4,32; Col. C. 6,21; S.C. C. 4,29; Miss. C. 6,25; La. C. 124.

(2) In most states, sheriffs: N.H.; Mass.; Me. C. 9,10; Vt. C. Amt. 24,2; Amt. 15; Ct. C. Amt. 7; N.Y.; N.J. C. 7,2,7; Ind. C. 6,2; Ill. C. 10,8; Mich. C. 10,3; Wis.; Md. C. 4,44; Del. C. 7,3; Va.; W.Va.; N.C. C. 4,24; Ky. C. 6,4; Tenn. C. 7,1; Ark. C. 7,46; Tex. C. 5,23; Cal.; Ore. C. 6,6; Nev.; Col. C. 14,8; S.C. C. 4,30; Ala. C. 5,26; Miss. C. 5,21; La. C. 118.

(3) In three, registers of probate: N.H.; Mass.; Me. C. 6,7.

(4) In many, registers of deeds: N.H.; Ind.; Ill.; Mich.; Wis.; N.C. C. 7,1; Tenn.; Nev.; Col.

(5) In several, all city officers: Wis.; Va.; Ky. C. 6,6; Cal.

(6) In several, all county officers: Pa. C. 14,2; Wis. C. 13,9; Va. C. 7,2; 6,20; Ky. C. 6,10; Cal.; Ga. C. 11,2,1.

(7) In many, county treasurers: N.H.; Ind.; Ill.; Mich.; Va.; N.C.; Tenn.; Ark.; Tex. C. 16,44; Ore.; Nev.; Col.; Miss.

(8) In many, county clerks: N.Y.; Ill.; Mich.; Va.; Ark. C. 7,19; Tex. C. 5,20; Cal.; Ore. C. 7,15; Nev.; Col. Assessors: W.Va.; Tex. C. 8,14.

(9) In one, commissioners of insolvency: Mass.

(10) In several, county surveyors: Ind.; Ill.; Md. C. 7,2; W.Va.; N.C.; Ky.; Ark.; Tex.; Ore.; Nev.; Col.; Miss.

(11) In many, clerks of the county or superior court: Mass.; Ind.; Ill.; Minn. C. 6,13; Md.; Va.; W.Va. C. 8,18; 8,26; N.C. C. 4,16; Ky.; Ark.; Tex. C. 5,9; Nev.; S.C. C. 4,27; Ala. C. 6,23; Miss. C. 6,19; La. C. 121.

(12) In one, high bailiffs: Vt.

(13) In several, all town officers: Mich. C. 11,1; Cal.

(14) In several, coroners: N.Y., N.J., Ind., Ill., Wis., Del., N.C., Ky., Ark., Ore., Col., S.C., Miss., La.

(15) In several, county commissioners: Md. C. 7,1; Va.; N.C.; Cal.; Nev. C. 4,26; Col. C. 14,6; S.C. C. 4,19; Miss. C. 6,20.

(16) In one, public administrators: Nev.

For other officers, the provisions vary widely in the different states, and in most states they are to be found not in the Constitution but in the statutes.

NOTES. — <sup>a</sup> For their removal, see Art. 26. <sup>b</sup> Of militia officers and coroners only. <sup>c</sup> Of coroners only. <sup>d</sup> On a two-thirds vote. <sup>e</sup> Territorial statutory provisions are not incorporated under E.

§ 211. **Vacancies**<sup>a</sup> in any office whatever (except in all states, members of the legislature [see § 201]; in all states, the governor or lieutenant-governor [see § 282; and for other executive officers see also § 202]) are (A) by the Constitutions of many states filled by the governor, or governor and council, unless otherwise provided by law: Vt. C. 2,11; R.I. C. 7,5; N.J. C. 5,12; Pa. C. 4,8; Ind. C. 5,18; Ill. C. 5,11; Io. C. 4,10; Minn. C. 5,4; Md. C. 2,11 and 14; Va. C. 4,5; W.Va. C. 7,9; N.C. C. 4,25; Ky. C. 3,9; Tenn. C. 3,14; Mo. C. 5, 11; Ark. C. 6,23; Tex. C. 4,12; Cal. C. 5,8; Ore. C. 5,16; Nev. C. 5,8; Col. C. 4,6; Ga. C. 5,1,14; Fla. C. 5,7; La. C. 69; Territories, U.S. R. S. 1858.

But in six, the governor must have the consent of the senate: N.J., Pa., Ill., Md., W.Va., Tex., Col.

If the senate be not in session at the time, the person appointed must be so confirmed in the first ten days of the next session: Tex. Or during the next session: N.J., Pa., Ill., Md., W.Va., Tenn., Col.

(B) In many states the legislature are to declare when offices are deemed vacant and the manner of filling them: N.Y. C. 10,5 and 8; O. C. 2,27; Mich. C. 4,37; Wis. C. 13,10; Kan. C. 2,19; Neb. C. 3,20; Md. C. 2,7; Va. C. 5,22; Ore. C. 6,9; Miss. C. 5,13; 12,7; La. C. 160.

In states where nothing is said, these offices are presumably filled in the same manner as the original appointment; see § 210. This is expressed in one: Neb. C. 5,11.

NOTE. — <sup>a</sup> Territorial statutes are not incorporated with this section.

§ 212. (A) **Tenure**.<sup>a</sup> By the Constitutions of a few states, there are general provisions regarding tenure of office. Thus, in five, no office can be granted for a longer term than during good behavior:<sup>b</sup> Me. C. 1,23; Pa. C. 1,24; Del. C. 1,19; S.C. C. 1,32; Ala. C. 1,30.

In Maine, all offices not otherwise provided for are held during the pleasure of the Governor and Council: Me. C. 9,6. But in one, all offices must be for some prescribed period; and no person can be elected or appointed for life or during good behavior: Miss. C. 1,29.

And in seven, no office can be created by the legislature for a longer term than four years: Ind. C. 15,2; Kan. C. 15,2; Ky. C. 13,28; 3,25; Cal.<sup>c</sup> C. 20,16; Ore. C. 15,2; Nev. C. 15,11; Fla. C. 16,14.

So, in one, two years: Tex. C. 16,30. Otherwise, they may be created during the pleasure of the authority making the appointment: Ind., Kan., Cal., Ore., Nev.

(B) By the Constitutions of most states, all officers shall continue to discharge their duties (except in cases of impeachment or suspension; see Art. 26) until their successors are duly appointed and qualified: R.I. C. 4,16; O. Sched. 10; Ind.<sup>d</sup> C. 15,3; Va. C. 6,25; W.Va. C. 4,6; Tenn. C. 7,5; Mo. C. 14,5; Ark. C. 19,5; Tex. C. 16,17; Ore. C. 15,1; Col. C. 12,1; La. C. 161.

So, in many, of the governor [or lieutenant-governor]: Vt. C. Amt. 21; R.I. C. 8,1; Ct. C. 4,1; Pa. C. 4,17; Io. C. 4,2; Minn. C. 5,3; Kan. C. 1,1; Md. C. 2,1; Ky. C. 3,5; Tenn. C. 3,4; Tex. C. 4,4; Nev. C. 5,2; S.C. C. 3,2; Ga. C. 5,1,2; Ala. C. 5,5; Fla. C. 5,2; La. C. 61.

So, in some, of the treasurer: Mass. C. Amt. 17; Vt.; N.J. C. 7,2,3; Minn.; Kan.; Tex. C. 4,23; Ala. So, in two, of the comptroller: N.J., Tex. So, in some, of the attorney-general: Mass.; Io. C. 5,12; Minn.; Kan.; Md. C. 5,1; Tex. C. 4,22; Ala. So, in four, of the auditor: Mass.; Minn. C. 5,5; Kan.; Ala. So, in four, of the secretary of state: Mass.; Minn.; Kan.; Ala. C. 5,5. So, in two, of the members of the legislature: Io. C. 3,3; Ga. C. 3,4,1. So, in nine, of the executive officers: Vt.; Ill. C. 5,1; Kan.; N.C. C. 3,1; Mo. C. 5,2; Ark. C. 6,1; Nev. C. 5,19; Miss. C. 5,22; Fla. C. 5,17.

(C) In five, no law can be passed which shall operate to extend the term of any public officer after his election or appointment: Pa. C. 3,13; Ill. C. 4,28; W.Va. C. 6,37; Mo. C. 14,8; Col. C. 5,30.

NOTES. — <sup>a</sup> See § 210. <sup>b</sup> Compare also §§ 18,185, and Art. 26. <sup>c</sup> Except when otherwise specified in the Constitution; see Art. 56. <sup>d</sup> Except members of the legislature.



§ 213. **Rotation in Office** is, by the Constitutions of two states, declared to be a necessary principle in a free government; and the people are given the right to return their officers to private life in such manner as they shall by law establish: Mass. C. 1,8; Va. C. 1,7. So, in one, a long continuance in the executive departments of power or trust is declared dangerous to liberty, and a rotation in them one of the best securities of freedom: Md. C. 1,34.

§ 214. **Pay.** By the Constitution of one state, there is a general provision that offices of profit are forbidden; but fees or a reasonable compensation may be allowed: Vt. C. 2,25.

And in one other, all fees and salaries shall be moderate: Del. C. 7,6.

So, in several, all officers are to receive a reasonable compensation, at stated periods, to be established by law: N.Y. C. 10,9; Mo. C. 5,24; Ark. C. 16,4; Tex. C. 3,44; Ore. C. 13,1; Miss. C. 12,7; Fla. C. 16,4. In several, a limit of salaries is fixed by the Constitution: Mich. C. 9,1; Md. C. 15,1; Ark. C. 19,23.

§ 215. **Increase of Pay.** This compensation can, by the Constitutions of many states, neither be increased nor diminished during the term for which they are appointed:<sup>a</sup> Ct. C. Amt. 24; N.Y. C. 10,9; Pa. C. 3,13; O. C. 2,20; Wis. C. 4,26; Neb. C. 3,16; Md. C. 3,35; W.Va. C. 6,38; Mo. C. 5,24; 14,8; Nev. C. 4,28; 15,9; Col. C. 5,30.

NOTE. — <sup>a</sup> Compare also §§ 209, 395.

§ 216. **Extra Pay.** By the Constitutions of many states, the legislature can grant no extra compensation to any public officer or agent after the service is ended or the contract of service entered into: Ct. C. Amt. 24; N.Y. C. 3,24; Pa. C. 3,11; O. C. 2,29; Ill. C. 4, 19; Mich. C. 4,21; Wis. C. 4,26; Io. C. 3,31; Neb. C. 3,16; Md. C. 3,35; W.Va. C. 6,38; Mo. C. 4,48; Ark. C. 5,27; Tex. C. 3,44; Cal. C. 4,32; Col. C. 5,28; Ga. C. 7,16,2; Ala. C. 4,29; La. C. 45.

In other states, this would follow from § 395.

Nor can the legislature, in several, authorize any municipal corporation to grant such compensation: Ct.; N.Y.; Mo.; Tex. C. 3,53; Cal.; La.

§ 217. **Farming Offices.** By the Constitutions of two states, no person elected or appointed to any office under the laws of the state or any municipal ordinance shall hold such office without personally devoting his time to the performance of its duties: Mo. C. 2,18; Col. C. 12,2.

§ 218. **Gerrymandering.** The Constitution of California provides that when a congressional district shall be composed of two or more counties, it shall not be separated by any county belonging to another district: Cal. C. 4,27. Nor can a county or city be divided to form congressional districts, except when rendered necessary by excess of population: Cal. In two, the Congressional districts shall be formed of contiguous counties, etc., and be "compact:" Va. C. 5,13; W.Va. C. 4,6.

There are in nearly all states provisions of the same nature as to districts electing members of the state legislature.

§ 219. **Election of United States Officers.** The Constitutions of five states provide that senators shall be elected by the two houses of the legislature in joint convention, (1) at such time and in such manner as may be by law provided: R.I. C. 4,18; Minn. C. 4,26; Fla. C. 4,31. (2) On some day in June: Mass. C. 2,4. (So here of representatives; but this conflicts with the United States laws, and is therefore invalid.) (3) By the legislature convened next before the expiration of his term: Nev. C. 4,34. In Nebraska the legislature may provide that at the general election next preceding the expiration of the term of a United States Senator, the electors may by ballot express their preference for some person for such office: Neb. C. Sep. Prop. By the Constitution of Florida, no person can receive credentials as a member of Congress who has not been two years a citizen of the state and nine years a citizen of the United States: Fla. C. 16,23.

In Colorado, one representative in Congress is elected for the state at large: Col. C. 5,44. Presidential electors shall, in two, be elected by the people: Col.; S.C. C. 8,9.

Territorial delegates are elected by the people, one from each territory: U.S. R. S.\* 1862.



**Art. 22. Qualifications for Office.<sup>a</sup>**

§ 220. **Plurality of Offices.** (A) In the Constitutions of many states there are various provisions to the effect that no person can hold more than one lucrative civil state office: N.H.<sup>b</sup> C. 2,94; Mass.<sup>b</sup> C. 2,6,2; Amt. 8; Vt. C. 2,26; Ind. C. 2,9; Neb. C. 5,2; Md. Decln. of Rts. 35; W.Va. C. 7,4; N.C.<sup>b</sup> C. 14,7; Tenn.<sup>b</sup> C. 2,26; Ark. C. 19,6; Tex.<sup>b,c</sup> C. 16,40; Ore.<sup>b</sup> C. 2,10; Ala.<sup>b</sup> C. 16,1; Ia.<sup>b</sup> C. 159.

So, in Delaware, no person can hold more than one of the following offices at the same time: treasurer, attorney-general, prothonotary, register, or sheriff: Del. C. 3,8. So, in a few, it is expressed in detail to the effect that no judge can at the same time hold the office of governor, lieutenant-governor, or councillor, or have a seat in the state legislature: Mass. C. Amt. 8; Me. C. 9,2; Ct. C. 10,4. Judges of the superior courts can hold no other state office except in the militia or justice of the peace: Minn. C. 6,11; Kan. C. 3,13; Md. Decln. of Rts. 33; Del. C. 6,14; Va. C. 6,24; W.Va. C. 8,17; Tenn. C. 6,7; S.C. C. 4,9; Ala. C. 6,10. So, in several, judges of the supreme courts: N.H. C. 2,93; Mass.; Me. C. 6,6; N.Y. C. 6,10; Io. C. 5,3; Minn.; Kan.; Md.; Del.; Va.; W.Va.; Tenn.; S.C.; Ala. Judges of the supreme courts cannot hold any place or office, or receive any pension or salary, from any other state, government, or power whatever: N.H., W.Va. Or from the United States or any other state: Me.; Md. In two, no judge of the supreme or superior courts, nor the treasurer, comptroller, secretary, or any sheriff, can be a member of the legislature: Ct. C. 10,4; Tenn. C. 2,26. So, in one, no officer under any city government: N.Y.<sup>d</sup> C. 3,8. No person elected to a judicial office shall, during his term, be eligible to any except a judicial office: Ind. C. 7,16; Mich.<sup>c</sup> C. 6,9; Wis.<sup>c</sup> C. 7,10; Minn.; W.Va.; Cal. C. 6,18; Ore. C. 7,21; Nev.<sup>c</sup> C. 6,11; Ala. C. 6,10.

So, in nearly all, to the effect that no person holding a lucrative state office is eligible for the legislature: N.H. C. 2,95; Mass.<sup>f</sup> C. 2,6,2; Me.<sup>b,f</sup> C. 4,3,11; N.J. C. 4,5,3; O.<sup>b</sup> C. 2,4; Ind. C. 2,9; Ill.<sup>b</sup> C. 4,3; Mich. C. 4,6; Io.<sup>b,c</sup> C. 3,22; Neb.<sup>c</sup> C. 3,6; Md. C. 3,11; Del. C. 2,12; Va. C. 5,5; W.Va. C. 6,13; Ky.<sup>c</sup> C. 2,27; Mo.<sup>b</sup> C. 4,12; Ark.<sup>b</sup> C. 5,7; Tex. C. 3,19; Ore.<sup>b</sup> C. 2,10; Col. C. 5,8; S.C. C. 2,28; Ga.<sup>b</sup> C. 3,4,7; Ia. C. 153.

Or, in several, for governor: N.H.; Me. C. 5,1,5; Pa. C. 4,6; O. C. 3,14; Ind. C. 5,8; Mich. C. 5,15; Io. C. 4,14; Kan. C. 1,10; Del. C. 3,5; Tenn. C. 3,13; Ark. C. 6,11; Cal. C. 5,12; Ore. C. 5,3. Or, in two, for the council: N.H.; Me. C. 5,2,4.

*And so, conversely*, in many, the governor can hold no other state office of profit or trust: N.H.<sup>b</sup> C. 2,93 and 95; Mass.; N.J. C. 5,8; Ill. C. 5,5; Mich. C. 5,16; Neb. C. 5,2; Va. C. 4,1; W.Va. C. 7,4; Tex. C. 4,6; S.C. C. 3,3; Ala. C. 5,17.

He can, in one, receive no other emolument than his salary, from the state or from any other government: Va. C. 4,4. And in one, he is forbidden by the Constitution to practise any profession while in office: Tex. See also above (A).

And members of the legislature in many states can be elected or appointed, during their term, to no state office: Pa. C. 2,6; Ill. C. 4,15; Mich. C. 4,18; Neb. C. 3,13; Mo.; Ark. C. 5,10; Col.; Ga. C. 3,4,7. In one, they can *hold* no state office during their term in the legislature: Mass.; Minn.<sup>c</sup> C. 4,9.

So, in several, they can be appointed to no state office of which the appointment is vested in the legislature: N.Y. C. 3,7; Ind. C. 4,30; Mich.; Tenn. C. 2,10; Tex. C. 3,18; Ore. C. 4,30. And in others, to no state office of which the appointment is vested in the executive: N.Y., Mich., Neb., Tenn.; or in any city government: N.Y., Mo.; or in any other state authority: Mich.

But in most states the provision is that no member of the legislature can be elected or appointed during his term (or, in Ohio, Minnesota, Kentucky, Nevada, and Louisiana and the territories, for one year thereafter) to any office of profit under the state which may be created, or the emoluments of which may be in-

creased, during such term: Me. C. 4,3,10; N.J. C. 4,5,1; O. C. 2,19; Ind.; Wis. C. 4,12; Io. C. 3,21; Minn. C. 4,9; Md. C. 3,17; Del. C. 2,12; Va. C. 5,8; W.Va. C. 6,15; Ky. C. 2,26; Tex. C. 3,18; Cal. C. 4,19; Ore. C. 4,30; Nev. C. 4,8; Ala. C. 4,17; Miss. C. 4,38; La. C. 25; Territories, U.S. R. S. 1854.

*Except*, in many, he may be elected to any office that is elective by the people: Me., Ind., Io., Va., W.Va., Ky., Cal., Ore., Nev., Ala., Miss.

(B) And by the Constitutions of most states, that no person holding an office of profit under the United States can also hold a state office of trust or profit: Vt. C. 2,26; R.I.<sup>d,f</sup> C. 9,6; Pa. C. 12,2; Ill. C. 4,3; Wis.<sup>c</sup> C. 13,3; Md. C. 3,10; Del. C. 3,8; N.C.; Ky. C. 8,18; Mo. C. 14,4; Tex. C. 16,12; Cal.<sup>c</sup> C. 4,20; Nev.<sup>c</sup> C. 4,9; Ala.<sup>c</sup> C. 16,1; La. C. 153.

So, in the territories, no person belonging to the army or navy: U.S. R. S. 1861.

So, in many, no member of Congress is eligible for the State legislature: Me. C. 4,3,11; Ct.; N.Y.<sup>d</sup> C. 3,8; Pa. C. 2,6; Ill.; Wis. C. 4,13; Kan. C. 2,5; Del. C. 2,12; W.Va. C. 6,13; Mo. C. 4,12; Ark. C. 5,7; Tex.; Col. C. 5,8; La.

Or, for the council: Me. Or, for governor: Ky. C. 3,6; Tenn. C. 3,13; Ark. C. 6,11; Ore. C. 5,3.

So, in most states, no person holding a lucrative office under the United States is eligible for the legislature: N.H. C. 2,95; Mass.<sup>c</sup> C. Amt. 8; Me.;<sup>c</sup> R.I.;<sup>f,a</sup> Ct.; N.Y.;<sup>d</sup> N.J.; Pa.; O.; Ind.; Ill.;<sup>c</sup> Mich. C. 4,6; Wis.; Io. C. 3,22;<sup>b,c</sup> Kan. C. 2,5; Neb.; Md. C. 3,10; Del. C. 2,12; W.Va.; N.C.; Ky. C. 2,27; Tenn. C. 2,26; Mo. C. 4,12; Ark.;<sup>c</sup> Tex.; Ore.<sup>c</sup> C. 2,10; Col. C. 5,8; S.C. C. 2,28; Ga. C. 3,4,7; La.; Territories,<sup>b,e</sup> U.S. R. S. 1854. Or, in many, for governor: N.H.; Mass.<sup>c</sup> Me.; N.J.; Pa. C. 4,6; O. C. 3,14; Ind. C. 5,8; Mich. C. 5,15; Io. C. 4,14; Kan. C. 1,10; Del. C. 3,5; Ky. C. 3,6; Tenn. C. 3,13; Ark. C. 6,11; Cal. C. 5,12; Nev. C. 5,12; Ore. C. 5,3; La. C. 60.

So, in one, no person can be governor who, within six months of his election, was a member of Congress or held office under the United States: La. And, in two, no person elected to Congress can continue to hold the offices of judge, attorney-general, solicitor-general, county attorney, clerk of any court, sheriff, treasurer, register of probate, or register of deeds: Mass., Me.

*And conversely*, in two, no member of the State legislature can during his term be elected to the United States Senate: N.Y. C. 3,7; Mich. C. 4,18.

And in many, a member of the State legislature taking any United States office, or being elected to Congress, vacates his seat: Me. C. 9,2; R.I.; N.Y. C. 3,8; N.J. C. 4,5,2; Wis.; Kan. C. 2,5; Md.; Mo.; S.C. C. 2,28.

And the governor cannot accept any United States office without vacating his seat: N.J., Ala. And he cannot be elected by the legislature to Congress: N.J.; Cal. C. 5,20. So, no judge can hold a United States office: Minn. C. 6,11; Kan. C. 3,13; Md.; Tenn.; S.C.; Ala.

(C) And by the Constitutions of several states, that no person holding office under a foreign power can also hold an office of trust, profit, or honor, under the State: R.I.; Ill. C. 4,3; Wis. C. 13,3; N.C.; Ky. C. 8,18; Tex. C. 16,12; Cal. C. 4,20; Nev. C. 4,9; La. C. 153.

So, in three, no person holding office under another of the United States: N.C.; Ky. C. 8,18; Tex. C. 16,12; La.

So, in several, no person holding office under a foreign power (or under another state: W.Va., S.C., Ga., La.) is eligible for the legislature: R.I.; Ill.; Io.; W.Va.; Ky.; Tex.; S.C. C. 2,28; La. C. 153.

Or, in four, for governor: N.H. C. 2,93; Mass. G. 2,6,2; Me.; Ore. Or, in two, for judge of the Supreme Court: N.H., Mass. Or, in one, for the council: Me. *And conversely*, no person holding any office under the state shall accept any office or title from any prince,

king, or foreign power: Del. C. 1,19. So, in two, of the governor: S.C. C. 3,3; Ala. So, in one, of the judges: S.C. C. 4,9.

NOTES. — <sup>a</sup> No territorial statutes are included in this Article. Except where otherwise specified this Article extends to all state offices, legislative, executive, administrative, and judicial. For special disqualifications in certain cases, see Art. 20 and § 561. <sup>b</sup> Except the office of justice of the peace. <sup>c</sup> Except postmasters. <sup>d</sup> Nor any person who has held such office within one hundred days previous to his election. <sup>e</sup> Of judges of the superior or supreme courts only. <sup>f</sup> But he may be elected or appointed thereto, thereby vacating his old office. <sup>g</sup> Unless he resign such office before taking the new one.

### § 221. Age and Citizenship.<sup>a</sup>

(A) And by the Constitutions of several states, no person who is not a citizen of the United States can hold any office under the state: Ill. C. 7,6; Mo. C. 8,12; Uta.\*

(B) In several, all persons entitled to vote are eligible for office except as specially restricted elsewhere: Va. C. 3,2; N.C. C. 6,4. So, in many, no one who does not possess the qualifications of an elector is eligible for office: Ct. C. 6,4; O. C. 15,4; Minn. C. 7,7; W.Va. C. 4,4; Ark. C. 19,3; Nev. C. 15,3; Col. C. 7,6; S.C. C. 14,1; Miss. C. 7,4; La. C. 195.

And in one he must be a registered voter: Fla. C. 16,22. In three he must be an elector of the county or district where the functions of the office are to be exercised: R.I. C. 9,1; Del. C. 3,8; La.

(C) So, in six, no one who is not resident in the state; and in three, he must have resided in the state (1) one year: Ill.; Mo.; Fla. C. 16,22. In three, he must continue to reside within the state: Ky. C. 8,11; Ark. C. 19,4; Tex. C. 16,14.

(D) And further, he must, in four, have resided (1) six months in the county where appointed: Fla. So, (2) sixty days: S.C. C. 8,7; (3) thirty days: Minn. C. 7,7; (4) one year: Del.

(E) And in four, if he change his residence from the district he forfeits the office: Del., Ark., Tex., La.

(F) By the Constitutions of some states, no woman can hold office: see § 25.

NOTES. — <sup>a</sup> For religious qualifications, see § 46; for sex and color, see §§ 21,24; for the legislative and executive offices, see Art. 20; for judicial offices, see Art. 56.

§ 222. Property and Educational Qualifications. The Constitutions of several states provide that there shall be no property qualification for holding office: Minn. C. 1,17; Kan. C. Bill of Rts. 7; Del.<sup>a</sup> C. 7,12; N.C. C. 1,22; Cal. C. 1,24; S.C. C. 1,32; Ala. C. 1,38; Miss. C. 1,17.

And in one, that there shall be no educational qualification required: Ala.

NOTE. — <sup>a</sup> Except in cases specially provided by law.

§ 223. Disqualifications:<sup>a</sup> (A) **Insanity.**<sup>b</sup> No insane<sup>b</sup> person can, by the Constitutions of three states, hold any<sup>c</sup> State office:<sup>d</sup> Ga. C. 2,2,1; Ala. C. 8,3; La. C. 187.

So, no idiot:<sup>b,d</sup> Ga., Ala., La.

(B) **Crime.** In many, no person convicted of infamous<sup>b</sup> crime can hold office:<sup>a</sup> Pa. C. 2,7; O.<sup>e</sup> C. 5,4; Ill. C. 4,4; Wis. C. 13,3; Minn.<sup>e</sup> C. 4,15; Neb.<sup>f</sup> C. 14,2; N.C.<sup>f</sup> C. 6,5; Ark. C. 5,9; Ga.<sup>f</sup> C. 2,2,1; Ala. C. 4,18; Miss. C. 4, 17; Fla. C. 14,4; La. C. 148.

So, in three, no person convicted of "other high crimes" (see below): Ky.<sup>e</sup> C. 8,4; Tex. C. 16,2; Cal. C. 20,11.

Or, in one, "high misdemeanors:" Ky.<sup>e</sup>

So, in one, all persons under interdiction: La.

But in one, no person can be disqualified for crimes committed while such person was a slave: S.C. C. 8,12.

(C) **Special Crimes.** And the Constitutions of some states further specify (1) that a conviction for murder shall disqualify for holding office: S.C.<sup>e</sup> C. 8,8.



(2) So, conviction for robbery: S.C.<sup>e</sup>

(3) So, for larceny: Ga.;<sup>f</sup> Ala. C. 8,3; Fla.; La.

(4) So, for forgery: Ky.;<sup>e</sup> Ark.; Tex.; Cal.; Miss. C. 12,2; La.

(5) So, for treason: N.C.,<sup>f</sup> S.C.,<sup>e</sup> Ga.,<sup>f</sup> Ala., La.

(6) So, in many, for perjury: Pa.; O.;<sup>e</sup> Ill.; Minn.;<sup>e</sup> N.C.;<sup>f</sup> Ky.;<sup>e</sup> Tex.; Cal.; Col. C. 12,4; Ala.; Miss.; Fla.; La. And so, specially, in five, all persons convicted of swearing falsely to, or violating, the oath of office<sup>g</sup> (§ 224): Ill. C. 4,5; Neb.<sup>f</sup> C. 14,1; Md. C. 1,7; W.Va. C. 6,16; Mo. C. 4,15.

(D) **Malfeasance in Office.** In four there is a general provision in the Constitution that all persons shall be so disqualified for malfeasance in office: Cal., Ga.,<sup>b</sup> Ala., La. Or, in two, for corruption in office: N.C.,<sup>f</sup> Ga. And compare E, F. Or, in one, malpractice in office: N.C.<sup>f</sup> So, in one, any officer who wittingly takes more fees than the law allows him: Vt. C. 2,25.

(E) **Public Defalcation.** In many, there is a general provision in the Constitution that convicted defaulters or embezzlers of public moneys are ineligible for office; Pa.; O. C. 2,5; Wis.<sup>g</sup> C. 13,3; Ark. C. 5,9; Cal.<sup>g</sup> C. 4,21; Nev. C. 4,10; Col. C. 12,4; S.C. C. 9,15; Ga.;<sup>b</sup> Ala.; Fla. C. 4,9; La.

So, in many, any person who remains liable for public moneys unaccounted for, whether actually convicted of defalcation or not: O.; Ind. C. 2,10; Ill. C. 4,4; Mich. C. 4,30; Io. C. 3,23; Neb. C. 16,2; Md. C. 3,12; Tenn. C. 2,25; Mo. C. 2,19; Ark. C. 5,8; Tex. C. 3,20; Ore. C. 2,11; Col. C. 12,3; Ga. C. 2,4,1; Miss. C. 4,16; La. C. 171.

So, in one, any person against whom there is a judgment unpaid for any moneys received by them in an official capacity and due the United States, the state, or any county thereof: Ala. And in one, no person who at any time was a collector of taxes or public moneys can be elected to the legislature unless six months before his election he obtained a *quietus* for all public moneys for which he was responsible: Ky. C. 2,28.

(F) **Bribery.** In many, there is a general constitutional provision that a conviction for bribery (whether of the party giving or receiving the bribe) disqualifies for holding office:<sup>h</sup> Pa.; O.<sup>d</sup> C. 5,4; Ill. C. 4,4; Minn.<sup>e</sup> C. 4,15; Md. C. 3,50; W.Va.<sup>e</sup> C. 6,45; Ky.<sup>e</sup> C. 8,4; Ark. C. 5,9; Tex. C. 16,2; Cal. C. 20,11; Col. C. 12,4; Ga. C. 2,2,1; Ala.; Miss. C. 4,17; Fla. C. 14,4; La. C. 173. The same is implied in N.Y., Tex., Nev. See § 152.

**Bribery at Elections,** effected or attempted, forever disqualifies for office, in several, both the party receiving and the party giving or offering the bribe:<sup>h</sup> Md. C. 1,3; Ark. C. 3,6 (but there must be a conviction of actual bribery); Nev. C. 4,10; Ga. C. 2,2,1; Miss. C. 4,18; Fla. C. 4,9; La.

But in four, only the person offering the bribe: N.H. C. 2,96; Mass. C. 2,6,2; Tex. C. 16,5; Miss. So, in several, a person giving or offering a bribe to procure his own election or appointment is disqualified from holding the office for which he was elected during the term for which he was elected: Vt. C. 2,34; R.I. C. 9,2; Ind. C. 2,6; Kan. C. 5,6; Ky. C. 8,3; Tenn. C. 10,3; Tex. C. 16,5; Ore. C. 2,7.

And in one, he is disqualified to hold such office for six years after the act of bribery: Tenn. In three, he is forever disqualified for office: Pa. C. 8,9; Cal. C. 20,10; Miss. C. 12,2. So, in two, he is disqualified for giving a "treat" to procure his election: Ky., Tenn.

**Bribery,** effected or attempted, of a member of the legislature, forever disqualifies for office (1) both the parties to the bribery. W.Va.; Fla.; La. (2) In one, only the member of the legislature is so disqualified: Cal. C. 4,35.

Bribery in obtaining an appointment to office so disqualifies the person offering the bribe: N.H., Mass.

(G) **Betting on Elections** is, in Florida, cause of disqualification for office.

(3) So, in two, any person who, while a candidate for office, is guilty of fraud or wilful violation of the election laws, is forever disqualified for office: Pa. C. 8,9; Ark. C. 3,6 (whether a candidate for office or not).

So, in one, of illegal voting: La. C. 187.



(H) **Duelling**, by the Constitutions of most states, is cause of disqualification for any office.<sup>a</sup> Thus, in many, fighting a duel, as principal: Pa. C. 12,3; O. C. 15,5; Ind. C. 2,7; Mich. C. 7,8; Wis. C. 13,2; Io. C. 1,5; Md.<sup>f</sup> C. 3,41; Va. C. 3,1; W.Va. C. 4,10; N.C. C. 14,2; Tenn. C. 9,3; Mo. C. 14,3; Ark.<sup>k</sup> C. 19,2; Tex. C. 16,4; Cal. C. 20,2; Ore. C. 2,9; Nev. C. 15,3; Col. C. 12,12; S.C. C. 1,32; Ga.<sup>f</sup> C. 2,4,2; Miss. C. 1,27; Fla.

In several, absence from the state for the purpose of fighting a duel: Ind.; Kan. C. 5,5; Md.;<sup>f</sup> N.C.; Mo.; Tex.; Ore.; Nev.; Col.; Miss.

And in many, the being second in a duel: Pa., O., Md.,<sup>f</sup> W.Va., N.C., Mo., Ark.,<sup>k</sup> Tex., Cal., Nev., Col., Miss., Fla.

In many, the giving, carrying, or accepting a challenge: Pa.; O.; Ind.; Kan.; Md.;<sup>f</sup> Va.; W.Va.; N.C.; Ky.<sup>h</sup> C. 8,20; Tenn.; Mo.; Ark.;<sup>k</sup> Tex.; Cal.; Ore.; Nev.; Col.; S.C.; Ga.;<sup>f</sup> Miss.; Fla.

And in many, the being engaged in a duel in any state or country either as principal or accessory: Mich., Wis., Io., Md.,<sup>b,f</sup> Va., W.Va., Tenn., Tex., Cal., Nev., S.C., Ga.<sup>f</sup>

(I) **Professional Disqualifications.** No minister or preacher of any religious denomination can, in four states (1) be a member of the legislature: Md. C. 3,11; Del.<sup>l</sup> C. 7,8; Ky. C. 2,27; Tenn. C. 9,1.

Or (2) in one, be governor: Ky. C. 3,6. Or (3) in one, he cannot hold any civil office: Del.<sup>l</sup>

**Army.** (Compare § 220, B.) So, in the territories, no soldier, seaman, or marine in the regular army or navy of the United States can hold a state office: U.S. R. S. 1860.

NOTES. — <sup>a</sup> See also § 46 and Art. 20. <sup>b</sup> See Glossary. <sup>c</sup> Including membership in the legislature, unless otherwise specified. <sup>d</sup> The same results indirectly in other states from the provisions of § 221. <sup>e</sup> In these states, the Constitution only provides that the legislature may pass laws to this effect. <sup>f</sup> Unless legally (see Art. 16) restored to the rights of citizenship. <sup>g</sup> Whether the conviction be in the home state or in any other. <sup>h</sup> So, in many states, by statutes. <sup>i</sup> See § 224, note <sup>d</sup>. <sup>j</sup> The duel being with a citizen of the state. <sup>k</sup> The disqualification lasts for only ten years. <sup>l</sup> While he continues in exercise of his pastoral functions.

§ 224. **Oath of Office.** (A) Members of the legislature are, by the Constitutions of most states, required to make oath (1) to support the National and the State (if in a state) Constitutions: Me. C. 9,1; R.I. C. 9,4; Ct. C. 10,1; N.Y. C. 12,1; N.J. C. 4,8,1; Pa. C. 7,1; O. C. 15,7; Ind. C. 15,4; Ill. C. 4,5; Mich. C. 18,1; Wis. C. 4,28; Io. C. 3,32; Minn. C. 4,29; Kan. C. 2,7; Neb. C. 16,1; Md. C. 1,6; Va. C. 3,5; W.Va. C. 4,5; N.C. C. 2,24; Ky. C. 8,1; Tenn. C. 10,1; Mo. C. 4,15; Ark. C. 19,20; Tex. C. 16,1; Cal. C. 20,3; Ore. C. 4,31; Nev. C. 15,2; Col. C. 12,7; S.C. C. 2,30; Ga. C. 3,4,5; Ala. C. 15,1; Miss. C. 12,26; Fla. C. 16,10; La. C. 149. So, in one, to support the Union: Ark.

But so, in four states, to bear allegiance to the State, and support the State Constitution, only: N.H. C. 2,84; Mass. C. Amt. 6; Vt. C. 2,12; 2,29; Del. C. 8,1.

(2) And in all states, to faithfully discharge the duties of the office: N.H.; Mass. C. 2,6,1; Me.; Vt.; R.I.;<sup>b</sup> Ct.; N.Y.; N.J.; Pa.; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Del.; Va.; W.Va.; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Cal.; Ore.; Nev.; Col.; S.C.; Ga.; Ala.; Miss.; Fla.; La.

(3) In five, they must make oath that they have not, directly or indirectly, paid, or offered to pay, any consideration, or made any promise, as a reward for the giving or withholding a vote at an election: N.Y., Pa., Ill., Neb., Tex.

And in four, also that they will not accept or directly or indirectly receive any valuable consideration (a) for the giving or withholding a vote: Pa.; Ill.; Neb.; W.Va. C. 6,16; Tenn. C. 10,2. Or (β) for the doing or not doing any duty relating to their office: Pa., Mo.

(4) In three, that they have not been concerned in a duel (as prohibited in § 223) : Ky. C. 8,1 (in a duel with a citizen of Kentucky) ; Tex. ; Nev.

And in one, in general terms, that they have not violated any election law of the state, or procured others to do so : Pa.

(5) And in four, they must make oath, in general terms, that they are not disqualified (a) for holding office under the National or State Constitution: Miss., Fla. And (β) that they will not receive the profits of any other office during their term as governor, member of the legislature, or judge : Md.

(6) In one, that they recognize the civil and political equality of all men before the law : Va.

(7) In one, that they hold no office of profit or trust under Congress : Vt. C. Amt. 1883.

(B) The various provisions in the oath so required in the several states respectively of members of the legislature are, in some states, also required of the governor :<sup>a</sup> N.H. ; Mass. ; Me. ; N.C. C. 3,4 ; S.C. C. 3,20 ; Ga. C. 5,1,10 ; Fla. C. 5,2.

And in most states, of all officers of the state executive :<sup>a</sup> Mass. ; Me. ; Vt. ; R.I. ; Ct. : N.Y. ; Pa. ; O. ; Ill. C. 5,25 ; Mich. ; Wis. ; Io. C. 11,5 ; Minn. C. 5,8 ; Kan. ; Neb. ; Del. ; Mo. C. 14,6 ; Ark. ; Cal. ; Nev. ; Ga. C. 5,1,10 ; Ala. ; Territories, U.S. R. S. 1878 (as in A, 1 and 2).

(C) So, in many, specially, of all judicial officers :<sup>a</sup> Me., Vt., R.I.,<sup>b</sup> Ct., N.Y., Pa., Mich., Wis., Io., Kan., Neb., Del., Mo., Ark., Cal., Nev., Ala.

Of judges of the Supreme Court : Ore. C. 7,21.

(D) So, in several, of all military officers : N.H., Mass., Me., Vt., R.I.,<sup>b</sup> Tenn., Mo.,<sup>a</sup> Ark.

(E) So, in two, of all members of the bar :<sup>a</sup> Ky., S.C.

(F) So, in four, of any person appointed to any office under the Constitution : Me. ; Md. ; Tenn. ; Ore. C. 15,3.

(G) So, in many, of all state officers :<sup>a</sup> Mass. ; Me. ; Pa. ; O. ; Ind. ; Io. ; Kan. ; Md. ; Va. ; W.Va. ;<sup>a</sup> N.C. C. 6,4 ; Ky. ; Tex. ; Nev. ; Col. C. 12,8 ; S.C. ; Miss. ; Fla. ; La.

(H) So, in two, of all civil officers [not "general"] : N.H. ; R.I. ;<sup>b</sup> Ill.<sup>a</sup> C. 5,25 ; Mo. ;<sup>a</sup> Ark.

(I) So, in two, all county officers : Pa., Ark.

**Violation of the Oath of Office** by members of the legislature is, by the Constitution of Missouri, declared to be perjury : Mo. C. 4,15.

And in three states, any officer convicted of having sworn falsely to, or violated, his oath of office, forfeits it : Ill.<sup>c</sup> C. 4,5 ; Neb. C. 14,1 ; Md. C. 1,7. See also § 223, F.

NOTES. — <sup>a</sup> § 224 (3), the provisions concerning bribery at the election, etc., are not required in the oath of these officers. <sup>b</sup> § 224 (2), the provision to faithfully discharge, etc., is not required in the oath of these officers [R.I. C. 3,4]. <sup>c</sup> Of members of the legislature only.

§ 225. **General Provisions.** The Constitution of West Virginia declares political tests which require persons, as a prerequisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths of past alleged offences, are repugnant to the principles of a free government, cruel, and oppressive : W.Va. C. 3,11.

## Art. 23. Elections.

§ 230. **General Provisions.** The Constitutions of many states declare that all elections should be free : <sup>a</sup> N.H. C. 1,11 ; Mass. C. 1,9 ; Vt. C. 1,8 ; 2,3,4 ; Pa. C. 1,5 ; Ind. C. 2,1 ; Ill. C. 2,18 ; Neb. C. 1,22 ; Md. Decln. of Rts. 7 ; Del. C. 1,3 ; Va. C. 1,8 ; N.C. C. 1,10 ; Ky. C. 13,7 ; Tenn. C. 1,5 ; Mo. C. 2,9 ; Ark. C. 3,2 ; Ore. C. 2,1 ; Col. C. 2,5 ; S.C. C. 1,31.

Of three, that they shall be open : Mo., Col., S.C. Of ten, that they shall be equal : N.H., Mass., Pa., Ind., Ill., Del., Ky., Tenn., Ark., Ore. Of three, that they shall be frequent : Md. ; Va. C. 1,7 ; N.C. C. 1,28. So, in five, that no power, civil or military, shall ever interfere with the free exercise of the right of suffrage : Pa., Neb., Mo., Ark., Col.

NOTE. — <sup>a</sup> Compare Stat. Eng. 1 W. & M. Session 2 ; also, § 235.

§ 231. **Votes by Ballot.** The Constitutions of many states provide that all elections shall be by ballot : N.Y. C. 2,5 ; O. C. 5,2 ; Ill. C. 7,2 ; Mich. C. 7,2 ; Wis. C. 3,3 ; Io. C. 2,6 ; Minn. C. 7,6 ; Neb. C. 7,6 ; Md. C. 1,1 ; Del. C. 4,1 ; Va. C. 3,2 ; W.Va. C. 4,2. So, in most, all elections by the people : N.H. C. 2,14 and 42 ; Mass. C. 2,1,3,3 ; Me. C. 2,1 ; Vt. C. 2,8 ; Amt. 19 ; R.I. C. 8,2 ; Ct. C. 6,7 ; Amt. 6 ; Pa. C. 8,4 ; Ind. C. 2,13 ; Kan. C. 4,1 ; N.C. C. 6,3 ; Tenn. C. 4,4 ; Mo. C. 8,3 ; Ark. C. 3,3 ; Tex. C. 6,4 ; Cal. C. 2,5 ; Nev. C. 2,5 ; Col. C. 7,8 ; S.C. C. 8,1 ; Ga. C. 2,1,1 ; Ala. C. 8,2 ; Miss. C. 4,7 ; 7,1 ; Fla. C. 14,5 ; Ia. C. 184 ; Wash.\* 3079 ; Dak.\* Pol. C. 27,12 ; Ida.\* 1874-75, p. 686,13 ; Mon.\* G. L. 526 ; Wy.\* 45,25 ; Uta.\* C. L. 21 ; N.M.\* 63,22 ; Ariz.\* 1358.

But in Kentucky all elections by the people must be *viva voce*, except that dumb persons may vote by ballot : Ky. C. 8,15. So, "until the legislature otherwise direct : " Ore. C. 2,15.

And all elections by the legislature, or by the people in a representative capacity, must be *viva voce* : Pa. C. 8,12 ; O. C. 2,27 ; Ind. ; Mich. C. 4,11 ; Wis. C. 4,30 ; Io. C. 3,38 ; Minn. C. 4,30 ; Kan. ; Neb. C. 3,8 ; W.Va. C. 6,44 ; N.C. C. 2,9 ; Ky. ; Tenn. ; Mo. C. 8,6 ; Ark. C. 3,12 ; Tex.<sup>a</sup> C. 3,41 ; Cal. C. 4,28 ; Ore. ; Nev. ; S.C. C. 2,24 ; Ga. C. 3,10,1 ; Ala. C. 4,44 ; Fla. ; La. ; Dak.\* Pol. C. 2,11 ; Ariz.\* 1112.

NOTE. — <sup>a</sup> Except in electing their own officers.

§ 232. **Majority Vote.** By the Constitutions of nearly all, (A) the person having the highest number (*i. e.*, a plurality) of votes is to be declared elected : Mass. C. Amt. 14 ; Me. C. 4,1,5 ; 4,2,5 ; 5,1,3 ; Amts. Art. 24 ; Vt.<sup>d</sup> C. Amt. 5 ; Ct.<sup>d</sup> C. Amt. 3 ; N.Y.<sup>c</sup> C. 4,3 ; N.J.<sup>c</sup> C. 5,2 ; Pa.<sup>c</sup> C. 4,2 ; O.<sup>b</sup> C. 3,3 ; Ind.<sup>c</sup> C. 5,5 ; Ill.<sup>b</sup> C. 5,4 ; Mich.<sup>c</sup> C. 5,3 ; Wis.<sup>c</sup> C. 5,3 ; Io.<sup>c</sup> C. 4,4 ; Kan.<sup>b</sup> C. 1,2 ; Neb.<sup>b</sup> C. 5,4 ; Md.<sup>c</sup> C. 2,3 ; 15,4 ; Del.<sup>c</sup> C. 3,2 ; Va.<sup>c</sup> C. 4,2 ; W.Va.<sup>b</sup> C. 7,3 ; N.C.<sup>b</sup> C. 3,3 ; Ky.<sup>c</sup> C. 3,2 ; Tenn.<sup>c</sup> C. 3,2 ; Mo.<sup>b</sup> C. 5,3 ; Ark.<sup>b</sup> C. 6,3 ; Tex.<sup>b</sup> C. 4,3 ; Cal.<sup>c</sup> C. 5,4 ; Ore. C. 5,5 ; Nev.<sup>b</sup> C. 5,4 ; Col.<sup>b</sup> C. 4,3 ; S.C. C. 8,10 ; 3,4 ; Ala.<sup>b</sup> C. 5,4 ; Miss.<sup>c</sup> C. 5,2 ; Territories, U.S. R. S. 1847 ; Wash.\* 3096 ; Dak.\* Pol. C. 27,43 ; Ida.\* 1874-75, p. 693,36 ; Mon.\* G. L. 549 ; Wy.\* 45,38 ; Uta.\* 24-25 ; N.M.\* 63,28 ; Ariz.\* 1373 ; D.C.\* 99-100.

And so, in four, a plurality of votes given at any election shall constitute a choice, where not otherwise directed in the Constitution : Cal. C. 20,13 ; Ore. C. 2,16 ; Nev. C. 15,14 ; Fla. C. 16,16.

(B) But in one state, in all elections held by the people, a majority of votes cast is necessary to a choice : R.I. C. 8,10. (C) When there is no majority for any person for governor, in five states, the legislature in joint session elects him : N.H. C. 2,42 ; Vt. C. 2,10 ; Amt. 9 ; R.I. C. 8,7 ; Ct. C. 4,2 ; Ga.<sup>b</sup> C. 5,1,5 ; 5,2,1. So, in two, when there is none for lieutenant-governor : Vt., R.I., Ct. Or for the council : N.H. C. 2,61. And so, in two, in the case of state senators, when no candidate has received a majority : N.H. C. 2,33 ; Me. C. 5,1,3. So, in two, when there is none for secretary, treasurer, or attorney-general : R.I., Ct. ; or for treasurer : Vt., Ga. Or for secretary of state or comptroller : Ga. For vacancies in offices, see § 201.

NOTES. — <sup>a</sup> In these states this rule applies only to elections of state representatives. <sup>b</sup> In these, only to elections of the officers of the executive (see § 202). <sup>c</sup> In these, only to elections of the governor or lieutenant-governor. <sup>d</sup> In these, only to elections of the legislature.



§ 233. **Cumulative Vote.** By the Constitution of Illinois (each district voting for three representatives), each voter may cast as many votes for each candidate as there are state representatives to be elected, or may distribute his votes, or equal parts thereof, among the candidates as he sees fit: Ill. C. 4,7 and 8.

§ 234. **Election Day**, by the Constitutions of the states, or statutes in some states and the territories, comes as follows: <sup>a</sup> (A) In nearly all states, on the first Tuesday after the first Monday in November, (1) biennially, in the even years: N.H. C. 2,12; 2,28; Ct. Amt. 27,1; Ill. C. 4,3 and 5,3; Mich. C. 4,34; Wis. C. 13,1; Io. C. Amt. 1 (1882, No. 12); Minn. C. 7,9, Amt. 1883; W.Va. C. Amt. 1884; N.C. C. 2,27; Code, 2668\*; Tenn. C. 2,7; Mo. C. 8,1; Ark.<sup>b</sup> C. 5,13; Tex.\* 1659; Cal. C. 4,3; Nev. C. 4,3; 15,5; S.C. C. 2,11; Amt.; Fla. C. 4,3; Wash.\* 3055; Ida.\* 1874-75, p. 684, § 3; Mon.\* G. L. 517; Wy.\* p. 307, § 1; N.M.\* 1876, 25,1; Ariz.\* 1124.

(2) Biennially, in the odd years: Md. C. 3,7; 15,7; Va. C. 5,2; Miss. C. 4,7; 12,1, Amt. 4. (National or other elections on the same day in any year.)

(3) Annually: Mass. C. Amt. 15; N.Y. C. 3,9; N.J. C. 4,1,3; Pa. C. 8,2; Ind. C. 2,14; Kan. C. 4,2; Neb. C. 16,13; Del. C. 4,1; Dak.\* Pol. C. 27,2.

In Ohio, on the second Tuesday in October, annually, in the odd years: O. C. 2,2; Sched. 2.

(B) In Louisiana the general election day is every four years on the Tuesday after the third Monday in April: La. C. 191. In Maine, on the second Monday in September in the even years: Me. C. 2,4; Amt. 23; first Monday in June, biennially, even years: Ore. C. 2,14. In Vermont, on the first Tuesday in September, biennially, on the even year: Vt. C. 2,8; Amt. 24,1. In Arkansas, on the first Monday in September, biennially, on the even year: Ark. C. 3,8; Jan. 23, 1875, § 1. In Rhode Island, on the first Wednesday in April, annually: R.I. C. 8,1. In Kentucky, on the first Monday in August, biennially, on the odd years: Ky. C. 2,3; 3,26. On the first Wednesday in October, biennially, on the even years: Ga.<sup>b</sup> C. 3,4,2. On the first Tuesday in October, annually: Col. C. 5,2; 7,7. In two, on the first Monday in August, (1) biennially, on the even years: Ala.<sup>b</sup> C. 4,3. (2) Annually: Uta.\* 17.

NOTES. — <sup>a</sup> See § 240, note <sup>a</sup>. <sup>b</sup> But the legislature may fix a different day.

§ 235. **Conduct of Elections.** The Constitutions of many states provide that the right of suffrage shall be protected by laws regulating elections and prohibiting all undue influences from power, bribery, tumult, or improper conduct: Ct. C. 6,6; W.Va. C. 4,11; Ky. C. 8,4; Tex. C. 16,2; Cal. C. 20,11; Ore. C. 2,8; Nev. C. 4,27; S.C. C. 1,33; Ala. C. 1,34; Fla. C. 4,24.

So, in two, there is a general provision that the legislature may enact laws concerning the judges, time, place, and manner of elections: Md. C. 3,49; Del. C. 7,11. And in three, that the legislature shall forbid the sale of intoxicating liquors near the polls: Ga. C. 2,5,1; Ala. C. 8,6; La. C. 190.

In four states, the election officers are sworn not to disclose how any person shall have voted, except in judicial proceedings: Pa. C. 8,4; Mo. C. 8,3; Ark. C. 3,3; Col. C. 7,8. So, in one, a voter may vote by sealed ballot if he so choose: W.Va. C. 4,2.

§ 236. **Registration.** The Constitutions of a few states have a general provision that there shall be laws to preserve the purity of elections, prevent fraud, and guard against the abuse of the elective franchise: R.I. C. 2,6; N.Y. C. 2,4; Mich. C. 7,6; Kan. C. 5,4; Md. C. 3,4,2; W.Va. C. 4,11; Tenn. C. 4,1; Tex. C. 6,4; Nev. C. 2,6; Col. C. 7,11; Ala. C. 8,5. And in many, provision for registration of voters is specially made: R.I.; Ind. C. 2,2 and 14; Wis.<sup>a</sup> C. 3,1, Amt.; Md. C. 1,5; N.C. C. 6,2; Mo. C. 8,5; Nev.; S.C. C. 8,3; Ga.<sup>b</sup> C. 2,2,1; Ala.;<sup>b</sup> Miss. C. 7,3; Fla. C. 14,6; La.<sup>b</sup> C. 186.



But in two, the Constitution expressly forbids registration laws: Ark. C. 3,2; Tex. And in two, no elector shall be deprived of his vote by reason of his name not being registered: Pa. C. 8,7; W.Va. C. 4,12. And, in one, the legislature shall establish no board or court of registration of voters: W.Va. C. 6,43.

NOTES. — <sup>a</sup> The legislature may provide for registration in incorporated cities and towns. <sup>b</sup> Such provision *may* be made by the legislature.

§ 237. **Freedom from Arrest.** In most states, the Constitution provides that electors shall be free from arrest while attending, going to, or returning from the polls, except for treason, felony, or breach of the peace: Me. C. 2,2; Pa. C. 8,5; O. C. 5,3; Ind. C. 2,12; Ill. C. 7,3; Mich. C. 7,3; Io. C. 2,2; Kan. C. 5,7; Neb. C. 7,5; Del. C. 4,2; Ky. C. 2,9; Tenn. C. 4,3; Mo. C. 8,4; Ark. C. 3,4; Tex. C. 6,5; Cal. C. 2,2; Ore. C. 2,13; Col. C. 7,5; S.C. C. 8,6; Ga. C. 2,3,1; Ala. C. 8,4; Miss. C. 4,7; La. C. 189; Ariz.\* Bill of Rts. 24.

So, in three, on any civil process: Ct. C. 6,8; Va. C. 3,4; W.Va. C. 4,3. So, in two, that they are not liable to arrest on civil process during election day: Minn. C. 7,5; Nev. C. 2,4. Nor, in three, are they required to attend court on that day, either as party or witness: Mich., Va., W.Va. And in eight, they are not obliged to perform military duty on election day, except in time of war or public danger: <sup>a</sup> Me. C. 2,3; Ill.; Mich. C. 7,4; Io. C. 2,3; Neb.; Va.; W.Va.; Cal. C. 2,3; Ore.

§ 238. **Contested Elections** are, by the Constitutions of many states, to be tried (A) in a manner to be provided by law: Ct.<sup>a</sup> C. 4,2; N.J.<sup>a</sup> C. 5,2; O. C. 2,21; Io.<sup>b</sup> C. 3,7; W.Va. C. 4,11; Ky.<sup>b,c</sup> C. 2,20; 8,24; Ark. C. 19,24; Tex.<sup>c</sup> C. 3,8; Col. C. 7,12; Miss.<sup>d</sup> C. 4,39; La. C. 194.

(B) In many others, they are to be tried by the legislature in joint session: N.H.<sup>a</sup> C. 2,42; Mass.<sup>a</sup> C. 2,21,3; Me.<sup>a</sup> C. 5,1,3; Vt.<sup>a</sup> C. Amt. 9; R.I.<sup>a</sup> C. 8,7; Va.<sup>c</sup> C. 4,2; W.Va.<sup>c</sup> C. 7,3; N.C.<sup>a</sup> C. 3,3; Mo.<sup>c</sup> C. 5,25; Ark.<sup>a</sup> C. 6,4; Tex.<sup>a</sup> C. 4,3; Col.<sup>a</sup> C. 4,3. So, in several others, by the legislature in the manner by law provided: Ind.<sup>c</sup> C. 5,6; Ill.<sup>a</sup> C. 5,4; Io.<sup>c</sup> C. 4,5; Neb.<sup>a</sup> C. 5,4; Ky.<sup>c</sup> C. 3,24; Tenn.<sup>c</sup> C. 3,2; Mo.;<sup>e</sup> Ore.<sup>c</sup> C. 5,6; S.C.<sup>c</sup> C. 3,4; Ga.<sup>a</sup> C. 5,1,6; Ala.<sup>a</sup> C. 5,4; Miss.<sup>c</sup> C. 5,2.

(C) In three states, by a committee of both houses: Pa.<sup>b</sup> C. 4,2; Del.<sup>c</sup> C. 3,2. (D) In one, by the house alone: Md.<sup>c</sup> C. 2,4.

(E) In many, by the courts of law: Pa.<sup>d</sup> C. 8,17; Mo.<sup>d</sup> C. 8,9; Wash.\* 3116; Ida.\* 1874-75, p. 693,39; Wy.\* 45,46; Uta.\* 29; N.M.\* 1874,29; Ariz.\* 1384. But in most of the states, the elections of members of each house of the legislature are to be determined by such house: N.H. C. 2,35; Dak.\* Pol. C. 2,9; Wy.\* 45,44; N.M.\* 63,59. For other states, see § 270.

NOTES. — <sup>a</sup> As to the governor or other executive officers only; see § 270. <sup>b</sup> As to members of the legislature only. <sup>c</sup> As to the governor or lieutenant-governor only. <sup>d</sup> Except of the governor, etc., as above. <sup>e</sup> As to executive officers other than governor, etc.

§ 239. **Evidence.** In the trial of contested elections, and proceedings for investigating them, no person can refuse to testify on the ground that it will criminate him; but such testimony shall not afterwards be used against him except in proceedings for perjury: Pa. C. 8,10; Ark. C. 3,9; Col. C. 7,9.

## Art. 24. The Right of Suffrage.

§ 240. **Citizens.**<sup>a</sup> The right of suffrage<sup>b</sup> (subject to the other conditions in this article) is, by the Constitutions (or statutes) of all the states, given (A) to every male<sup>a</sup> (see F) citizen of the United States aged twenty-one: N.H.\* 29,1; Me. C. 2,1; R.I. C. 2,1; Ct. C. Amt. 8; N.J. C. 2,1; O. C. 5,1; Ind. C. 2,2; Ill.

C. 7,1; Wis. C. 3,1, Amt.; Io. C. 2,1; Minn. C. 7,1; Kan. C. 5,1; Neb. C. 7,1; Md. C. 1,1; Va. C. 3,1; N.C. C. 6,1; Tenn. C. 4,1; Mo. C. 8,2; Ark. C. 3,1; Tex. C. 6,2; Cal. C. 2,1; Ore. C. 2,2; Nev. C. 2,1; Col. C. 7,1; S.C. C. 8,2; Ga. C. 2,1,2; Ala. C. 8,1; Miss. C. 7,2; Fla. C. 14,1; La. C. 185; Territories, U.S. R. S. 1859, 1860; Wash.\* 3050; Dak.\* Pol. C. 27,47; Ida.\* 1874-75, p. 684, § 1; Mon.\* 1881, p. 68, § 1; Wy.\* 45,18; Uta.\* 40; N.M.\* 1868,26,2; Ariz.\* 1347; D.C.\* 98.

So, in California, of any person naturalized; but he must have been a United States citizen ninety days before the election. And in one other, one month before: Pa. C. 8,1.

(B) And in many states, also to every male of foreign birth, aged twenty-one, who has declared his intention to become a citizen according to the United States naturalization laws: Ind.; Wis.; Minn.; Kan.; Mo.; Ark.; Tex.; Ore.; Col.; Ala.; Fla.; La.; Territories; Dak.\*; Mon.\*; Wy.\*; Ariz.\* 1412.

So, in others; but he must have declared such intention (1) at least thirty days before the election: Neb. (2) At least one year, and not more than five years, before: Mo. (3) At least four months before: Col.

(C) In many, to every male citizen or inhabitant of the state, aged twenty-one: N.H. C. 2,28; Mass. C. 2,1,2,2; Amts. 3; Vt.\* 62; N.Y. C. 2,1; Pa. C. 8,1; Mich. C. 7,1; Del. C. 4,1; W.Va. C. 4,1; Ky. C. 2,8; Miss.; Wash.\* He must have been a citizen ten days: N.Y. In Delaware, he must be aged twenty-two.

(D) **Indians**, aged twenty-one, if civilized, and not a member of any tribe, can vote, in Wisconsin.<sup>c</sup> So, in Michigan, if born in the United States. So, in Wisconsin, persons of Indian blood who have once been declared by Congress citizens of the United States, any subsequent act of Congress to the contrary notwithstanding. So, in Minnesota and Washington, persons of mixed white and Indian blood who have adopted the customs and habits of civilization; and Indians also, after an examination by the courts, in Minnesota. But in two, no Indian not taxed can vote: Me. C. 2,1; Miss. C. 7,2. And in one, no Indian can vote: R.I. C. 2,4.

(E) The Constitutions of seven states restrict the right of suffrage to white persons. See § 22.

(F) (See also § 23.) In three territories, women vote in all respects like men: Wash.\* 1883, p. 39; Wy.\* 50,1; Uta.\* 43. Thus, in Utah, "every woman aged twenty-one, who has resided in the territory six months, born or naturalized in the United States, or who is the wife, widow, or daughter of a native born or naturalized citizen of the United States, shall be entitled to vote at any election." See also § 23. (G) By the Constitution of Wisconsin, the legislature may at any time extend the right of suffrage to persons not here enumerated; but the law must be approved by a majority of the voters at a general election.

NOTES. — <sup>a</sup> In order to give a complete presentation of the subject in this article, the statute provisions of a few states which have no constitutional provisions on the subject are also incorporated.

<sup>b</sup> The right of suffrage here provided for is the right of voting for the state legislature and executive only; and statutes permitting women to vote in local elections are, consequently, not unconstitutional.

<sup>c</sup> In other states, it would follow from Articles 1 and 2, that all Indians are citizens, there being no provision to the contrary.

§ 241. **Residence Qualifications.**<sup>a</sup> (A) By the Constitutions of a few states, a voter must have been resident a certain period of time in the United States; thus, in one, ninety days: Cal. (cf. § 240, A). In two, one year: Ind.<sup>b</sup> C. 2,2; Minn. C. 7,1. He must have been a citizen ten days: N.Y. C. 2,1; one month: Pa. C. 8,1. In one, he must be *born* in the United States, unless he hold a certain amount of real estate in the state (§ 244): R.I.<sup>c</sup> C. 2,1 and 2.

(B) And by the Constitutions of nearly all, to vote at a state election, a person qualified according to § 240 must have been resident for a certain period immediately preceding the election in the State; thus, in two states, (1) for three months: Me. C. 2,1; Mich. C. 7,1; Dak.\* Pol. C. 27,47; Wy.\* 45,18. In one, (2) for four months: Minn.; Ida.\* 1874-75, p. 684, § 1. In many, (3) for six months: N.H.\* 29,9; Ind. C. 2,2; Io. C. 2,1; Kan. C. 5,1; Neb. C. 7,1; Ark. C. 8,2; Ore. C. 2,2; Nev. C. 2,1; N.M.\*;

Col. C. 7,1 ; Miss. C. 7,2 ; Wash.\* 3050 ; Mon.\* 1881, p. 68, § 1 ; Uta.\* 40. In many others, (4) for one year : Mass. C. Amt. 3 ; Vt.\* 62 ; R.I. C. 2,1 ; Ct. C. Amt. 8 ; N.Y. ; N.J. C. 2,1 ; Pa. C. 8,1 ; O. C. 5,1 ; Ill. C. 7,1 ; Wis. C. 3,1 ; Md. C. 1,1 ; Del. C. 4,1 ; Va. C. 3,1 ; W.Va. C. 4,1 ; N.C. C. 6,1 ; Tenn. C. 4,1 ; Mo. C. 8,2 ; Ark. C. 3,1 ; Tex. C. 6,2 ; Cal. C. 2,1 ; S.C. C. 8,2 ; Ga. C. 2,1,2 ; Ala. C. 8,1 ; Fla. C. 14,1 ; La. C. 185 ; Ariz.\* 1412 ; D.C.\* 98 (in the District). In one, (5) for two years : Ky. C. 2,8. In one, (6) for two and a half years : Mich.

In one state, residence on state land ceded to the United States is not sufficient (compare § 243) : R.I. C. 2,5.

(C) And by the Constitutions of a few states, a person otherwise qualified must, in order to vote at any election, have been resident in the county or legislative district for a certain period of time before ; thus, in two, for ten days : Minn., Ark., Ariz.\* In one, for twenty days : Dak.\* In several, for thirty days : O.\* 2945 ; Del. ; Nev. ; Miss. ; Wash.\* ; Ida.\* ; Mon.\* In a few, for sixty days : Io., W.Va., Mo., S.C. In a few, for three months : Ill., Va., N.C., Cal., Ala. In one, for four months : N.Y. In one, for five months : N.J. In some others, for six months : Md., Tenn., Ark., Tex., Ga., Fla., La. In one, for one year : Ky. In four, "as by law provided." O., Neb., Col., Ala.

(D) And in three, he must have been resident in the city or township sixty days : Pa., Ind., Mo. In five, six months : N.H., Mass., R.I., Ct., Md. In one, thirty days : Kan. In the ward or precinct or election district, five days : Dak.\* Ten days : Mich., Minn. In two, twenty days : O., N.C. In several, thirty days : N.Y., Ind., Ill., Wis., Ark., Cal., Nev., Ala., La., D.C.\* In two, sixty days : Pa. C. 8,1 ; Ky. In one, three months : Me.

NOTES. — <sup>a</sup> See § 240, note <sup>a</sup>. <sup>b</sup> If of foreign birth only. <sup>c</sup> In the case of native United States citizens owning no real estate, see § 244.

§ 242. **Losing a Residence, etc.** By the Constitutions of many states, (A) no person shall be deemed to have lost a residence for the purpose of voting (or, in Kentucky, Texas, Colorado, for the purpose of holding office ; or in California, Indiana, Wisconsin, Arkansas, for any purpose whatever) by reason of his absence from the state while employed (1) in the service of the United States : <sup>a</sup> Me. C. 2,1 ; N.Y. C. 2,3 ; Pa. C. 8,13 ; Ind. C. 2,4 ; Ill. C. 7,4 ; Mich. C. 7,5 ; Wis. C. 3,4 ; Minn. C. 7,3 ; Kan. C. 5,3 ; Ky. C. 8,12 ; Mo. C. 8,7 ; Ark. C. 19,7 ; Tex. C. 16,9 ; Cal. C. 2,4 ; 20,12 ; Ore. C. 2,4 ; Nev. C. 2,2 ; Col. C. 7,4 ; S.C. C. 8,4 ; La. C. 193 ; Wash.\* 3051 ; Ariz.\* 1348.

(2) Or, in several, while employed in the service of the state : <sup>a</sup> Me. ; Pa. ; Ind. ; Ill. ; Mich. ; Wis. ; Ky. ; Mo. ; Ark. ; Tex. ; Cal. ; Ore. ; Col. ; La. ; Ariz.\* 1350.

(3) Or, in many, while engaged in the navigation of the waters of this state or of the United States : N.Y., Pa., Mich., Minn., Kan., Mo., Cal., Ore., Nev., S.C., La., Wash.,\* Ariz.\* (Or, in all these last except Minnesota, of the waters of the high seas.)

(4) Or, in two, while temporarily absent from the state : Ark. ; S.C. ; Wash.\* <sup>b</sup> 3053. (5) Or, while confined in prison : N.Y., Pa., Mich., Minn., Kan., Mo., Cal., Ore., Nev., Col., S.C., Wash.,\* <sup>a</sup> Ariz.\* (6) Or, while kept at an almshouse or asylum at the public expense : N.Y., Pa., Mich., Minn., Kan., Mo., Cal., Ore., Nev., Col., S.C., Wash.,\* Ariz.\* (7) Or, while a student in any institution of learning : N.Y., Pa., Mich., Minn., Kan., Mo., Cal., Ore., Nev., Col., La., Wash.,\* Ariz.\*

(B) And in several states no person shall be deemed to have *gained* a residence in the state by reason of his presence, for the various reasons respectively specified in A : <sup>a</sup> N.Y., Pa., Mich., Kan., Mo., Cal., Ore., Nev., Col., La., Wash.,\* Ariz.\* So, in Maine, as to case (7) only.

NOTES. — <sup>a</sup> Except when serving out a sentence in the penitentiary for infamous crime. <sup>b</sup> "Provided the right to vote has not been claimed and exercised elsewhere."

§ 243. **Army and Navy.** And in most states it is specially provided that no person shall be deemed to have acquired a residence for the purpose of voting by reason of being stationed in the state while in the military or naval service of the



United States: Me. C. 2,1; R.I. C. 2,4; N.J. C. 2,1; O. C. 5,5; Ind. C. 2,3; Ill. C. 7,5; Mich. C. 7,7; Wis. C. 3,5; Io. C. 2,4; Minn. C. 7,4; Neb. C. 7,4; Del. C. 4,1; Va. C. 3,1; W.Va. C. 4,1; Ark. C. 3,7; Ore. C. 2,5; S.C. C. 8,5; Ga. C. 2,1,2; Ala. C. 8,1; La. C. 164; Territories, U.S. R. S. 1860; Wash.\* 3050; Uta.\* 41 (unless such territory is, and has been for six months, his permanent domicile: Wash.\* Uta.\*).

And the same law would seem to be implied (by § 242, B) in a few other states. In several, no person in the regular army or navy of the United States can vote (see also below): Kan. C. 5,3; Mo. C. 8,11; Tex. C. 6,1; Ore.

*And conversely*, no person in the actual military service of the United States is deemed to have lost his right to vote by reason of his absence (in time of war, except in Nevada); but a manner in which he may vote is to be provided by the legislature: Me. C. 2,4; R.I. C. Amt. 4; Ct. C. Amt. 13; N.Y. C. 2,1; N.J. C. 2,1; Pa. C. 8,6; Mich. C. 7,1; Kan. C. 5,3; Neb. C. 7,3; Nev. C. 2,3; Miss. C. 7,6; Ariz.\* 1407.

But in three, only when such person is not in the regular army or navy: Ct., Kan., Neb.

**§ 244. Property Qualification.**<sup>a</sup> (A) In eight states there is a constitutional provision that there shall be no property qualification for the right of suffrage: Minn. C. 1,17; Kan. C. Bill of Rts. 7; N.C. C. 1,22; Ark. C. 1,21; Cal. C. 1,24; Ala. C. 1,38; Miss. C. 1,18.

(B) But in one, the Constitution declares that every free man has a right to vote "who has a sufficient interest in the community:" Vt. C. 1,8. And in several, there is a provision requiring a voter to have paid certain taxes; thus, in Georgia, all taxes except for the year of the election: Ga. C. 2,1,2; so, in three, he must have paid a state, county, or city tax within two years previous to the election: Mass. C. Amt. 3; Pa. C. 8,1; Del. C. 4,1; so, in one, he must have paid all poll taxes assessed upon him for a period (1) of two years preceding: R.I. C. 2,3; (2) to be prescribed by the legislature: Tenn. C. 4,1. In Utah, no person is deemed a *resident* (so as to vote) who is not "a taxpayer:" Uta.\* 42. So, in New Hampshire, no person can vote who is excused from paying taxes at his own request: N.H. C. 2,23. But in Massachusetts a person can vote who is exempted by law (see Part IV.) from taxation. In Rhode Island, he must have paid a tax to the amount of \$1, unless he owns real estate in the state: R.I. C. 2,1 and 2.

(C) And in *municipal elections*, in Texas, to determine the expenditure of money or the assumption of debt, no person can vote who does not pay a property tax in such municipality: Tex. C. 6,3. See also § 372. And in one, no person not born in the United States can vote unless he hold real estate in the state to the net value of \$134, or possess real estate with a rental value of \$7: R.I. C. 2,1.

NOTE. — <sup>a</sup> See § 252.

**§ 245. Educational Qualifications** of the right of suffrage exist in four states. Thus, in one, no person can vote who cannot read the Constitution and statutes of the State: Ct. C. Amt. 11. So, in one other, no person who cannot read the Constitution of the State in English: Mass. C. Amt. 20. And in Massachusetts, no person who cannot write his name. In two, the legislature are given authority to enact laws requiring an educational qualification (1) after 1880: Fla. C. 14,7; (2) after 1890: Col. C. 7,3. But in two, all educational qualifications are expressly forbidden by the Constitution: Ala. C. 1,38; Miss. C. 1,18. For religious qualifications, see § 45.

**§ 246. Challenges.** By the Constitution of Georgia, any voter, on being challenged, must make oath that he has complied with the constitutional requirements: Ga. C. 2,1,2.

**§ 247. General Provisions.** In Virginia, all men having sufficient evidence of permanent common interests with, and attachment to, the community, have the right of suffrage, and cannot be bound by any law to which they or their representatives have not assented: Va. C. 1,8.



**Art. 25. Disfranchisement.**

§ 250. **General Provisions.** The Constitution of South Carolina declares that no person shall be deprived of the right of suffrage except (1) by the law of the land or the judgment of his peers: <sup>a</sup> S.C. C. 1,34. Or, (2) except upon conviction by a jury of some infamous crime previously ascertained and determined by law and judgment thereon by a court of competent jurisdiction: Tenn. C. 1,5. Or, (3) upon lawful conviction of a felony at common law: Ark. C. 3,2.

NOTE. — <sup>a</sup> This is probably implied in other states; see § 130.

§ 251. **Insanity.** By the Constitutions of most states no insane person <sup>a</sup> can vote: R.I. C. 2,4; N.J. C. 2,1; O. C. 5,6; Wis. C. 3,2; Io. C. 2,5; Minn. C. 7,2; Kan. C. 5,2; Neb. C. 7,2; Del. C. 4,1; Va. C. 3,1; W.Va. C. 4,1; Ark. C. 3,5; Tex. C. 6,1; Cal. C. 2,1; Ore. C. 2,3; Nev. C. 2,1; S.C. C. 8,2; Ga. C. 2,2,1; Ala. C. 8,3; Miss. C. 7,2; Fla. C. 14,2; La. C. 187.

So, in many, no idiot: <sup>a</sup> R.I., N.J., O., Wis., Io., Minn., Kan., Neb., Del., Va., W.Va., Ark., Tex., Cal., Ore., Nev., S.C., Ga., Ala., Miss., Fla., La.

So, in a few, no person under guardianship: Mass. C. Amt. 3; Me. C. 2,1; R.I.; Wis.; Minn.; Kan.; Md. C. 1,2; Fla.

NOTE. — <sup>a</sup> See Glossary.

§ 252. **Poverty.** In a few states there are constitutional provisions disfranchising paupers; thus, in eight, that no pauper can vote: N.H. C. 2,28; Mass. C. Amt. 3; Me. C. 2,1; R.I. C. 2,4; N.J. C. 2,1; Del. C. 4,1; W.Va. C. 4,1; Tex. C. 6,1.

So, in two, no person kept at a poorhouse or asylum at the public expense: Mo. C. 8,8; S.C. C. 8,2. So, in Texas, no pauper supported by any county.

**Exception.** But these provisions do not apply to any person who has served in the United States army or navy in time of war and been honorably discharged: Mass. C. Amt. 28.

§ 253. **Crime.** By the Constitutions of most states, no person convicted of infamous <sup>a</sup> crime can vote: R.I.<sup>b</sup> C. 2,4; Ct. C. 6,3; N.Y.<sup>d</sup> C. 2,2; N.J.<sup>b</sup> C. 2,1; O.<sup>d</sup> C. 5,4; Ind.<sup>d</sup> C. 2,8; Ill.<sup>d</sup> C. 7,7; Wis.<sup>d</sup> C. 3,6; Io. C. 2,5; Minn.<sup>d</sup> C. 4,15; Neb.<sup>b</sup> C. 7,2; Md.<sup>b,c</sup> C. 1,2; Del. C. 4,1; Va. C. 3,1; W.Va. C. 4,1; N.C.<sup>b</sup> C. 6,1; Tenn.<sup>d</sup> C. 4,2; Mo.<sup>d</sup> C. 8,10; Tex. C. 6,1; Cal. C. 2,1; Ore. C. 2,3; Nev.<sup>b,c</sup> C. 2,1; Ga.<sup>b</sup> C. 2,2,1; Ala. C. 8,3; Miss. C. 7,2; 4,17; Fla.<sup>d</sup> C. 14,4; La. C. 148,187.

And in three, no person convicted of "other high crimes": Ky.<sup>d</sup> C. 8,4; Tex.<sup>d</sup> C. 16,2; Cal.<sup>d</sup> C. 20,11; or high misdemeanors: Ky.; <sup>d</sup> Miss.<sup>d</sup> 12,2. No person "under interdiction": La.

So, in several, specially, no person convicted of "felony": Wis.<sup>b,f</sup> C. 3,2; Minn.<sup>b,f</sup> C. 7,2; Kan.<sup>b</sup> C. 5,2; N.C.; <sup>d,f</sup> Mo.; <sup>d,f</sup> Ark.<sup>d</sup> C. 3,2; Fla.<sup>b</sup> C. 14,2. And in three, no person confined in public prison: Mo. C. 8,8; Col. C. 7,10; S.C. C. 8,2.

NOTES. — <sup>a</sup> See Glossary. <sup>b</sup> Unless legally (see § 160) restored to the rights of citizenship. <sup>c</sup> Whether the conviction be in the home state or in any other. <sup>d</sup> In these states, the Constitution only provides that the legislature may pass laws to that effect. <sup>e</sup> If over the age of twenty-one when convicted. <sup>f</sup> The word seems here to be used as different in meaning from "infamous crime."

§ 254. **Special Crimes.** The Constitution further specifies (1) that no person convicted of larceny can vote: Ct. C. 6,3; Wis.<sup>d</sup> C. 3,6; Md.<sup>b</sup> C. 1,2; Va. C. 3,1; Ga.<sup>b</sup> C. 2,2,1; Ala. C. 8,3; Fla. C. 6,3; La. (2) No person convicted of forgery: Ct. C. 14,4; Ky.; <sup>d</sup> Tex.<sup>d</sup> C. 16,2; Cal.<sup>d</sup> C. 20,11; Miss. C. 12,2; La. C. 148,187. (3) No person convicted of treason: Wis.<sup>b</sup> C. 3,2; Minn.; <sup>b</sup> Neb.; <sup>b,c</sup> Va.; W.Va. C. 4,1; Nev.<sup>b,c</sup> C. 2,1; Ga.; <sup>b</sup> Ala.; La. So, specially, in two states, no person who has ever borne arms voluntarily against the United States (if, in Nevada, such person was over eighteen at the time): Kan.<sup>b</sup> C. 5,2; Nev.

And in Nevada, no person who held civil or military office under the Confederate States. And in Kansas,<sup>b</sup> no person who in any manner voluntarily aided or abetted the Rebellion; and no one dishonorably discharged from the United States service.

*Except*, in Kansas, persons honorably discharged from the military service of the United States, after April, 1861, and who had served at least one year therein, are not so disfranchised. And in Nevada, the foregoing provisions cease to apply when an amnesty be granted by the United States Government: Nev.

(4) Or of perjury: Ct.; O.;<sup>d</sup> Minn.<sup>d</sup> C. 4,15; Ky.;<sup>d</sup> Tex.;<sup>d</sup> Cal.;<sup>d</sup> Miss. C. 4,17; Fla.; La. (5) Or of malfeasance in office: Cal., Ga.,<sup>b</sup> Ala., La. (6) Or of misdemeanors connected with the right of suffrage: Mo.;<sup>d</sup> or "illegal voting:" La. (7) Or of embezzlement of the public funds: Va., Cal.,<sup>c</sup> Ga.,<sup>b</sup> Ala., La. (8) Or of defrauding the United States, or any State government: Kan.<sup>b</sup> (9) Or for fraudulent bankruptcy: Ct.

For notes, see § 253.

§ 255. **Bribery.** By the Constitutions of many states, no person convicted of bribery can vote: R.I.<sup>b</sup> C. 2,4; Ct. C. 6,3; N.Y.;<sup>d</sup> N.J.<sup>d</sup> C. 2,2; O.<sup>d</sup> C. 5,4; Wis.<sup>d</sup> C. 3,6; Minn.;<sup>d</sup> Ky.;<sup>d</sup> Tex.<sup>d</sup> C. 16,2; Cal.<sup>d</sup> C. 20,11; Ga.;<sup>c</sup> Ala.; Miss. C. 4,17; 12,2; Fla. C. 14,4; La. C. 147.

Whether giving or receiving the bribe: Miss. So, in Kansas,<sup>b</sup> no person guilty of giving or offering to give or receive a bribe. So, in one, a person convicted of giving or offering a bribe to procure his own election or appointment, or that of any other person: Miss. C. 4,18; 12,2.

So, in five, no person convicted of bribery at elections, as to both parties: Me.<sup>c</sup>,<sup>d</sup> C. 9,13; Md. C. 1,3; Va.; W.Va.; Ga. And in three, a person giving or offering or receiving a bribe at an election is disqualified to vote at that election: Vt. C. 2,34; N.Y.; Pa. C. 8,8.

No member of the legislature convicted of bribery can vote: Cal. C. 4,35. In Pennsylvania, any person convicted of wilful violation of the election laws is deprived of the right of suffrage for four years: Pa. C. 8,9.

NOTES. — <sup>b</sup>, <sup>d</sup> See § 253, same notes. <sup>c</sup> For a term not over ten years.

§ 256. **Betting on an Election** disqualifies the persons interested from voting at that election: N.Y.; Wis.<sup>d</sup> C. 3,6. And in Florida, laws shall be passed to deprive a person convicted of so betting of the right of suffrage absolutely: Fla. C. 14,4. See § 253 for note.

§ 257. **Duelling.** By the Constitutions of several states a person is disfranchised by being concerned in a duel in the same cases in the several states respectively that he would be disqualified to hold office (see § 223): Mich. C. 7,8; Wis. C. 13,2; Va. C. 3,1; Ky. C. 8,20; Tex. C. 16,4; Cal. C. 20,2; Nev. C. 15,3; Miss. C. 1,27; Fla. C. 14,4. And so, a conviction for duelling is cause of disfranchisement: Ct. C. 6,3; S.C. C. 8,8.

## Art. 26. Removal of Officers.

§ 260. **By Impeachment.** By the Constitutions of many states, every civil state officer may be impeached: N.H. C. 2,38; Mass. C. 2,1,2,8; Me. C. 9,5; Vt. C. 2,24; N.J. C. 5,11; Pa. C. 6,3; O. C. 2,24; Ind. C. 6,7; Ill. C. 5,15; Mich. C. 12,1; Wis. C. 7,1; Io. C. 3,20; Neb. C. 5,5; Del. C. 5,2; Va. C. 5,16; W.Va. C. 4,9; Ky. C. 5,3; Ark. C. 15,1; Nev. C. 7,2; Col. C. 13,2; Miss. C. 4,28.

So, in Kansas, all officers under the Constitution: Kan. C. 2,28. So, in three, all "executive" officers: R.I. C. 11,3; Ct. C. 9,3; S.C. C. 7,3.

And in the Constitutions of many, it is specified that the governor may be impeached: N.H. C. 2,40; R.I.; Ct.; N.J.; Pa.; O. C. 2,24; Ill.; Wis.; Io.; Minn. C. 13,1; Kan.; Del.; Va.; N.C. C. 4,4; Ky.; Tenn. C. 5,4; Mo. C. 7,1; Ark.; Tex. C. 15,2; Cal. C. 4,18; Nev.; Col.; S.C.; Ala. C. 7,1; Miss.; Fla. C. 4,29; La. C. 196.

So, the lieutenant-governor: Va., Mo., Tex., Cal., Fla., La. So, in several, the secretary of state: Minn., Tenn., Mo., Cal., Ala., La.; so, the treasurer of the state: Minn., Tenn.,

Mo., Tex., Cal., Ala., La.; so, the members of the cabinet: Fla.; the council: N.H. C. 2,63; the auditor of the state: Minn., Mo., Ala., La.; the comptroller of the state: Tenn., Tex., Cal.; the attorney-general: Minn., Mo., Tex., Cal., Ala., La.; all attorneys for the state: Tenn., Ark.; the superintendent of education: Mo., Ala., La.; the commissioner of public lands: Tex.; the surveyor-general: Cal.; all judicial officers or judges: R.I.; Ct.; O.; Md. C. 4,4; Va.; Tenn.; Nev.; Col.; S.C.; La. C. 93; all judges of the supreme<sup>a</sup> courts: Io., Minn., Tenn., Mo., Ark., Tex., Cal., Ala., Fla.; all judges of the superior<sup>a</sup> courts: Io., Minn., Mo., Ark., Tex., Cal., Fla.; all judges of the criminal court: Mo.; all judges of the Court of Appeals: Tex.; all chancellors: Tenn., Ark. Any such officer may be impeached within two years after his term of office expired: N.J.

The Constitution forbids impeachment of public officers: Ore. C. 1,19.

NOTE. — <sup>a</sup> See § 551 and note.

§ 261. **The Causes of Impeachment** are (A) in many states, crime. Thus in detail (for citations, see also in § 260): —

(1) Crime (generally): Ind., Mich., Wis., Minn., Va., W.Va., Mo., Ark., Col., La. (2) Misdemeanors (generally): Mich., Wis., Minn., Va., W.Va., Mo., Ark., Col., La. (3) Any high crime in office: Del. C. 5,2; Tenn.; Miss. (4) Any misdemeanor in office: Me., Pa., O., Ill., Io., Kan., Neb., Del., Ky., Cal., Nev., Miss., Fla. (5) Any offence involving moral turpitude, committed while in office, or connected therewith: Ala. (6) Treason: Del., Miss. (7) Bribery: N.H. C. 2,38; Del.; Miss. (8) Habitual drunkenness: Mo., Ala., La. Drunkenness, at any time or place; Neb. C. 14,3; Fla. C. 16,9. (9) "Other dissipations:" Fla. Conduct detrimental to morals: Fla. "Gross immorality:" W.Va. (10) Gambling: Fla.

(B) In several, (1) malfeasance or misconduct in office: N.H.; Mass. C. 2,1,2,8; Io.; Mo.; Ark.; Nev.; Col.; S.C. C. 2,31; Fla.; La. (2) Corruption in office: N.H., Mich., Wis., Minn., Va., W.Va., Ala., La. Or "favoritism:" La. (3) Extortion in office: La. Oppression in office: Mo., La. (4) Neglect of official duties: Ind., Va., W.Va., S.C., Ala. (5) "Maladministration:" N.H.; Mass.; Vt. C. 2,24; Va.; W.Va.

(C) (1) Incompetency: W.Va., Ala., Fla., La. (2) Incapacity, mental or physical: Ind., S.C.

§ 262. **Process of Impeachment.** (A) By the Constitutions of all but Nebraska and Oregon, the impeachment is first made by the House of Representatives: N.H. C. 2,17; Mass. C. 2,1,3,6; Me. C. 4,1,8; Vt. C. Amt. 25,3; R.I. C. 11,1; Ct. C. 9,1; N.Y. C. 6,1; N.J. C. 6,3,1; Pa. C. 6,1; O. C. 2,23; Ind. C. 6,7; Ill. C. 4,24; Mich. C. 12,1 and 2; Wis. C. 7,1; Io. C. 3,19; Minn. C. 4,14; Kan. C. 2,27; Md. C. 3,26; Del. C. 5,1; Va. C. 5,16; W.Va. C. 4,9; N.C. C. 4,4; Ky. C. 5,1; Tenn. C. 5,1; Mo. C. 7,2; Ark. C. 15,2; Tex. C. 15,1; Cal. C. 4,17; Nev. C. 7,1; Col. C. 13,1; S.C. C. 7,1; Ga. C. 3,6,3; Ala. C. 7,1; Miss. C. 4,27; Fla. C. 4,29; La. C. 197.

In most, a majority of a quorum seems to be sufficient for impeachment in the house as in ordinary votes (see § 304): N.H., Mass., Me., Ct., Ind., Io., Kan., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Cal., Ga., Ala., La.

But in a few, a majority of the members elected: N.Y., N.J., O., Ill., Mich., Wis., Minn., Md., Nev., Col. In two, a vote of two thirds of the members present: Miss., Fla. In five, a vote of two thirds of the members elected: Vt., R.I.,<sup>a</sup> Ind., Del., S.C.

And the impeachment is then, in all these states but New York, tried by the Senate, sitting as a court, under oath: N.H.; Mass. C. 2,1,2,8; Me. C. 4,2,7; Vt. C. Amt. 7; R.I. C. 11,2; Ct. C. 9,2; N.J.; Pa. C. 6,2; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Md.; Del.; Va.; W.Va.; N.C. C. 4,3; Ky. C. 5,2; Tenn. C. 5,2; Mo.; Ark.; Tex. C. 15,2; Cal.; Nev.; Col.; S.C. C. 7,2; Ga. C. 3,5,3; Ala.; Miss.; Fla.; La.

So, in New York, it is tried by the Senate and the judges of the Court of Appeals.

Two thirds of the senators elected must, in many states, concur to convict of the impeachment: R.I., N.J., O., Ind., Ill., Mich., Kan., Md., Del., W.Va., Cal., Nev., Col.,



S.C., La. In others, two thirds of the senators present: Me.; Vt.; Ct.; N.Y.; Pa.; Wis.; Io.; Minn.; Va.; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex. C. 15,3; Ga. C. 3,5,4; Miss. C. 4,29; Fla.; La.

In four, a vote of a quorum, as in other cases (see § 304): N.H., Mass., Ala., Miss.

(B) But in one state, the impeachment is first made by the legislature in joint convention upon resolution in either house; and a majority of elected members must concur; and it is then tried by the judges of the Supreme Court: Neb. C. 3,14.

NOTE. — <sup>a</sup> When the governor is impeached, only.

§ 263. **The Effect of Impeachment** is, by the Constitutions of all but Maryland and Oregon, merely to remove from office, *and* in all these states except Rhode Island, Indiana, Michigan, South Carolina, [in North Carolina and Montana, *or*] to disqualify the person impeached from holding any other state office: N.H. C. 2,39; Mass. C. 2,1,2,8; Me. C. 4,2,7; Vt. C. Amt. 7; R.I. C. 11,3; Ct. C. 9,3; N.Y. C. 6,1; N.J.<sup>a</sup> C. 6,3,3; Pa. C. 6,3; O. C. 2,24; Ill. C. 4,24; Mich. C. 12,2; Wis. C. 7,1; Io. C. 3,20; Minn. C. 13,1; Kan. C. 2,28; Neb. C. 3,14; Del. C. 5,2; Va. C. 5,16; W.Va. C. 4,9; N.C. C. 4,3; Ky. C. 5,3; Tenn. C. 5,4; Mo. C. 7,2; Ark. C. 15,1; Tex. C. 15,4; Cal. C. 4,18; Nev. C. 7,2; Col. C. 13,2; S.C. C. 7,3; Ga. C. 3,5,5; Ala.<sup>b</sup> C. 7,4; Miss. C. 4,30; Fla. C. 4,29; La. C. 197.

In many, when an officer is impeached, he is at once suspended from his office until acquitted: R.I. C. 11,2; N.Y.; <sup>a</sup> N.J.<sup>a</sup> C. 6,3,2; Mich.<sup>a</sup> C. 12,4; Wis.<sup>a</sup> C. 7,1; Minn. C. 13,3; Neb.; Tex. C. 15,5; S.C. C. 7,1; Fla. C. 16,9; La. C. 198.

In Tennessee the legislature has no power to relieve the person impeached from the above penalties (and see also § 160).

NOTES. — <sup>a</sup> Of judicial officers only. <sup>b</sup> But such disqualification only lasts during the term for which he was elected or appointed.

§ 264. **Trial at Law.** A person impeached, whether convicted or not on the impeachment, is nevertheless liable, by the Constitutions of all but Indiana and Maryland, to indictment, trial, and punishment according to law: N.H.; Mass.; Me.; Vt. C. Amt. 7; R.I.; Ct.; N.Y.; N.J.; Pa.; O.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Del.; Va.; W.Va.; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Cal.; Nev.; Col.; S.C.; Ga.; Ala.; Miss.; Fla.; La. C. 197. For citations, see § 263.

§ 265. **Removal by Address.** Certain officers may, by the Constitutions of many states, be removed (A) by the legislature; thus, in many states, judges of the supreme or superior courts: R.I. C. 10,4; O. C. 4,17; Wis. C. 7,13; Kan. C. 3,15; Va. C. 6,23; W.Va. C. 8,18; N.C. C. 4,31; Cal. C. 6,10; Nev. C. 7,3.

In a few, all judicial officers: O.; Nev.; Ill. C. 6,30. In one, judges of the supreme court: N.Y. C. 6,11. In one, all civil officers: La. C. 152. In New York, all other judicial officers than as above, on recommendation of the governor, by vote of two thirds of the senate elected.

In a few, a two-thirds concurrent vote of both houses elected is necessary: N.Y., O., Wis.,<sup>a</sup> Kan., W.Va., N.C., Cal., Nev., La. In Illinois, a three-fourths vote. In two, a majority vote of elected members in joint committee: R.I., Va.

(B) By the governor (or governor and council), upon the address of both houses of the legislature (and in Connecticut, Pennsylvania, Michigan, Maryland, Delaware, Kentucky, Missouri, Texas, Oregon, South Carolina, Mississippi, Louisiana, two thirds of each house must concur); thus, (1) in many states, all judicial officers or judges: N.H. C. 2,73; Mass. C. 2,3,1; Pa. C. 5,15; Mich. C. 12,6; Md. C. 4,4; Del. C. 6,14; Mo. C. 6,41; Tex. C. 15,8; S.C. C. 7,4.



(2) The judges of the supreme and superior courts: Ct. C. 5,3; Ky. C. 4,3 and 23; Ark.<sup>a</sup> C. 15,3; Ore. C. 7,20; Miss. C. 4,31; La. C. 93. (3) All state officers: Me. C. 9,5; S.C.; La. C. 199. (4) Prothonotaries, registers, and clerks of the probate court: Del. C. 7,4. (5) The auditor, treasurer, secretary of state, attorney-general, and chancellors: Ark. (6) The attorney-general: Del., Ore.

(C) In one state, by the governor, on address of two thirds of the full senate, all officers elected by the people except members of the legislature and judges: Pa. C. 6,4.

**The Causes of Removal** of officers under this section are by the Constitutions specified to be (1) any reasonable cause: Pa., Mich., Nev., S.C., Miss., La. (2) Misbehavior in office: Pa., Ore. (3) Any infamous crime: Pa. (4) Incompetence: W.Va., Ore. (5) Neglect of duty: Ore., S.C. (6) Age: W.Va. (7) Mental or bodily infirmity: W.Va., N.C., Mo. (8) Corruption in office: Ore.

NOTE. — <sup>a</sup> On address of two thirds of the elected members.

§ 266. **Removal by the Governor.** So, in many states, certain officers (A) by the governor alone; as, namely:—

(1) Any officer whom he has power to appoint (§ 210): Pa. C. 6,4 (except judges); Ill. C. 5,12; Neb. C. 5,12; Md. C. 2,15; W.Va. C. 7,10; Col. C. 4,6. (2) All officers not legislative or judicial: Mich. C. 12,8; Ariz.\* 1097. (3) Judges: Md. C. 4,4. (4) Sheriffs: N.Y. C. 10,1; Wis. C. 6,4. (5) Coroners: N.Y., Wis. (6) District-attorneys: N.Y., Wis. (7) County clerks: N.Y. (8) Registers of deeds: Wis.

(B) In two states, by the governor, with the concurrence of the senate, all officers appointed by the governor may be removed: Fla. C. 4,29. So, in California, by the senate on recommendation of the governor, judges of inferior courts: Cal. C. 6,10.

**The causes of removal** under this section are specified to be (1) incompetency: Ill.; Neb.; Md.; W.Va. C. 7,10; Col. (2) Malfeasance in office: Ill., Neb., W.Va., Col. (3) Misconduct: Md., W.Va. (4) Neglect of duty: Ill., Neb., W.Va., Col. (5) Conviction in a court of law of incompetency, misbehavior, or neglect in office, or any crime (as to judges only): Md. (6) Gross immorality: W.Va.

§ 267. **Removal by the Courts.** In a few states, certain officers may be removed (A) by the judges of the supreme court.

Thus, (1) judges of the superior court: Tex. C. 15,6; Ala. C. 7,2; La. C. 200. (2) All officers not liable to impeachment: Tenn. C. 5,5. (3) Any judge (except those mentioned in § 260): Ind. C. 7,12; Ala. (4) Any prosecuting attorney: Ind.

(B) By the judges of the superior courts, (1) minor officers: Ala. C. 7,3; La. C. 201. (2) County or town officers: Ark. C. 7,27; Tex. C. 5,24; Ala.; Miss. C. 6,26; La. (3) County judges, attorneys, clerks of court, and justices of the peace: Tex. C. 5,24; Ala.

(C) In Oregon, all officers may be tried for incompetency, corruption, malfeasance or delinquency in office, as for criminal offences; and judgment may be rendered for dismissal from office: Ore. C. 7,19.

§ 268. **Other Removals from Office.** The Constitutions of other states provide that the legislature may provide for the removal of inferior officers from office, for malfeasance or nonfeasance of their duties: Minn. C. 13,2; Mo. 14,7; Nev. C. 7,4; Col. C. 13,3; S.C. C. 2,31. So, in West Virginia, for official misconduct, incompetency, neglect of duty, or gross immorality: W.Va. C. 4,6. So, in Texas, for any cause: Tex. C. 15,7.

## Art. 27. The Legislature.<sup>a</sup>

§ 270. **General Provisions.** The Constitutions of all the states provide that each house of the legislature shall judge of the qualifications, elections, and returns of its members:<sup>a</sup> N.H. C. 2,22 and 35; Mass. C. 2,1,2,4; 2,1,3,10; Me. C. 4,1,5; 4,2,5; 4,3,3; Vt. C. 2,9; Amt. 6; R.I. C. 4,6; Ct. C. 3,6; N.Y. C. 3, 10; N.J. C. 4,4,2; Pa. C. 2,9; O. C. 2,6; Ind. C. 4,10; Ill. C. 4,9; Mich. C. 4,9; Wis. C. 4,7; Io. C. 3,7; Minn. C. 4,3; Kan. C. 2,8; Neb. C. 3,7; Md. C. 3,19; Del. C. 2,6; Va. C. 5,7; W.Va. C. 6,24; N.C. C. 2,22; Ky. C. 2,20;

Tenn. C. 2,11; Mo. C. 4,17; Ark. C. 5,11; Tex. C. 3,8; Cal. C. 4,7; Ore. C. 4,11; Nev. C. 4,6; Col. C. 5,10; S.C. C. 2,14; Ga. C. 3,7,1; Ala. C. 4,8; Miss. C. 4,10; Fla. C. 4,6; La. C. 23; Dak.\* Pol. C. 2,9; N.M.\* 63,35; Ariz.\* 1110.

In most states, that each house shall choose its own officers: N.H. C. 2,22 and 37; Mass. C. 2,1,2,7; 2,1,3,10; Me. C. 4,1,7; 4,2,8; Vt.; R.I. C. 5,2; 6,4; Ct. C. 3,7; N.Y.; N.J. C. 4,4,3; Pa.; O. C. 2,8; Ind. C. 2,10; Ill.; Mich.; Wis. C. 4,9; Io.; Minn. C. 4,5; Neb.; Md.; Del. C. 2,5; Va. C. 5,7; W.Va.; N.C. C. 2, 18-20; Ky. C. 2,7 and 10; Tenn.; Mo.; Ark.; Tex. C. 3,9; Cal.; Ore.; Nev.; Col.; S.C. C. 2,15; Ga. C. 3,5,2; 3,6,2; Ala.; Miss.; Fla.; La.; Ariz.\*

*Except*, in many, the president of the senate, which place is filled (1) by the lieutenant-governor: Vt.; Ct. C. 4,13; N.Y.; Pa.; O. C. 3,16; Ind.; Ill.; Mich.; Wis.; Io. C. 4,18; Minn.; Neb.; Va.; N.C.; Tex.; Nev.; Col.; Miss. C. 4,11; Fla.; La. See also § 282. (2) By the governor or lieutenant-governor: R.I. C. 6,2. (3) If neither, by the secretary of state: R.I. C. 6,3.

In all states, that each house shall determine the rules of its own proceedings: N.H.; Mass.; Me. C. 4,3,4; Vt.; R.I. C. 4,7; Ct. C. 3,8; N.Y.; N.J.; Pa. C. 2,11; O. C. 2,8; Ind.; Ill.; Mich.; Wis. C. 4,8; Io. C. 3,9; Minn. C. 4,4; Kan.; Neb.; Md.; Del. C. 2,7; Va.; W.Va.; Ky. C. 2,21; Tenn. C. 2,12; Mo.; Ark. C. 5,12; Tex. C. 3,11; Cal. C. 4,9; Ore.; Nev.; Col. C. 5,12; S.C.; Ala. C. 4,11; Miss. C. 4,14; Fla.; La.; Ariz.\*

NOTE. — <sup>a</sup> See U. S. C. 1, 2 and 3 and 5. See § 240, note <sup>a</sup>.

§ 271. **Quorum.** <sup>a</sup> By the Constitutions of nearly all, (A) a majority of elected members in either house constitutes a quorum: <sup>b</sup> Me. C. 4,3,3; Vt. C. 2,9; Amt. 6; R.I. C. 4,6; Ct. C. 3,7; N.Y. C. 3,10; N.J. C. 4,4,2; Pa. C. 2,10; O. C. 2,6; Ill. C. 4,9; Mich. C. 4,8; Wis. C. 4,7; Io. C. 3,8; Minn. C. 4,3; Kan. C. 2,8; Neb. C. 3,7; Md. C. 3,20; Del. C. 2,6; Va. C. 5,6; W.Va. C. 6,2,4; N.C. C. 2,2; Ky. C. 2,19; Mo. C. 4,18; Ark. C. 5,11; Cal. C. 4,8; Nev. C. 4,13; Col. C. 5,11; S.C. C. 2,14; Ga. C. 3,4,4; Ala. C. 4,10; Miss. C. 4,12; Fla. C. 4,8; La. C. 32. But in some, two thirds is necessary: Ind. C. 4,11; Tenn. C. 2,11; Tex. C. 3,10; Ore. C. 4,12; Ariz.\* 1116.

And in one state, a majority is a quorum in the house; but when less than two thirds are present, a two-thirds vote is necessary to any act or proceeding; and in the senate thirteen are necessary to a quorum, and when less than sixteen are present, a vote of ten is necessary: N.H. C. 2,20 and 37. And in one other, sixteen members constitute a quorum in the senate, and one hundred in the house: Mass. C. 2,1,2,9; Amts. 22.

(B) But a smaller number than a quorum may generally adjourn from day to day and compel the attendance of absent members: Mass., Me., R.I., Ct., N.J., Pa., O., Ind., Mich., Wis., Io., Minn., Md., Del., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., S.C., Ga., Ala., Miss., Fla., La., Ariz.\*

NOTES. — <sup>a</sup> So in U. S. C. 1,5. <sup>b</sup> But there are often special provisions for finance bills; see Chaps. 2 and 3. See § 240, note <sup>a</sup>.

§ 272. **Speech in the Legislature.** The Constitutions of most states provide that no member of the legislature for any speech or debate in either house shall be questioned elsewhere: Me. C. 4,3,8; R.I. C. 4,5; Ct. C. 3,10; N.Y. C. 3,12; N.J. C. 4,4,8; Pa. C. 2,15; O. C. 2,12; Ind. C. 4,8; Ill. C. 4,14; Mich. C. 4,7; Minn. C. 4,8; Kan. C. 2,22; Md. C. Decln. of Rts. 10; Del. C. 2,11; Va. C. 5,11; W.Va. C. 6,17; Ky. C. 2,25; Tenn. C. 2,13; Mo. C. 14,12; Ark. C. 5,15; Tex.

C. 3,21; Ore. C. 4,9; Col. C. 5,16; Ga. C. 3,7,3; Ala. C. 4,14; La. C. 26; Ariz.\* 1118.

So, in many, that speech in the legislature can be the foundation of no prosecution or action whatever, civil or criminal, in any other court or place: N.H. C. 1,30; Mass. C. 1,21; Vt. C. 1,14; Wis. C. 4,16; Neb. C. 3,23; Md. C. 3,18.

§ 273. **Freedom from Arrest.** (A) By the Constitutions of most states, state senators and representatives are privileged from arrest, in all cases except treason, felony, and breach of the peace, (1) during the session of the legislature: Me. C. 4,3,8; N.J. C. 4,4,8; Pa. C. 2,15; O. C. 2,12; Ind. C. 4,8; Ill. C. 4,14; Io. C. 3,11; Minn. C. 4,8; Kan. C. 2,22; Neb. C. 3,12; Del. C. 2,11; Va. C. 5,11; W.Va. C. 6,17; Ky. C. 2,25; Tenn. C. 2,13; Mo. C. 14,12; Ark. C. 5,15; Tex. C. 3,14; Ore. C. 4,9; Col. C. 5,16; S.C. C. 2,17; Ga. C. 3,7,3; Ala. C. 4,14; Miss. C. 4,19; La. C. 26; Dak.\* Pol. C. 2,3; Uta.\* 9.

(2) In going to and returning from the legislature: Me., N.J., Pa., O., Ind., Ill., Io., Minn., Kan., Del., Ky., Tenn., Ark., Tex., Ore., Col., S.C., Ga., Ala., La., Uta.\*

(3) For fifteen days before and after the session of the legislature: Neb., Mo., Cal., Miss.

So, in two, ten days before and after: W.Va., S.C. (4) In some, they are so privileged from arrest (except as above) at all times while members of the legislature: Mich. C. 4,7; Wis. C. 4,15; Cal. C. 4,11; Ariz.\* 1118.

**Exceptions.** This privilege does not, in three states, protect from arrest in cases of violation of the oath of office (§ 224): Pa., Col., Ala.

(B) In two, they cannot be arrested or held to bail upon mesne process during their attendance upon, going to or returning from, the legislature: N.H. C. 2,21 (this is ambiguous, but § 22 seems to confine the word *arrest* to arrests for debt); Mass. C. 2,1,3,10 (the privilege is here confined to the House of Representatives, by the letter of the Constitution).

And it is further provided, in a few states, that members of the legislature are not subject to any civil process during the session of the legislature, and (1) for fifteen days before such session and after its termination: Ind., Mich.; Wis.; Kan.; Va.; Cal.; Ore.; Nev. C. 4,11; Ariz.\* (2) For fifteen days *before* the session: Ind. No suit at law can be maintained against them during the session: Uta.\*

So, in one, their persons are free from arrest and their property from attachment on any civil action during the session and for two days before and after it: R.I. C. 4,5; and in one other, they are free from arrest in civil process during the session and for four days before and after: Ct. C. 4,10.

§ 274. **Open Sessions.** The Constitutions of nearly all the states provide that the doors of each house of the legislature shall be open, or that the proceedings shall be public: N.H. C. 2,8; Vt. C. 2,13; Ct. C. 3,11; N.Y. C. 3,11; Pa. C. 2,13; O. C. 2,13; Ind. C. 4,13; Ill. C. 4,10; Mich. C. 4,12; Wis. C. 4,10; Io. C. 3,13; Minn. C. 4,19; Neb. C. 3,8; Md. C. 3,21; Del. C. 2,9; Tenn. C. 2,22; Mo. C. 4,19; Ark. C. 5,13; Tex. C. 3,16; Cal. C. 4,13; Ore. C. 4,14; Nev. C. 4,15; Col. C. 5,14; S.C. C. 2,27; Ala. C. 4,15; Miss. C. 4,15; Fla. C. 4,11; Ariz.\* 1113.

*Except* (1) such occasions as may, in the opinion of the House, require secrecy: N.H., Vt., Ct., N.Y., Pa., O.,<sup>a</sup> Ind., Ill., Mich., Wis., Io., Minn., Neb., Md., Del., Tenn., Mo., Ark., Cal., Ore., Col., S.C., Ala., Miss., Ariz.\* Or (2) except the senate when in executive session: Tex., Nev., Fla.

And in a few it is also required that the doors of either house should be open when sitting as committee of the whole: Pa., Ill., Neb., Md., Del., Tenn., Ark., Ore., Col., Miss.

NOTE. —<sup>a</sup> In the opinion of two thirds of those present.

§ 275 **Journals** The Constitutions of all the states but Massachusetts provide (A) that each house of the legislature shall keep a journal of its proceed-



ings: <sup>a</sup> N.H. C. 2,24; Me. C. 4,3,5; Vt. C. 2,14; R.I. C. 4,8; Ct. C. 3,9; N.Y. C. 3,11; N.J. C. 4,4,4; Pa. C. 2,12; O. C. 2,9; Ind. C. 4,12; Ill. C. 4,10; Mich. C. 4,10; Wis. C. 4,10; Io. C. 3,9; Minn. C. 4,5; Kan. C. 2,10; Neb. C. 3,8; Md. C. 3,22; Del. C. 2,8; Va. C. 5,10; W.Va. C. 6,41; N.C. C. 2,16; Ky. C. 2,22; Tenn. C. 2,21; Mo. C. 4,42; Ark. C. 5,12; Tex. C. 3,12; Cal. C. 4,10; Ore. C. 4,13; Nev. C. 4,14; Col. C. 5,13; S.C. C. 2,26; Ga. C. 3,7,4; Ala. C. 4,13; Miss. C. 4,14; Fla. C. 4,10; La. C. 28; Dak.\* Pol. C. 2,12; Ariz.\* 1111.

And, in all these states except Oregon, publish the same. But, in one, they are only to publish it when required by one fifth of the members: Ct.

*Except* they need not print such parts as may require secrecy: <sup>a</sup> Me., Ct., N.Y., Pa., Mich., Wis., Neb., Del., Tenn., Ark., Col., S.C., Ala., Miss., Ariz.\*

(B) The yeas and nays of the members of either house voting on any question shall, in some states, be always entered on the journal (see also § 304): Io.<sup>b</sup> C. 3,38; Minn.; Kan.; W.Va.<sup>b</sup> C. 6,44; Tenn.<sup>b</sup> C. 4,4; Ark.<sup>b</sup> C. 4,14; Cal.;<sup>b</sup> S.C.<sup>b</sup> C. 2,24.

So, in three, at the request of any one member: N.H., Vt., Del. So, in several, at the request of two members in either house: Pa.; O.; Ind.; Io. C. 3,10; Neb.; Ky.; Mo.; Ore.; Col.; S.C. So, in one, at the request of two in the senate, or five in the house: Ill. So, in four, at the request of three in either house: Tex., Cal., Nev., Fla. So, in three, at the request of five in either house: Md., Tenn., Ark. So, in one, at the request of one sixth of the members present in either house: Wis. C. 4,20. In many, at the request of one fifth of the members present in either: <sup>a</sup> Me.; R.I.; Ct.; N.J.; Va.; N.C. C. 2,26; Ga. C. 3,7,6; La. C. 34. In one, of one fifth of the members elected in either: Mich., Ariz.\* In three, of one tenth of those present: W.Va., Ala., Miss. In one, whenever the Constitution requires a two-thirds vote: Ga. C. 3,7,21.

Any member may dissent from or protest against any act or proceeding he may deem injurious to the public, and have the reasons for his dissent entered on the journal: N.H.; Vt.; O. C. 2,10; Ind. C. 4,26; Mich.; Io.; Kan. C. 2,11; N.C. C. 2,17; Tenn. C. 2,27; Ore. C. 4,26; S.C.; Ala.; Ariz.\*

So, in two, any two or more members: Ill., Minn. C. 4,16.

NOTES. — <sup>a</sup> So in U.S. C. 1,5. <sup>b</sup> Only, in these states, of votes on *elections*.

§ 276. **Expulsion of Members, etc.** By the Constitutions of most states, either house of the legislature may expel any of its members by a vote of two thirds of the elected members: <sup>a</sup> Me. C. 4,3,4; R.I. C. 4,7; Ct. C. 3,8; N.J.<sup>b</sup> C. 4,4,3; Pa.<sup>b</sup> C. 2,11; O.<sup>b</sup> C. 2,8; Ind.<sup>b</sup> C. 2,8; Ill. C. 4,9; Mich. C. 4,9; Wis. C. 4,8; Io.<sup>b</sup> C. 3,9; Minn.<sup>b</sup> C. 4,4; Neb. C. 3,7; Md. C. 3,19; Del.<sup>b</sup> C. 2,7; Va.<sup>b</sup> C. 5,7; W.Va.<sup>b</sup> C. 6,25; Ky.<sup>b</sup> C. 2,21; Tenn.<sup>b</sup> C. 2,12; Mo. C. 4,17; Ark.<sup>b</sup> C. 5,12; Tex.<sup>b</sup> C. 3,11; Cal. C. 4,9; Ore.<sup>b</sup> C. 4,15; Nev. C. 4,6; Col.<sup>b</sup> C. 5,12; S.C.<sup>b</sup> C. 2,15; Ga.<sup>b</sup> C. 3,7,1; Ala.<sup>b</sup> C. 4,11; Miss.<sup>c</sup> C. 4,14; Fla.<sup>c</sup> C. 4,6; La. C. 23; Ariz.\* 1110. So, in one, by a majority vote of a quorum: Vt. C. 2,9.

But no member can, in many, be expelled a second time for the same cause: Me., R.I., Ct., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Neb., Md., W.Va., Ky., Tenn., Mo., Ark., Tex., Ore., Col., S.C., Ala., Miss., Ariz.\*

Nor, in two, for any cause known to his constituents before his election: Vt., Mich., Ariz.\* The reasons for the expulsion must, in two, be entered on the journal with the names of the members voting: Mich., Ariz.\*

In four, a member expelled for corruption is not thereafter eligible for either house: Pa.; Ark.; Col.; Ala. C. 4,12.

Each House has, in most states, power to punish its members for disorderly conduct: Me., R.I., Ct., N.J., Pa., O., Ind., Ill., Wis., Io., Minn., Md., Del., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Ore., Nev., Col., S.C., Ala., Miss., Fla., La., Dak.\* Pol. C. 2,4; Ariz.\* 1120.

And in many, either House may punish any person not a member for disorderly or



contemptuous conduct, such punishment not to extend beyond final adjournment of the session: Me. C. 4,3,6; W.Va. C. 6,26; Nev. C. 4,7; S.C. C. 2,16; Ga. C. 3,7,2; Miss. C. 4,15; Fla. C. 4,7; Dak.\*; Ariz.\*

In five, such punishment is to be by imprisonment: N.H. C. 2,22-23; Mass. C. 2,1,3,10-11; Me.; Tenn. C. 2,14 But not over thirty days: Mass. Not over ten days: N.H.; Md. C. 2,23; Mo.; La. C. 24. Not over twenty-four hours at a time: Ind. C. 4,15; Ill.; Minn. C. 4,18; Neb.; Ore. C. 4,16. No time is specified: Wis., Col., Ala. Not over forty-eight hours: Tex. C. 3,15. The House may commit any person to gaol for crime, until duly released by law: Md. C. 3,24.

NOTES. — <sup>a</sup> See U.S. C. 1,5. <sup>b</sup> The provision is ambiguous; as it does not appear whether "two thirds" means two thirds of a quorum, or of the full house elected. <sup>c</sup> Two thirds of the members present.

§ 277. **Time of Session.** (See § 240, note <sup>a</sup>.) There is in three states a general provision of the Constitution that the legislature should be frequently convened: Mass. C. 1,22; Md. Decln. of Rts. 12; S.C. C. 1,27.

The regular session of the legislature is, in one state, twice a year: R.I. C. 4,3; Amt. 3; in four states, once each year: Mass. C. Amt. 10; N.Y. C. 3,2; N.J. C. 4,1,3; S.C. C. 2,12; in many states and most territories once every two years; thus, in the even year: Vt. C. Amt. 24,1; O. C. 2,25; Md. C. 3,14; Va. C. 5,6; Ark. C. 5,5; Ore. C. 4,10; Ga. C. 3,4,3; Ala. C. 4,5; Stats. 32\*; Miss. C. Amt. 4; La. C. 21; Ida.\* 1879, p. 31, § 1; Wy.\* 1879,52; Uta.\* 8; N.M.\* 1884,82; U.S. R. S. 1846; and in others, in the odd year: N.H. C. 2,9; Me. C. Amt. 23; Ct. C. Amt. 27; Pa. C. 2,4; Ind. C. 4,9; Ill. C. 4,9; Mich. C. 4,33; Wis. C. 4,11, Amt. Stats.\*; 99, Amt.; Io. C. 3,2; Minn. C. 4,1; Kan. C. 2,25; Neb. C. 3,7 and 3; Del. C. 2,4; W.Va. C. 6,18; N.C. C. 2,2; Ky. C. 2,18; Tenn. C. 2,8; Mo. C. 4,20; Ark.\* 1875,39,1; Tex. C. 3,5; Cal. C. 4,2; Nev. C. 4,2; 17,12; Col. C. 5,7; Fla. C. 4,2; Wash.\* 1883, p. 62; Dak.\*; Mon.\* U.S. 1876,287; G. L. 793; N.M.\*; Ariz.\* 1125. But often there are adjourned sessions held in the intervening year. In Pennsylvania, such adjourned sessions are, however, prohibited.

Beginning, in a number of states, on the first Monday in January: O., Tenn., Cal., Nev., Ariz.\*; on the first Wednesday in January: Me. C. 4,3,1; Mass.; Mich.; Md.; Mo.; Col.; on the Wednesday after the first Tuesday in January: Ct.; on the second Wednesday in January: Wis.,\* W. Va.; on the first Tuesday after the first Monday in January: Minn.\* 3,4; Miss.; Fla.; on the first Thursday after the first Monday in January: Ind.; on the second Tuesday in January: N.J. C. 4,1,3; Kan.; Tex.\* 3141; Dak.\* Pol. C. 2,2; Wy.\*; on the first Wednesday of October: Vt.; on the first Wednesday in June: N.H. C. 2,3; on the Wednesday after the first Monday in January: Ct., Ill., N.C.; on the first Tuesday in January: N.Y.\* 1,7,2,1; Pa. C. 2,4; Neb.; Del.; on the second Monday in January: Io., Ark., Mon,\* Uta.\*; on the first Tuesday after the second Monday in November: Ala., 1879, Feb. 21; Ark.; on the second Monday in September: Ore.; on the fourth Tuesday in November: S.C.; on the second Monday in May: La.; on the first Wednesday in November: Ga.; on the second Monday in December: Ida.\*; on the last Monday in December: N.M.\* 1884,82; on the first Monday in December: Ky.\* 68,10; Cal.\* 235; Wash.\*; on the first Wednesday in December: Va.\* 1877,248; on the first Tuesday in November: Wy.\* In Rhode Island, on the first Tuesday in May, at Newport, with an adjourned session at Providence.

Extra sessions on extraordinary occasions may be convened by the governor: <sup>a</sup> Mass. C. Amt. 10; Me. C. 5,1,13; Vt. C. 2,11; R.I. C. 7,7; Ct. C. 3,2; N.Y. C. 4,4; N.J. C. 5,6; Pa. C. 4,12; O. C. 3,8; Ind.; Ill. C. 5,8; Mich. C. 5,7; Wis. C. 5,4; Io. C. 4,11; Minn. C. 5,4; Kan. C. 1,5; Neb. C. 5,8; Md. C. 2,16; Del. C. 3,12; Va.<sup>b</sup> C. 4,5; W.Va.<sup>c</sup> C. 6,19; 7,7; N.C.<sup>d</sup> C. 3,9; Ky. C. 3,13; Tenn. C. 3,9; Mo. C. 5,9; Ark. C. 6,19; Tex. C. 4,8; Cal. C. 5,9; Ore. C. 5,12; Nev. C. 5,9; Col. C. 4,9; S.C. C. 3,16; Ga. C. 5,1,13; Ala. C. 5,10; Miss. C. 5,7; Fla. C. 4,2; 5,8; La. C. 72; Wash.\*; Ida.\*; Mon.\*; U.S.<sup>e</sup> R. S. 1923; 1874, 388; Ariz.\* 1090.

So, in two, the governor may call the legislature together sooner than the time to which it was adjourned or prorogued, if necessity require: N.H. C. 2,50; Mass. C. 2,2,1,5.

No session can extend beyond the term of (1) sixty-one days: Ind. C. 4,29; (2) forty days: Col. C. 5,6; Ga. C. 3,4,6; (3) sixty days: Minn. C. 4,1; Ky. C. 2,24; Ark. C. 5,17; Nev. C. 4,29; Fla. C. 4,25; La. C. 21; Territories, U.S. R. S. 1852; U.S. 1881, C. 7; (4) ninety days: Md. C. 3,15; Va. C. 5,6; (5) fifty days: Ala. C. 4,5; (6) forty-five days: W.Va. C. 6,22. So, in one, no member will be paid, or paid full rates, for more than a session (1) of seventy-five days: Tenn. C. 2,23; (2) of seventy days: Mo. C. 4,16; (3) of sixty days: Tex. C. 3,24; Cal. C. 4,2; (4) forty days: Ore. C. 4,29.

Unless continued by a two-thirds vote: W.Va., Ky., Ga. And in Virginia, the session may be continued for thirty days beyond the time so above limited, upon concurrence of three fifths of the members.

NOTE. — <sup>a</sup> But no such extraordinary session can be called in the territories without the approval of the President of the United States. <sup>b</sup> On application of two thirds of the members. <sup>c</sup> Of three fifths of the elected members, except on extraordinary occasions. <sup>d</sup> With advice of the council.

§ 278. **Adjournment.** By the Constitutions of all states, neither House can adjourn without the consent of the other. (1) for more than three days: Vt. C. Amt. 3; N.J. C. 4,4,5; Pa. C. 2,14; Ind. C. 4,10; Mich. C. 4,12; Wis. C. 4,10; Io. C. 3,14; Minn.<sup>a</sup> C. 4,6; Neb. C. 3,8; Md. C. 3,25; Del. C. 2,10; Va. C. 5,6; W.Va. C. 6,23; Ky. C. 2,23; Tenn. C. 2,16; Ark. C. 5,28; Tex. C. 3,17; Cal. C. 4,14; Ore. C. 4,11; Nev. C. 4,15; Col. C. 5,15; S.C. C. 2,25; Ga. C. 3,7,24; Ala. C. 4,16; Miss. C. 4,13; Fla. C. 4,11; La. C. 33; Ariz.\* 1113. So, in others, (2) for not more than two days: N.H. C. 2,19 and 36; Mass. C. 2,1,2,6; 2,1,3,8; Me. C. 4,3,12; R.I. C. 4,9; N.Y. C. 3,11; O.<sup>a</sup> C. 2,14; Ill. C. 4,10; Kan.<sup>a</sup> C. 2,10; Mo. C. 4,23.

Nor, in many states, without such consent, to any other place than that in which it may be sitting: Me., Vt., R.I., N.J., Pa., O., Ind., Ill., Mich., Io., Minn., Md., Del., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., S.C., Ga., Ala., Miss., Fla., La., Ariz.\*

But in one it may adjourn to such other place by concurrent vote of two thirds present: Md. And in one other, every adjournment or recess taken by the legislature for more than three days has the effect of an adjournment *sine die*: Mo. C. 4,21.

**Adjournment by the Governor.** In most states, if the two Houses disagree with respect to the time of adjournment, the governor may adjourn the legislature to such time as he think proper, (1) not beyond the first day of the next regular session: Me. C. 5,1,13; R.I. C. 7,6; Ct. C. 4,7; O. C. 3,9; Ill. C. 5,9; Io. C. 4,13; Kan. C. 1,6; Neb. C. 5,9; Ark. C. 6,20; Cal. C. 5,11; Nev. C. 5,11; Col. C. 4,10; S.C. C. 3,16; Miss. C. 5,7; Fla. C. 5,10; (2) not for more than ninety days: N.H. C. 2,42; Mass. C. 2,2,1,6; Del. C. 3,12; (3) to such time as he think proper: Vt. C. Amt. 3; Ga.; (4) not exceeding four months: Pa. C. 4,12; Ky. C. 3,13.

NOTE. — <sup>a</sup> Sundays excepted.

## Art. 28. The Executive. (See § 240, note <sup>a</sup>)

§ 280. **Duties of the Governor.** It is in most states declared to be the duty of the governor to take care that the laws are faithfully executed: Me. C. 5,1,12; Vt. C. 2,11; R.I. C. 7,2; Ct. C. 4,9; N.Y. C. 4,4; N.J. C. 5,6; Pa. C. 4,2; O. C. 3,6; Ind. C. 5,16; Ill. C. 5,6; Mich. C. 5,6; Wis. C. 5,4; Io. C. 4,9; Minn. C. 5,4; Kan. C. 1,3; Neb. C. 5,6; Md. C. 2,9; Del. C. 3,13; Va. C. 4,5; W.Va. C. 7,5; N.C. C. 3,7; Ky. C. 3,14; Tenn. C. 3,10; Mo. C. 5,6; Ark. C. 6,7; Tex. C. 4,10; Cal. C. 5,7; Ore. C. 5,10; Nev. C. 5,7; Col. C. 4,2; S.C. C. 3,12; Ga. C.

5,1,12; Ala. C. 5,8; Miss. C. 5,9; Fla. C. 5,6; La. C. 72; Ariz.\* 1089; Territories, U.S. R. S. 1841.

He is generally, at the commencement of each session, or from time to time, to give the legislature information by message of the condition of the State, and recommend such measures as he deems expedient: Me. C. 5,1,9; Ct. C. 4,8; N.Y.; N.J.; Pa. C. 4,11; O. C. 3,7; Ind. C. 5,13; Ill. C. 5,7; Mich. C. 5,8; Wis.; Io. C. 4,12; Minn. C. 5,4; Kan. C. 1,5; Neb. C. 5,7; Md. C. 2,19; Del. C. 3,11; Va.; W.Va. C. 7,6; N.C. C. 3,5; Ky. C. 3,12; Tenn. C. 3,11; Mo. C. 5,9; Ark. C. 6,8; Tex. C. 4,9; Cal. C. 5,10; Ore. C. 5,11; Nev. C. 5,10; Col. C. 4,8; S.C. C. 3,15; Ga. C. 5,1,13; Ala. C. 5,11; Miss. C. 5,8; Fla. C. 5,9; La. C. 71; Ariz.\* 1091.

He must, in some states, present estimates, at the commencement of the session, to the legislature of the amount of money required to be raised by taxation for all state purposes: Ill.; Neb.; W.Va. C. 7,6; Mo. C. 5,10; Tex.; Col.; Ala.

§ 231. **Powers of the Governor.** By the Constitutions of most states, the governor may require information in writing from officers of the executive department upon any subject relating to the duties of their respective offices: Me. C. 5,1,10; Ct. C. 4,6; Pa. C. 4,10; O. C. 3,6; Ind. C. 5,15; Ill. C. 5,21; Mich. C. 5,5; Io. C. 4,8; Minn. C. 5,4; Kan. C. 1,4; Neb. C. 5,22; Del. C. 3,10; Va. C. 4,6; W.Va. C. 6,18; N.C. C. 3,7; Ky. C. 3,11; Tenn. C. 3,8; Mo. C. 5,22; Ark. C. 6,7; Tex. C. 4,24; Cal. C. 5,6; Ore. C. 5,13; Nev. C. 5,6; Col. C. 4,8; S.C. C. 3,14; Ga. C. 5,1,18; Ala. C. 5,9; Miss. C. 5,6; Fla. C. 5,5; La. C. 70; Ariz.\* 1088.

So, in a few, from all officers or managers of state institutions: N.H. C. 2,57; Mass. C. 2,2,1,12; Neb.; Mo.; Col.; Ala.

He may, in four, require such information to be given under oath: Ill., Tex., Col., Ala. So, in two, any officer making a false report is guilty of perjury: Mo., Ala.

§ 232. **The Lieutenant Governor,** by the Constitutions of most states, succeeds to the office of governor upon the death, impeachment, or other disability of the latter: Mass. C. 2,2,2,3; Vt. C. Amt. 8; R.I. C. 7,9; Ct. C. 4,14; N.Y. C. 4,6; Pa. C. 4,13; O. C. 3,15; Ind. C. 5,10; Ill. C. 5,17; Mich. C. 5,12; Wis. C. 5,7; Io. C. 4,17; Minn. C. 5,6; Kan. C. 1,11; Neb. C. 5,16; Va. C. 4,10; N.C. C. 3,12; Ky. C. 3,17; Mo. C. 5,16; Tex. C. 4,16; Cal. C. 5,16; Nev. C. 5,18; Col. C. 4,13; S.C. C. 3,9; Miss. C. 5,17; Fla. C. 5,14; La. C. 62.

But in many (where there is no lieutenant-governor), the president of the senate succeeds the governor: N.H. C. 2,49; Me. C. 5,1,14; N.J. C. 5,12; Md.<sup>a</sup> C. 2,7; Del. C. 3,14; W.Va. C. 7,16; Tenn. C. 3,12; Ark. C. 5,18; 6,12; Ga. C. 5,1,8; Ala. C. 5,15. And after him, the speaker of the house: Me.; N.J.; W.Va.; Tenn.; Ark. C. 6,13; Ga.; Ala.

In Oregon, the secretary of state succeeds (so in the territories, U.S. R. S. 1843), and after him the president of the senate: Ore. C. 5,8. And in two, the legislature, in case of vacancy, elects a governor: Md. C. 2,6; W.Va.<sup>b</sup> But if the vacancy occurs in the first three years of the term, there is an election by the people: W.Va. So, if in the first two years of the term: Ky. C. 2,18. So, if a year of the term remains unexpired: Ark. C. 6,14.

The lieutenant-governor is in most states president of the senate, with a casting vote: Vt. C. Amt. 6; Ct. C. 4,13; N.Y. C. 4,7; Pa. C. 4,4; O. C. 3,16; Ind. C. 5,21; Ill. C. 5,18; Mich. C. 5,14; Wis. C. 5,8; Io. C. 4,18; Minn. C. 5,6; Kan. C. 1,12; Neb. C. 5,17; Va. C. 4,11; N.C. C. 3,11; Ky. C. 3,16; Mo. C. 5,15; Tex. C. 4,16; Cal. C. 5,15; Nev. C. 5,17; Col. C. 4,14; S.C. C. 3,5 and 6; Miss. C. 5,15; Fla.; La. C. 64.



And in one, he is a member of the council, and president thereof when the governor's chair is vacant: Mass. C. 2,2,2,2.

But he cannot, in one, grant pardons or reprieves: Vt. Nor, in one, can he command the militia except as lieutenant-general, but by advice of the senate: Vt.

Upon the death, impeachment, or inability of the lieutenant-governor also, the temporary president of the senate is, in most states, governor *pro tempore*: R.I. C. 7,10; Ct. C. 4,15; N.Y.; Pa. C. 4,14; O. C. 3,17; Ill. C. 5,19; Mich. C. 5,13; Io. C. 4,19; Minn.; Kan. C. 1,13; Neb. C. 5,18; N.C.; Ky. C. 3,18; Mo. C. 5,17; Tex. C. 4,17; Cal.; Nev.; Col. C. 4,15; S.C.\* 469; Miss.; Fla.; La.

But in one, the council, or a majority of it, has the power of the governor: Mass. C. 2,2,2,6. And in one, the secretary of state succeeds: Wis. And so, by succession, in several, the speaker of the house succeeds the president of the senate: O.; Ill.; Io.; Kan.; Neb.; Mo.; Col.; S.C.\* 470; Miss.; and the secretary of state the speaker: Del.

NOTES. — <sup>a</sup> Until election of a governor as below. <sup>b</sup> When there is no president of the senate, etc., as above.

## Art. 29. The Militia.

§ 290. **General Provisions.** (A) In four state Constitutions it is declared that every member of society is bound to yield his personal service, or an equivalent thereto, to the state for the defence of life, liberty, and property: Mass. C. 1,10; Vt. C. 1,9; Ore. C. 1,27; S.C. C. 1,36.

(B) But in many states, it is declared that a person conscientiously opposed to bearing arms will not be compelled thereto (1) if he will pay an equivalent: N.H. C. 1,13; Me. C. 7,5; Vt.; Ind. C. 12,6; Ill. C. 12,6; Io. C. 6,2; Va. C. 9,1; Ky. C. 7,1; Tenn. C. 1,28; 8,3; Mo. C. 13,1; Tex. C. 16,47; Ore. C. 10,2; Col. C. 17,5; S.C. C. 1,30; La. C. 183.

But in a few it seems that he may be compelled to bear arms in time of war, as the exemption applies only to militia duty in time of peace: Ill., Io., Ore., Col. (2) "Upon such terms as may be prescribed by law," he will be relieved from such service: N.Y. C. 11,1; Mich. C. 17,1; Kan. C. 8,1; N.C. C. 12,1; Mo.; Fla. C. 11,1. (3) And in Maine, Quakers and Shakers and clergymen are excused.

(C) So, in several, the militia is declared the proper and natural defence of a free state: N.H. C. 1,24; Md. C. Decln. of Rts. 28; Va. C. 1,15; N.C. C. 1,24; Tenn. C. 1,24; Ga. C. 10,1,1; La. C. 3.

§ 291. **The Militia consists**, in most states, (A) of all able-bodied male *persons* (*citizens*, in states so <sup>b</sup> noted; *inhabitants*, in Oregon) between the ages of (1) eighteen and forty-five: O. C. 9,1; Ind. C. 12,1; Ill. C. 12,1; Mich.<sup>b</sup> C. 17,1; Io.<sup>b</sup> C. 6,1; Va. C. 9,1; Ky. C. 7,1; Mo. C. 13,1; Ark. C. 11,1; Ore. C. 10,1; Col. C. 17,1; S.C. C. 13,1; Ala. C. 12,1; Miss. C. 9,1; Fla. C. 11,1. (2) Twenty-one and forty-five: Kan.<sup>b</sup> C. 8,1. (3) Twenty-one and forty: N.C. C. 12,1.

In a few, they must in addition be *white*: O., Ind., Kan., Ky.

(B) In others, the whole matter is left to the legislature to be determined by law: N.J. C. 7,1,1; Pa. C. 11,1; Wis. C. 4,29; Minn. C. 12,1; Neb. C. 13,1; Md. C. 9,1; Tex. C. 16,46; Cal. C. 8,1; Nev. C. 12,1; Ga. C. 10,1,1; La. C. 181.

NOTES. — <sup>a</sup> This applies only to volunteer companies. <sup>b</sup> See above.

§ 292. **Civil Power.**<sup>a</sup> The military is, in all states except New York, declared forever subordinate to the civil power: N.H. C. 1,26; Mass. C. 1,17; Me. C. 1,17; Vt. C. 1,16; R.I. C. 1,18; Ct. C. 1,18; N.J. C. 1,12; Pa. C. 1,22; O. C. 1,4; Ind. C. 1,33; Ill. C. 2,15; Mich. C. 18,8; Wis. C. 1,20; Io. C. 1,14;



Minn. C. 1,14; Kan. C. Bill of Rts. 4; Neb. C. 1,17; Md. Decln. of Rts. 30; Del. C. 1,17; Va. C. 1,15; W.Va. C. 3,12; N.C. C. 1,24; Ky. C. 13,26; Tenn. C. 1,24; Mo. C. 2,27; Ark. C. 2,27; Tex. C. 1,24; Cal. C. 1,12; Ore. C. 1,27; Nev. C. 1,11; Col. C. 2,22; S.C. C. 1,28; Ga. C. 1,1,19; Ala. C. 1,28; Miss. C. 1,25; Fla. C. Decln. of Rts. 12; La. C. 12; 162; N.M.\* 1851, July 12, § 16; Ariz.\* Bill of Rts. 3.

NOTE. — <sup>a</sup> Compare Eng. Stat. 1 W. & M. Sess. 2; also Declaration of Independence. See § 240, note <sup>a</sup>.

§ 293. **Martial Law** is in one state declared inconsistent with a free government, and is not "confided" to any department of the state government: Tenn. C. 1,25. And in several, no person can be subjected to martial law except the army, navy, or militia in actual service: N.H. C. 1,34; Mass. C. 1,28; Me. C. 1,14; Vt. C. 1,17; Md. Decln. of Rts. 32; W.Va. C. 3,12; Tenn. C. 1,25; S.C. C. 1,25.

In one, martial law is to be employed only when occasion necessarily requires it: R.I. C. 1,18. But in three, it seems any person may be subjected to martial law by authority of the legislature: N.H., Mass., S.C.

§ 294. **Standing Armies.**<sup>a</sup> The Constitutions of most of the states provide that (A) standing armies are dangerous to liberty and ought not to be kept up in time of peace: N.H. C. 1,25; Mass. C. 1,17; Me. C. 1,17; Vt. C. 1,16; Pa. C. 1,22; O. C. 1,4; Io. C. 1,14; Minn. C. 1,14; Kan. C. Bill of Rts. 4; Va. C. 1,15; W.Va. C. 3,12; N.C. C. 1,24; Ky. C. 13,26; Tenn. C. 1,24; Ark. C. 2,27; Cal. C. 1,12; Nev. C. 1,11; S.C. C. 1,28.

And in time of war the appropriation for such army cannot be for a longer term than two years: Io.; Ky. C. 8,5; Nev. Not for a longer term than one year: Ala. C. 1,28.

(B) But in several, it seems standing armies may be kept up at any time with the authority of the legislature: N.H.; Mass.; Me.; Pa.; Md. C. Decln. of Rts. 29; Del. C. 1,17; Ky.; S.C.; Ala.

NOTE. — <sup>a</sup> § 292, note <sup>a</sup>.

§ 295. **Billeting Soldiers.**<sup>a</sup> By the Constitutions of all but Vermont, New York, Wisconsin, Virginia, and Mississippi, no soldier can be quartered in any house without the consent of the owner, except in time of war; and then only (in all these states except Louisiana) in the manner by law prescribed: N.H. C. 1,27; Mass. C. 1,27; Me. C. 1,18; R.I. C. 1,19; Ct. C. 1,19; N.J. C. 1,13; Pa. C. 1,23; O. C. 1,13; Ind. C. 1,34; Ill. C. 2,16; Mich. C. 18,9; Io. C. 1,15; Kan. C. Bill of Rts. 14; Neb. C. 1,18; Md. Decln. of Rts. 31; Del. C. 1,18; W.Va. C. 3,12; N.C. C. 1,36; Ky. C. 13,27; Tenn. C. 1,27; Mo. C. 2,27; Ark. C. 2,27; Tex. C. 1,25; Cal. C. 1,12; Ore. C. 1,28; Nev. C. 1,12; Col. C. 2,22; S.C. C. 1,29; Ga. C. 1,1,19; Ala. C. 1,29; Fla. C. Decln. of Rts. 13; La. C. 162; Ariz.\* Bill of Rts. 4.

NOTE. — <sup>a</sup> U.S. C. Art. 3. See § 240, note <sup>a</sup>.

§ 296. **Privileges of Militia.** Members of the militia are, by the Constitutions of several states, (A) privileged from arrest during their attendance at musters and elections and in going to and returning from them.

*Except* in cases of treason, felony, and breach of the peace: Ill. C. 12,4; Mo. C. 13,5; Ark. C. 11,3; Ala. C. 12,5; Miss. C. 9,8.

And in several, no person can be imprisoned for a militia fine in time of peace: N.J. C. 1,17; Mich. C. 6,33; Io. C. 1,19; Cal. C. 1,15; Nev. C. 1,14.

§ 297. **The Governor is Commander-in-Chief** of the militia (and army and navy of the state), by the Constitutions of all states : N.H. C. 2,51 ; Mass. C. 2,2,1,7 ; Me. C. 5,1,7 ; Vt. C. 2,11 ; R.I. C. 7,3 ; Ct. C. 4,5 ; N.Y. C. 4,4 ; N.J. C. 5,6 ; Pa. C. 4,7 ; O. C. 3,10 ; Ind. C. 5,12 ; Ill. C. 5,14 ; Mich. C. 5,4 ; Wis. C. 5,4 ; Io. C. 4,7 ; Minn. C. 5,4 ; Kan. C. 8,4 ; Neb. C. 5,14 ; Md. C. 2,8 ; Del. C. 3,7 ; Va. C. 4,5 ; W.Va. C. 7,12 ; N.C. C. 3,8 ; Ky. C. 3,8 ; Tenn. C. 3,5 ; Mo. C. 5,7 ; Ark. C. 6,6 ; Tex. C. 4,7 ; Cal. C. 5,5 ; Ore. C. 5,9 ; Nev. C. 5,5 ; Col. C. 4,5 ; S.C. C. 3,10 ; Ga. C. 5,1,11 ; Ala. C. 5,18 ; 12,6 ; Miss. C. 5,5 ; Fla. C. 5,4 ; La. C. 183. And so, in all the territories, by U.S. R. S. 1841.

*Except*, in many, when they are called into the United States service : Me., R.I., Ct., Pa., O., Ill., Neb., Del., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Nev., Col., S.C., Ala., Miss., Fla.

But he is not, in a few, to command in person in the field unless he is advised to do so by resolution of the legislature : Md., Ky., Mo., Ala.

And he is not, without legislative authority or their consent, to lead or order the militia out of the state : N.H., Mass., Me.

§ 298. **Purposes of the Militia.** The governor may, by the Constitutions of most states, call out the militia (1) to execute the laws : Ind. C. 5,12 ; Ill. C. 5,14 ; Mich. C. 5,4 ; Minn. C. 5,4 ; Kan. C. 8,4 ; Neb. C. 5,14 ; Md. C. 2,8 ; Va. C. 4,5 ; W.Va. C. 7,12 ; N.C. C. 12,3 ; Mo. C. 5,7 ; Ark. C. 11,4 ; Tex. C. 4,7 ; Cal. C. 8,1 ; Ore. C. 5,9 ; Nev. C. 12,2 ; Col. C. 4,5 ; S.C. C. 13,2 ; Ala. C. 5,18 ; Miss. C. 9,5 ; Fla. C. 11,4 ; La. C. 183. So, in Louisiana, " when the public service requires it."

(2) To suppress insurrection : Ind., Ill., Mich., Minn., Kan., Neb., Md., Va., W.Va., N.C., Mo., Ark., Tex., Cal., Ore., Nev., Col., S.C., Ala., Miss., Fla.

But so, in three, only when the legislature declare by law that the public safety requires it : N.H. C. 2,51 ; Mass. C. 2,2,1,7 ; Tenn. C. 3,5.

(3) And to repel invasion : N.H., Mass., Ind., Ill., Mich., Minn., Kan., Neb., Md., Va., W.Va., N.C., Mo., Ark., Tex., Cal., Ore., Nev., Col., S.C., Ala., Miss., Fla.

So, in Tennessee, only with special enactment of the legislature, as in (2). So, to protect the frontier : Tex.

(4) And in four, to preserve the public peace : Ark., S.C., Fla., La.

§ 299. **Miscellaneous Provisions.** The California Constitution provides that all military organizations receiving state support should carry under arms no device or flag of any nation other than the United States or state flag : Cal. C. 8,2.

## CHAPTER II.

### LEGISLATION : FORM.

#### Art. 30. Process of Legislation.

§ 300. **Bills.** By the Constitutions of many states, no law can be passed except by bill : N.Y. C. 3,14 ; Pa. C. 3,1 ; Ind. C. 4,1 ; Wis. C. 4,17 ; Kan. C. 2,20 ; Neb. C. 3,10 ; Md. C. 3,29 ; Mo. C. 4,25 ; Ark. C. 5,21 ; Tex. C. 3,30 ; Cal. C. 4,15 ; Nev. C. 4,23 ; Col. C. 5,17 ; Ala. C. 4,19.

Bills may generally originate in either house of the legislature : Me. C. 4,3,9 ; Vt. C. Art. 3 ; N.Y. C. 3,13 ; O. C. 2,15 ; Ind. C. 4,17 ; Ill. C. 4,12 ; Mich. C. 4,13 ; Wis. C. 4,19 ; Io. C. 3,15 ; Kan. C. 2,12 ; Neb. C. 3,9 ; Md. C. 3,27 ; Va.

C. 5,9 ; W.Va. C. 6,28 ; Tenn. C. 2,17 ; Mo. C. 4,26 ; Tex. C. 3,31 ; Cal. ; Ore. C. 4,18 ; Nev. C. 4,16 ; S.C. C. 2,18 ; Miss. C. 4,23 ; Fla. C. 4,12 ; Ariz.\* 1114. And the same is probably implied in all other states. See § 303.

But they may be amended, altered, or rejected in the other house : <sup>a</sup> Me., N.Y., Pa., O. ; Ind., Ill., Wis., Io., Kan., Neb., Md., Va., W.Va., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., S.C., Ala., Miss., Fla. This is also implied in other states.

But not, in some states, so as to change the original purpose of the bill : Pa., Mo., Ark., Tex., Col., Ala.

NOTE. — <sup>a</sup> Compare also §§ 201,310.

§ 301. **Form of Bills.** The Constitutions of most states prescribe that no law shall relate to more than one subject, and that this shall be expressed in the title : N.J. C. 4,7,4 ; Pa. C. 3,3 ; O. C. 3,16 ; Ind. C. 4,19 ; Ill. C. 4,13 ; Mich. C. 4,20 ; Io. C. 3,29 ; Minn. C. 4,27 ; Kan. C. 2,16 ; Neb. C. 3,11 ; Md. C. 3,29 ; Va. C. 5,15 ; W.Va. C. 6,30 ; Ky. C. 2,37 ; Tenn. C. 2,17 ; Mo. C. 4,28 ; Tex. C. 3,35 ; Cal. C. 4,24 ; Ore. C. 4,20 ; Nev. C. 4,17 ; Col. C. 5,21 ; S.C. C. 2,20 ; Ga. C. 3,7,8 ; Ala. C. 4,2 ; Fla. C. 4,14 ; La. C. 29 ; Wash. U.S. R. S. 1924.

*Except*, in a few, general appropriation bills : Pa., Mo., Tex., Col., Ala. See § 311. And in two, the principal provision only applies to private or local bills : N.Y. C. 3,16 ; Wis. C. 4,18.

But, in several states, if there are other subjects in the bill, not embraced in the title, the bill is nevertheless good *pro tanto* as to those that are : Ind., Ill., Io., W.Va., Tex., Cal., Ore., Col.

By the Constitutions of two states every act is to be plainly worded, avoiding, so far as possible, the use of technical terms : Ind. C. 4,20 ; Ore. C. 4,21. And by that of Louisiana, the legislature shall never adopt any system or code of laws by general reference to such code, but shall in all cases recite at length the provisions enacted (compare § 309) : La. C. 31.

§ 302. **Committees.** By the Constitutions of six states, no bill shall be considered for passage unless it has first been referred to a committee and reported therefrom : Pa. C. 3,2 ; Mo. C. 4,27 ; Tex. C. 3,37 ; Col. C. 5,20 ; Ala. C. 4,20 ; La. C. 37.

And in Texas, no bill shall be passed unless so referred and reported at least three days before the final adjournment of the legislature.

§ 303. **Reading of Bills.** Every bill must ordinarily, by the Constitutions of most states, be read by sections on three different days in each house of the legislature : N.J. C. 4,4,6 ; Pa. C. 3,4 ; O. C. 3,16 ; Ind. C. 4,18 ; Ill. C. 4,13 ; Mich.<sup>a</sup> C. 4,19 ; Minn. C. 4,20 ; Kan. C. 2,15 ; Neb. C. 3,11 ; Md. C. 3,27 ; W.Va. C. 6,29 ; N.C.<sup>a</sup> C. 2,23 ; Ky. C. 2,29 ; Tenn. C. 2,18 ; Mo. C. 4,26 ; Ark. C. 5,22 ; Tex. C. 3,32 ; Cal. C. 4,15 ; Ore. C. 4,19 ; Nev. C. 4,18 ; Col. C. 5,22 ; S.C. C. 2,21 ; Ga. C. 3,7,7 ; Ala. C. 4,21 ; Miss. C. 4,23 ; Fla. C. 4,15 ; La. C. 37 ; Ariz.\* 1117.

But in case of urgency, either house may dispense with such rule, on a vote (1) of four fifths of the members present : W.Va., Ky., Tex. ; (2) of three fourths : O. ; (3) of two thirds : Ind., Minn., Kan., Md. (*of the members elected*), Ark.,<sup>b</sup> Cal., Ore., Nev., Miss., Fla. But in Minnesota, every bill must have been read at least twice at length, in order to pass either house.

And every bill, in order to become a law, must, in many states, have been read at length on its final passage : Ind. ; Mich. ; Io. C. 3,17 ; Kan. ; W.Va. ; Cal. ; Ore. ; Nev. ; Ala. ; Fla. ; La.

(B) **Of Private or Local Bills,**<sup>c</sup> there must, by the Constitutions of several states, be notice given ; as (1) by thirty days' publication of the bill in the locality affected before its introduction into the legislature : Pa. C. 3,8 ; N.C. C. 2,12 ; Mo. C. 4,54 ; Ark. C. 5,26 ; Tex. C. 3,57 ; Ga. C. 3,7,16 ; La. C. 48. (2) So, in Alabama, twenty days' notice by such publi-

cation: Ala. C. 4,24. (3) In one state, the manner of notice is left to the legislature to determine: N.J. C. 4,7,9. All private or local bills must, in Georgia, originate in the lower house, and be referred to a committee: Ga. C. 3,7,15.

NOTES. — <sup>a</sup> It seems the readings need not be on different days. <sup>b</sup> But only so far as to allow all three readings to be on the same day. <sup>c</sup> See also § 441.

§ 304. **Voting.**<sup>a</sup> By the Constitutions of many states (A) no bill can become a law unless on its final passage it receive in each house a vote (1) of a majority of "each house:" Ark. C. 5,22; Ala. C. 4,21. (2) In others, of a majority of the members present: Fla. C. 4,15; Ariz.\* 1117. (This would be implied in states where the Constitution is silent.) (3) In most states, of a majority of the members elected: N.Y. C. 3,15; N.J. C. 4,4,6; Pa. C. 3,4; O. C. 2,9; Ind. C. 4,25; Ill. C. 4,12; Mich. C. 4,19; Io. C. 3,17; Minn. C. 4,13; Kan.<sup>b</sup> C. 2,13; Neb. C. 3,10; Md.<sup>b</sup> C. 3,28; Tenn. C. 2,18; Mo. C. 4,31; Cal. C. 4,15; Ore. C. 4,25; Nev. C. 4,18; Col. C. 5,22; Ga. C. 3,7,14; La. C. 37.

(B) The names of the members so voting for or against a bill on its final passage must, in many, be entered in the journals:<sup>c</sup> N.Y.; N.J.; Pa.; O.; Ill.; Mich.; Io.; Minn.; Kan.; Neb.; Md.;<sup>c</sup> Tenn. C. 2,21; Mo.; Ark.; Cal.; Nev.; Col.; Ga.; Ala.; Ariz.\*

(C) In three states, a member who has a personal or private interest in any measure or bill, proposed or pending, must disclose the fact to the house of which he is a member, and cannot vote thereon: Tex. C. 3,22; Col. C. 5,43; La. C. 50. See also § 154.

NOTES. — <sup>a</sup> Whether by ballot or not; see § 231. See also § 314. <sup>b</sup> So, in these states, also of joint resolutions. <sup>c</sup> The same would follow in other states from § 275, B.

§ 305. **Veto Power.**<sup>a</sup> In all states but four, the Constitution provides (A) that every bill passed by the legislature shall be presented to the governor before it becomes a law; and if he approves he is to sign it: N.H. C. 2,44; Mass. C. 2,1,1,2; Me. C. 4,3,2; Vt. C. Amt. 11; Ct. C. 4,12; N.Y. C. 4,9; N.J. C. 5,7; Pa. C. 4,15; Ind. C. 5,14; Ill. C. 5,16; Mich. C. 4,14; Wis. C. 5,10; Io. C. 3,16; Minn. C. 4,11; Kan. C. 2,14; Neb. C. 5,15; Md. C. 2,17; Va. C. 4,8; W.Va. C. 7,14; Ky. C. 3,22; Tenn. C. 3,18; Mo. C. 4,38; Ark. C. 6,15; Tex. C. 4,14; Cal. C. 4,16; Ore. C. 5,15; Nev. C. 4,35; Col. C. 4,11; S.C. C. 3,22; Ga. C. 5,1,17; Ala. C. 5,13; Miss. C. 4,24; Fla. C. 4,28; La. C. 73; and in all the territories: U.S. R. S. 1842.

So, in most states, every joint or concurrent resolution, except for adjournment: N.H. C. 2,45; Mass.; Me.; Pa. C. 3,26; Mich.; Minn. C. 4,12; Kan.; Neb.; Va.; Ky. C. 3,23; Tenn.; Mo. C. 5,14; Ark. C. 6,16; Tex. C. 4,15; Col. C. 5,39; S.C.; Ga.; Ala.; Miss. C. 4,25; La. C. 75; Ariz.\* And in Missouri, except resolutions for amending the Constitution.

(B) The governor may generally veto a bill, by returning it, with his objections, (1) to the house in which it originated: N.H.; Mass.; Me.; Vt.; Ct.; N.Y.; N.J.; Pa.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Neb.; Md.; Va.; W.Va.; Ky.; Tenn.; Mo. C. 4,39; Ark.; Tex.; Cal.; Ore.; Nev.; Col.; S.C.; Ala.; Miss.; Fla.; La.; all the Territories, U.S. R. S. 1842; Ariz.\* (2) To the house of representatives: Kan.

(C) It will then become a law, (1) by an ordinary majority vote in each house: Ct. (2) By a vote of the majority of the elected members of each house: Vt., N.J., Ind., W.Va., Ky., Tenn., Ark., Ala. (3) By a vote of three fifths of the elected members of each house: Neb., Md. (4) By a vote of two thirds of the members present in each house: N.H.; Mass.; Me.; Wis.; Io.; Minn.; Va.; Tex.; Ore.; S.C.;<sup>b</sup> Ga.<sup>b</sup> C. 5,1, 16; Miss.;<sup>b</sup> Fla.; and all the Territories, U.S. R. S. 1842. (5) By a vote of two



thirds of the elected members of each house: N.Y., Pa., Ill., Mich., Kan., Cal., Nev. Col., La. (6) By a vote of two thirds of the elected members of the house which originated the bill, and of a majority in the other house: Mo.

The votes must in this case be entered on the journal: N.H., Mass., Me., Vt., Ct., N.Y., N.J., Pa., Ill., Mich., Wis., Minn., Kan., Neb., Md., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Ore., Nev., Col., S.C., Ala., Miss., Fla., La.; and all the Territories. And for other states, see § 304, B.

NOTES. — <sup>a</sup> Compare U.S. C. 1,7. <sup>b</sup> The provision is ambiguous, however, upon this point.

§ 306. **Pocketed Bills.** (A) In most states, if a bill be kept a certain length of time by the governor, without returning it, it will become a law, except in case of adjournment by the legislature.

So, (1) if it be kept three days: Ct.,<sup>a</sup> Ind.,<sup>a</sup> Wis.,<sup>a</sup> Io.,<sup>a</sup> Minn.,<sup>a</sup> Kan.,<sup>a</sup> Nev.,<sup>a</sup> S.C.,<sup>a</sup> Dak.,<sup>a,b</sup> Ida.,<sup>a,b</sup> Mon.,<sup>a,b</sup> Uta.,<sup>a,b</sup> N.M.,<sup>a,b</sup> (2) If it be kept five days: N.H.,<sup>a</sup> Mass., Me.,<sup>a</sup> Vt.,<sup>a</sup> N.J.,<sup>a</sup> Neb.,<sup>a</sup> Va.,<sup>a</sup> W.Va.,<sup>a</sup> Tenn.,<sup>a</sup> Ark.,<sup>a</sup> Ore.,<sup>a</sup> Nev.,<sup>a</sup> Ga.,<sup>a</sup> Ala.,<sup>a</sup> Miss.,<sup>a</sup> Fla.,<sup>a</sup> La., Wash.,<sup>a,b</sup> Wy.,<sup>a,b</sup> (3) If kept six days: Md.,<sup>a</sup> Wash.,<sup>b</sup> Wy.,<sup>b</sup> (4) If kept ten days: N.Y.;<sup>a</sup> Pa.; Ill.;<sup>a</sup> Mich.;<sup>a</sup> Ky.;<sup>a</sup> Mo. C. 4,40; Tex.;<sup>a</sup> Cal.;<sup>a</sup> Col.; Ariz.<sup>a</sup>

(B) But, in most states, if the legislature adjourn before the time respectively limited above, the bill does not (except as below) become a law: N.H.; Mass. C. Amt. 1; Me.; Vt.;<sup>c</sup> Ct.; N.Y.; N.J.; Pa.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Va.; W.Va.; Ky.; Tenn.; Mo. C. 5,12; Ark.; Tex.; Cal.; Ore.; Col.; S.C.; Ga.; Ala.; Miss.; Fla.; La.; and all the Territories.<sup>b</sup>

In several states, however, the bill does become a law if not returned by the governor (1) within five days after the adjournment: Ind., Neb., W.Va., Ore.<sup>a</sup> (2) Within ten days after: Ill., Nev.,<sup>a</sup> Fla. (3) Within twenty days after: Ark., Tex. (4) Within thirty days after: N.J.\* 1880,173; Pa.; Mo.; Col. (5) Within three days after the next meeting of the legislature: Me., Ky., Miss. (6) Within ten days after such next meeting: Ill. (7) And in California,<sup>a</sup> the bill becomes a law if returned and signed within (a) ten days after the adjournment. (3) So, within thirty days after final adjournment: N.Y. (y) Within two days after the next meeting: S.C. (8) So, in Michigan, if returned signed within five days of the adjournment, the bill having been passed in the last five days of the session. (9) So, in Minnesota, a bill passed in the last three days of the session will become a law if signed within three days of the adjournment. So, in Iowa, if returned within thirty days after.

NOTES. — <sup>a</sup> Sundays excepted. <sup>b</sup> U.S. R. S. 1842. <sup>c</sup> In these states, it does not become a law if the legislature adjourn within *three* days after its presentment to the governor. For citations, see § 305. See also § 240, note <sup>a</sup>.

§ 307. **General Restrictions.** (A) By the Constitutions of several states, no new bill can be introduced into either house (1) after the first twenty-five days of the session: Col. C. 5,19. (2) In two, not after the first fifty days of the session have expired: Mich. C. 4,28; Cal. C. 4,2 (unless by the consent of two thirds of the members: Cal.). (3) In one, not during the last three days of the session: Ark. C. 5,34. (4) In one, not within the last ten days, except by a two-thirds vote of a full house: Md. C. 3,27. (5) And in one, no bill can be passed by either house on the day prescribed for adjournment: Minn. C. 4,22. (6) And in one, none can be presented to the governor within two days of the final adjournment: Ind. C. 5,14.

(B) By the Constitutions of four states, after a bill or resolution has been considered and defeated in either house, no bill the same in substance (1) shall be passed during that session: Tenn. C. 2,19; Tex. C. 3,34; Ga. C. 3,7,13 (without the consent of two thirds of the house which rejected it). (2) Shall be again proposed without the consent of a majority of the house which rejected it: La. C. 36.

In Utah, Washington, New Mexico, and Arizona, all laws passed by the territorial legislature and governor must be submitted to Congress, and, if disapproved, shall be void: U.S. R. S. 1850.

§ 308. **Amendments, Repeals, and Revisions.** (A) The Constitutions of many states provide that no law shall be revived, altered, or amended by reference to its

title only; but the act revived, and sections altered or amended, shall be enacted and published at length:<sup>a</sup> N.J. C. 4,7,4; Pa. C. 3,6; O. C. 2,16; Ind. C. 4,21; Ill. C. 4,13; Mich. C. 4,25; Kan. C. 2,16; Neb. C. 3,11; Md. C. 3,29; Va. C. 5,15; W.Va. C. 6,30; Mo. C. 4,33 and 34; Ark. C. 5,23; Tex. C. 3,36; Cal. C. 4,24; Ore. C. 4,22; Nev. C. 4,17; Col. C. 5,24; Ala. C. 4,2; Fla. C. 4,14; La. C. 30. And the sections so amended shall, in three, be repealed: O., Kan., Neb.

(B) So, in two states, no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or shall be applicable, except by inserting it in such act: N.Y. C. 3,17; N.J.

But in two others, all acts which repeal, revive, or amend former laws, shall recite in their caption or otherwise the substance of the act repealed or revived: Tenn. C. 2,17; Ga. C. 3,7,17.

NOTE.—<sup>a</sup> Compare §§ 1042-1044.

§ 309. **When Acts take Effect.**<sup>a</sup> In some states the Constitution provides that laws go into effect (1) immediately upon publication: Ind. C. 4,28; Wis. C. 7,21; (2) on the fortieth day after final passage: Tenn.<sup>b</sup> C. 2,20; (3) on the sixtieth day after: Miss.<sup>b</sup> C. 12,9; (4) on the ninetieth day after: Col. C. 5,19; (5) ninety days after the end of the session: Mich. C. 4,20; Neb. C. 3,24; W.Va. C. 6,30; Mo. C. 4,36; Tex. C. 3,39; Ore.<sup>b</sup> C. 4,28; (6) on the July 1st after the passage of the law: Ill. C. 4,13; (7) on the July 4th following: Io. C. 3,26; (8) on the June 1st following that session: Md.<sup>b</sup> C. 3,31; (9) in Louisiana, on the day of publication in the place where the State journal is published; elsewhere, twenty days thereafter: La. C. 40. (10) In one other state the legislature is to prescribe the time when its acts take effect: Kan. C. 1,19.

And in several, the legislature are to provide for the speedy publication of laws: N.Y. C. 6,23; Mich. C. 4,36; Io.; Wis.; Kan.; Neb.; Nev. C. 15,8; Col. C. 18,8; Fla. C. 16,13; La.

No law can be in force until published: Wis., Kan. In three states, no law shall be passed the taking effect of which shall be made to depend upon any authority, except as provided in the Constitution: O. C. 2,26; Ind. C. 1,25; Ore. C. 1,21.

But in some states the legislature may provide that any law shall go into effect sooner than the time respectively above limited: Ind., Mich., Io., Neb., W.Va., Mo., Tex., Ore., Col.

By a two-thirds vote of all members elected to each house: Ill., Mich., Neb., W.Va., Mo., Tex., Col.

NOTES.—<sup>a</sup> See § 1040. <sup>b</sup> Unless otherwise provided in the act itself.

## Art. 31. Form of Revenue Bills.

§ 310. **Origin.**<sup>a</sup> All bills for raising revenue must, by the Constitutions of most of the states, originate in the lower house: N.H. C. 2,18; Mass. C. 2,1,3,7; Me. C. 4,3,9; Vt. C. Amt. 3; N.J. C. 4,6,1; Pa. C. 3,14; Ind. C. 4,17; Minn. C. 4,10; Neb. C. 3,9; Del. C. 2,14; Ky. C. 2,30; Tex. C. 3,33; Ore. C. 4,18; Col. C. 5,31; S.C. C. 2,18; Ga. C. 3,7,10; Ala. C. 4,31; La. C. 35.

The senate may generally propose amendments as in other bills: N.H., Mass., Me., Vt., N.J., Pa., Minn., Neb., Del., Ky., Ark., Tex., Col., S.C., Ga., Ala., La. But no new matter not relating to the revenue can, in four, be so introduced: Me., Vt., Del., Ky.

The governor may, in many states, veto certain items in an appropriation bill, and allow the others to become a law: N.Y. C. 4,9; N.J. C. 5,7; Pa. C. 4,16; Minn. C. 4,11; Neb. C. 5,15; W.Va. C. 7,15; Mo. C. 5,13; Ark. C. 6,17; Tex. C. 4,14; Cal. C. 4,16; Col. C. 4,12; Ga. C. 5,1,16; Ala. C. 5,14; Fla. C. 5,22 La. C. 74.

In one state, no appropriation can be passed in the last five days of the legislative session: La. C. 55.

NOTE.—<sup>a</sup> So in U.S. C. 1,7.

§ 311. **The General Appropriation Bill** may contain only, in some states, appropriations for the ordinary expenses of the state in its legislative, executive, and judicial departments: Pa. C. 3,15; Ark. C. 5,30; Col. C. 5,32; Ga. C. 3,7,9; Ala. C. 4,32.

So, in several, for the general expenses of government: Neb. C. 3,19; Cal. C. 4,29; Ore. C. 9,7; Fla. C. 4,30; La. C. 53; and in a few, for the interest on the public debt: Pa.; Mo. C. 4,43; Col.; Ga.; Ala.; La. So, in one, for the sinking fund: Mo. And for public schools: Pa., Mo., Col., Ga., Ala., La.

In more detail, it may contain appropriations for salaries (1) of state officers generally: Ill. C. 4,16; Neb.: W.Va. C. 6,42; Cal.; Ore.; Fla.; (2) of the legislature: Mo.; (3) for the "civil list": Mo.; (4) for the cost of collecting the revenue: Mo.; (5) for institutions under the exclusive control and management of the state: Cal., Ga.; (6) for the support of the eleemosynary institutions of the state: Mo., La.

§ 312. **Other Appropriation Bills** must, by the Constitutions of a few states, (A) contain no provisions on any other subject: Pa. C. 3,15; Ga. C. 3,7,9; Ala. C. 4,32; La. C. 53. So, in one, of all bills for raising revenue: Del. C. 2,14.

(B) They can, in a few, contain only one item or subject: Pa.; Ark. C. 5,30; Cal. C. 4,34; Col. C. 5,32; Ga.; Ala.; La.

(C) They must, in several, be for a certain, specified purpose: N.Y. C. 7,8; Mo. C. 10,19; Ark. C. 5,29; Cal.; La. C. 54; and it is not sufficient to refer to any other law to fix such purpose: Mo. So, no appropriation can be made under the title of "contingent": La. They must state a distinct amount: N.Y. In two, no moneys shall be issued out of the treasury but for the necessary defence and support of the state government and the protection of the inhabitants: N.H. C. 2,56; Mass. C. 2,2,1,11.

(D) In one the *general* appropriations (§ 311) must be made first, and take precedence of any others: Mo. C. 4,43.

§ 313. **Voting.** The Constitutions of several provide that a bill appropriating money or property for private or local purposes must (1) receive a vote of two thirds of the elected members of each house: R.I. C. 4,14; N.Y. C. 1,9; Mich. C. 4,45; Io. C. 3,31.

So, in two, an appropriation for charitable or educational institutions not under the absolute control of the state: Pa. C. 3,17; Ala. C. 4,34. In one, a bill appropriating money for extraordinary purposes (not included in § 335) requires a two-thirds vote in each house (compare § 314): Ark. C. 5,31. In two, the yeas and nays must always be entered on the journal, on the passage of a bill appropriating money: Ga. C. 3,7,12; Miss. C. 4,14. In two, on every act appropriating public money, the vote must be taken by yeas and nays, entered on the journal, and (1) three fifths of each house are necessary to a quorum: N.Y. C. 3,21; Wis. C. 8,8. So, in two, (2) such act must be voted for by a majority of the members elected to each house: Va. C. 10,11; Ky. C. 2,40. So, in one, of any act releasing, discharging, or commuting any claim or demand of the state: Va. See § 304.

§ 314. **Tax Bills.** The Constitutions of several require that every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied: N.Y. C. 3,20; O. C. 12,5; Mich. C. 14,14; Io. C. 7,7; Kan. C. 11,4; Va. C. 10,16; N.C. C. 5,7; Ark. C. 16,11; Ore. C. 9,3; S.C. C. 9,4.

So, in a few, of a bill creating a debt: N.Y. C. 7,12; Pa. C. 9,5; Nev. C. 9,3; Col. C. 11,4; S.C. C. 9,7; Ga. C. 7,4,1.

And in three, it is not sufficient to refer to any other law, to fix such object: N.Y., Mich., Io., Va.

In several, all taxes must be levied and collected by general laws: Pa. C. 9,1; Mo. C. 10,3; Tex. C. 8,3; Col. C. 10,3; Ga. C. 7,2,1.

In two, a bill imposing a tax must receive the necessary vote in a quorum of three fifths of each house, to be entered in the journal (as in § 313): N.Y. C. 3,21; Wis. C. 8,8; and in one, of a majority of a quorum of two thirds of the elected members, in the house: Vt. C. 2,9. In one other, it must be read three several times in each house, and passed the three readings, on different days, the yeas and nays of the second and third readings entered in the journal: N.C. C. 2,14. In one other, a bill imposing a tax for extraordinary objects (not included in § 335) requires a two-thirds vote in each house: Ark. C. 5,31.



§ 315. **State Debt Bills.**<sup>a</sup> Bills providing for a loan to the state or creating a state debt require, in some states (1) the assent of two thirds of the elected members of each house: Minn. C. 9,5; S.C. C. 9,7; Ala. C. 11,3. (2) The vote of a majority of members present; but three fifths are, in such case, necessary to a quorum (as in § 313): N.Y. C. 3,21; Wis.<sup>b</sup> C. 8,8. (3) The vote of a majority of members *elected* (as in § 313): Wis. C. 8,6; Kan. C. 11,5; Ky. C. 2,40. (4) They must be read three times, like tax bills; see § 314: N.C. C. 2,14.

NOTES. — <sup>a</sup> See also § 314. <sup>b</sup> For temporary loans; see § 160.

§ 316. **State Aid Bills.**<sup>a</sup> In two states the legislature has no power to give or lend the credit of the state in aid of any person or corporation, unless the law be approved by direct vote of the people: N.C. C. 5,4; Ark. C. 10,6.

NOTE. — <sup>a</sup> Compare § 326.

## CHAPTER III.

### FINANCE.

**Note to Chapter III.** None but constitutional provisions are generally incorporated in this chapter; for all similar provisions, by the laws of the territories as well as of the states, see in Parts III. and IV.

### Art. 32. Appropriations.<sup>a</sup>

§ 320. **Warrants, etc.** By the Constitutions of most states, no money shall be paid out of the treasury except (A) upon appropriations duly made by law (see Art. 31): Me. C. 5,4,4; Vt. C. 2,17; N.Y. C. 7,8; N.J. C. 4,6,2; Pa. C. 3,16; O. C. 2,22; Ind. C. 10,3; Ill. C. 4,17; Mich. C. 14,5; Wis. C. 8,2; Io. C. 3,24; Minn. C. 4,12; 9,9; Kan. C. 2,24; Neb. C. 3,22; Md. C. 3,32; Del. C. 2,15; Va. C. 10,10; W.Va. C. 10,3; N.C. C. 14,3; Ky. C. 8,5; Tenn. C. 2,24; Mo. C. 4,43; Ark. C. 5,29; 16,12; Tex. C. 8,6; Cal. C. 4,22; Ore. C. 9,4; Nev. C. 4,19; Col. C. 5,33; S.C. C. 2,22; 9,12; Ga. C. 3,7,11; Ala. C. 4,33; Miss. C. 4,26; Fla. C. 4,16; 12,4; La. C. 43; [Ariz.\* Bill of Rts. 26].

And there must be warrants drawn by the proper officer: N.H. C. 2,56; Mass. C. 2,2,1,11; Pa.; Ill.; Neb.; W.Va.; Mo. C. 10,19; Cal.; Col.; Ala.

(B) And in a few states, no appropriation can be made for a longer term than two years: O., Kan., Mo., Ark., Tex., La. So, in others, the warrant must be issued within two years of the act of appropriation: N.Y., Kan., Mo.

NOTE. — <sup>a</sup> See U.S. C. 1,9.

§ 321. **State Accounts.** By the Constitutions of most states, a regular statement and account of receipts and expenditures of public moneys must be published (1) annually: W.Va. C. 10,3; N.C. C. 14,3; Ky. C. 8,5; Tex. C. 16,6; S.C. C. 2,22; Ala. C. 4,33.

(2) At or after every session of the legislature, with the laws: Me. C. 5,4,4; Vt. C. 2,28; Ind. C. 10,4; Ill. C. 4,17; Mich. C. 18,5; Io. C. 3,18; Minn. C. 9,11; Neb. C. 3,22; Md. C. 3,32; Va. C. 10,18; Tenn. C. 2,24; Cal. C. 4,22; Ore. C. 9,5; Nev. C. 4,19; S.C. C. 9,11; Ga. C. 3,7,11; Fla. C. 12,5.

(3) In such manner as by law directed: Ct. C. 4,21; O. C. 15,3; Kan. C. 15,5; Mo. C. 10,19; Ark. C. 19,12; Tex. (4) Every three months: Ga., La. (5) Every two years: Del. C. 2,15.



§ 322. **Private Appropriations, Claims, and Debts.** (A) The Constitution of Illinois provides that the legislature shall make no appropriation of money out of the treasury in any private law: Ill. C. 4,16. So, in Texas, that no appropriation for private or individual purposes shall be made: Tex. C. 16,6. Compare Art. 39.

So, in several states, no appropriation of money or grant of property can be made by the state to any individual or corporation, municipal or otherwise: N.J. C. 1,20; Neb.<sup>a</sup> C. 3,18; Mo. C. 4,46; Tex. C. 3,51; Ga. C. 7,16,1; La. C. 56. See also in § 326.

And in Illinois, specially, the Illinois and Michigan Canal can never be sold or leased but by vote of the people: Ill. C. Sep. Section 3.

*Except*, that in two states a grant of aid may be made in case of a public calamity: Mo., Tex. And a right of way through public land may, in one, be granted to a railroad or canal: La.

(B) The Constitutions of two states provide that the legislature shall not audit nor allow any private claim<sup>b</sup> or account: N.Y. C. 3,19; Mich. C. 4,31; [Ariz.\* Bill of Rights, 28]. Nor, in several, authorize the payment of any claim against the state under an agreement or contract made without the authority of law: Ill. C. 4,19; W.Va. C. 6,38; Mo. C. 4,48; Tex. C. 3,53; Cal. C. 4,32; Ala. C. 4,28; La. C. 45. Or of any such claim against a municipality: Tex., Cal., La. And all such private or special contracts are void: Ill., W.Va., Mo., Cal., La.

Nor, in a few, can money be paid on any claim the subject-matter of which is not provided for by pre-existing laws: Pa. C. 3,11; O.<sup>c</sup> C. 2,29; Io. C. 3,31; Ark.<sup>c</sup> C. 5,27; Tex. C. 3,44; Nev. C. 4,28; Col. C. 5,27 and 28. So, in two, no special act making compensation to a person claiming damages against the state can be passed: Ind. C. 4,24; Ore. C. 4,24.

In Maryland, the legislature can appropriate no money in payment of a private claim over \$300 unless proved before the comptroller and reported on by him: Md. C. 3,52. And specially, in Indiana (C. 10,7), the state is freed from all liability on account of Wabash & Erie Canal stock.

**Exceptions.** But, in two states, the legislature may appropriate for expenses incurred by private persons in suppressing insurrection or repelling invasion: Ill., W.Va.

(C) The Constitutions of several states provide that the legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, any indebtedness or liability of any corporation or individual to the state (or, in Illinois or Colorado, to any municipal corporation therein): Ill. C. 4,23; Va. C. 10,21; Mo. C. 4,51; Ark. C. 5,33 and 12,12; Tex. C. 3,55; Col. C. 5,38; La. C. 57.

This follows, practically, in other states, from the provisions of § 395: Md., Cal.

So, in several, the legislature have no power to release, alienate, or alter the lien held by the state upon (1) any railroad: Pa. C. 3,24; Mo. C. 4,50; Ark. C. 5,33; Tex. C. 3,54. Or (2) as against any corporation: N.Y. C. 7,4; Pa. And in Illinois, specially, of the Illinois Central Railroad, no lien, contract, obligation, or liability, in the original charter, shall ever be released or impaired: Ill. C. Sep. Section 1.

(D) In one state, no claim shall be allowed (by the legislature or other body or officers acting for the state) against the State which would be barred by lapse of time if made against a private person: N.Y. C. 7,14.

*Except* that a claim may be so prosecuted within two years of the removal of a legal disability of the claimant: N.Y.

NOTES. — <sup>a</sup> As to grants of land only. <sup>b</sup> See §§ 75,553. <sup>c</sup> Such claim may, however, be allowed on a two-thirds vote of the full legislature.

§ 323. **Charitable and Sectarian Appropriations.** The Constitutions of a few states provide that no appropriation shall be made for private, charitable, educational, or benevolent purposes to any person or community or any corporation not wholly under the state authority: Pa. C. 3,17; Cal. C. 4,22; Col. C. 5,34; La. C. 51.

See also §§ 44,54.

**Exceptions.** (See § 313.) But in California, grants of aid may be made (1) to orphan or indigent asylums in accordance with a uniform rule. And in Pennsylvania, (2) to asylums for soldiers' widows or orphans: Pa. C. 3,19.

§ 324. **Internal Improvement.** By the Constitution of Michigan the state cannot be interested in works of internal improvement.<sup>a</sup> Nor, in Alabama, loan its credit in support of such works: Ala. C. 4,54. Nor, in several states, create or contract debts for them: O. C. 12,6; Wis. C. 8,10; Minn.<sup>a</sup> C. 9,5; Md. C. 3,34; Ala. Nor be a party to carrying on such works: Mich. C. 14,9; Wis.; Minn.;<sup>a</sup> Kan. C. 11,8; Md.; Va. C. 10,15; Ala.

But the Tennessee Constitution declares that a well-regulated system of internal improvement should be encouraged by the legislature: Tenn. C. 11,10. And in Mississippi there is a board of public works established for that purpose: Miss. C. 10,1. See also § 202.

NOTE. — <sup>a</sup> See, however, § 361.

§ 325. **Miscellaneous Restrictions.** The Constitution of Texas provides that the state shall make no appropriation for a bureau of, or to encourage or assist, immigration: Tex. C. 16,56.

§ 326. **Loans of Credit,<sup>a</sup> etc.** The state, by the Constitutions of most of the states, cannot (A) lend money or its credit to any individual, association, or corporation, municipal or otherwise, whatever: Me. C. 9,14; N.Y. C. 7,9; 8,10; N.J. C. 4,6,3; Pa. C. 9,6; O. C. 8,4; Ind. C. 11,12; Ill. C. 4,20; Mich. C. 14,6; Wis. C. 8,3; Io. C. 7,1; Minn. C. 9,10; Neb. C. 14,3; Md. C. 3,34; Va. C. 10,12; W.Va. C. 10,6; N.C. C. 5,4; Ky. C. 2,33; Tenn. C. 2,31; Mo. C. 4,45; Ark. C. 16,1; Tex. C. 3,50; Cal. C. 4,31; Nev. C. 8,9; Col. C. 11,1-2; Ga. C. 7,5,1; Ala. C. 4,54; Miss. C. 12,5; Fla. C. 12,7; La. C. 56.

*Except*, in Nevada, corporations for religious or charitable purposes.

So, specially, it cannot loan, etc., to railroads or canals: Ill. C. Sep. Section 3.

(B) Nor, in many, can the state become a stockholder or bondholder in any corporation: Pa.; O.; Ind.; Mich. C. 14,8; Io. C. 8,3; Va. C. 10,14; W.Va.; Tenn.; Mo. C. 4,49; Ark. C. 12,7; Cal. C. 12,13; Ore. C. 11,6; Nev.; Col.; Ga.; Miss.; Fla.; La.; Ariz.\* Bill of Rts. 27.

So, specially, not in any bank: Ind., Ill., Kan., Tenn., Mo., Ala. See § 480.

The Constitution of Alabama provides, in general terms, that the state may not be interested in any private or corporate enterprise: Ala. C. 4,54.

(C) Nor, in many, can it assume the debts of any individual or municipal corporation: Pa. C. 9,9; O. C. 8,5; Ind. C. 10,6; Ill.; Io.; Va. C. 10,17; W.Va.; Ark. C. 12,12; Tex.; Cal.; Ore. C. 11,8; Nev. C. 9,4; Col.; Ga. C. 7,8,1; La.

*Except*, in several, when incurred in time of war for the benefit of the state: Pa., O., Io., Ark., Ore., Nev., Ga.

(D) Nor, in Tennessee, can any bonds of the state be issued to any railroad which is in default in paying interest on bonds previously loaned to it, or has sold them for less than par: Tenn. C. 2,33.

**Limitations.** But in North Carolina, the credit of the state may be so loaned, contrary to the above rules, upon vote of the people.

NOTE. — <sup>a</sup> Compare § 316.

§ 327. **Money.** The Constitution of Texas provides that the state shall have no power to issue treasury notes or warrants intended to circulate as money: Tex. C. 16,7. So, in Washington Territory, by U.S. R. S. 1925.

**Art. 33. Taxation.** (For statutes on this subject, see in Part III.)

§ 330. **General Principles.** (A) In the Constitutions of several states it is declared that every member of society is bound to contribute his proportion to the expenses of government; but no part of his property can be taken without

his own consent or legislative authority: <sup>a</sup> N.H. C. 1,12; Mass. C. 1,10; Vt. C. 1,9; Md. Decln. of Rts. 14 and 15; Va. C. 1,8; S.C. C. 1,36 and 37.

(B) So, in many, no tax, impost, duty, or charge can be levied except (1) in pursuance of a law: O. C. 12,5; Kan. C. 11,4; Mo. C. 10,1; Ark. C. 16,11; Ore. C. 9,3; S.C. C. 9,4; Fla. C. 12,3. Or (2) "by consent of the people:" N.H. C. 1,28; Mass. C. 1,23; Me. C. 1,22; N.C. C. 1,23; Ore. C. 1,32; S.C. C. 9,4. Or (3) "by consent of their representatives in the legislature:" N.H., Mass., Me., Md., N.C., Ore., S.C.

And in Vermont, previous to any law for a tax, the purpose for which the tax is levied ought to appear of more importance to the community than the money would be if not collected. By the Constitution of one state, "the state's ancient right of eminent domain, and of taxation, is expressly and fully conceded:" Ark. C. 2,23. In Georgia, taxation is declared to be a sovereign right of the state, absolutely inalienable: Ga. C. 4,1,1.

In several, the legislature has no power to release (in Louisiana, postpone) the inhabitants of, or property in, any town or county from payment of state or county taxes: Ill. C. 9,6; Neb. C. 9,4; Mo. C. 10,9; Tex.<sup>b,c</sup> C. 8,10; Cal. C. 11,10; Col. C. 10,8; La.<sup>b</sup> C. 212. So, in others, the power to tax shall not be surrendered or suspended by any act, contract, or grant to which the state is a party: Me. C. 9,9; Cal. C. 13,6; Ga.; so, specially, of the power to tax corporations and their property: Pa. C. 9,3; Mo. C. 10,2; Ark. C. 16,7; Tex. C. 8,4; Col. C. 10,9; Ga. C. 7,2,5; La. C. 205.

And in several, no power to levy taxes can be delegated to individuals or private corporations: Pa. C. 3,20; Cal. C. 11,13; Col. C. 5,35; Ga. C. 4,1,1; Ala. C. 11,2. See § 340.

In Illinois, the Constitution provides that the specification therein of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in the Constitution: Ill. C. 9,2.

NOTES. — <sup>a</sup> Compare Art. 9. <sup>b</sup> Except in case of great public calamity, and <sup>c</sup> by a two-thirds vote of each house.

§ 331. **Taxable Property.** In many states, the Constitution declares that all property, real and personal and mixed, is taxable: O. C. 12,2; Ind. C. 10,1; Minn. C. 9,3; Va. C. 10,1; W.Va. C. 10,1; N.C. C. 5,3; Tenn. C. 2,28; Cal. C. 13,1; Nev. C. 10,1; Col. C. 10,3; S.C. C. 9,1; Fla. C. 12,1.

In two, taxes "shall be levied upon such property as is described by law:" Mich. C. 14, 11; Wis. C. 8,1.

In one, the personal property of residents of the state is taxable in the county or city where the resident *bona fide* resides for the greater part of the year; and not elsewhere, except goods and chattels "permanently located:" Md. C. 3,51. But in two, all property is to be assessed where situated (except rolling stock, etc., of railroads): Tex. C. 8,11; Cal. C. 13,10.

Land and the improvements thereon are to be separately assessed: Cal. C. 13,2. Mortgages are taxed to the owner, and the property less the value of the mortgage to the mortgagor: Cal.<sup>a</sup> C. 13,4. And all contracts by which the debtor is to pay the taxes on mortgages or money loaned are void: Cal. C. 13,5.

In Texas, all property of railroads in towns shall bear its share of municipal taxation: Tex. C. 8,5. And all property of railroads shall be taxed: Tex. C. 8,8.

The property of all corporations shall, by several state Constitutions, be subject to taxation the same as that of individuals: O. C. 13,4; Io. C. 8,2; Nev. C. 8,2; Col. C. 10,10; S.C. C. 12,2; Ala. C. 11,6; Miss. C. 12,13; Fla. C. 16,24. So, in Iowa, but of corporations for pecuniary profit only: Io. C. 8,2.

In Maryland, the legislature are to provide for the taxation of the revenue of foreign corporations doing business in the state: Md. C. 3,58. In three states, mines and mining claims may not be directly taxed, but only their proceeds: Nev. C. 10,1; Col. C. 10,3; S.C. C. 9,1.

NOTE. — <sup>a</sup> Except mortgages by railroads, etc.



§ 332. **Exemptions.** The following are the constitutional <sup>a</sup> exemptions from taxation:—

(A) Burying-grounds: Pa.<sup>b</sup> C. 9,1; O.<sup>b</sup> C. 12,2; Ill.<sup>b</sup> C. 9,3; Minn. C. 9,3; Neb.<sup>b</sup> C. 9,2; W.Va.<sup>b</sup> C. 10,1; N.C.<sup>b</sup> C. 5,5; Mo. C. 10,6; Ark. C. 16,5; Tex.<sup>b,c</sup> C. 8,2; Col.<sup>c</sup> C. 10,5; S.C. C. 9,5; Ga.<sup>b,c</sup> C. 7,2,2; Ala. C. 4,52; La.<sup>c</sup> C. 207.

(B) Public school-houses: O.;<sup>b</sup> Minn.; Cal. C. 13,1; Col.; S.C.; La.<sup>c</sup> School buildings and apparatus: Ark., Tex.,<sup>b</sup> S.C., Ga.,<sup>b,c</sup> La. Libraries and grounds used for school purposes: Ark., Col., S.C., Ga.,<sup>b,c</sup> La.<sup>c</sup>

(C) Churches: Pa.,<sup>b</sup> O.,<sup>b</sup> Minn., Ark., Tex.,<sup>b</sup> S.C., Ga.,<sup>b,c</sup> La.<sup>c</sup> Church property used for religious purposes: Minn., Col. Public hospitals: Minn., S.C.

(D) Academies: Minn., S.C., Ga.<sup>b,c</sup> Colleges, universities, and seminaries of learning: Minn., S.C., Ga.,<sup>b,c</sup> La.<sup>c</sup> Public libraries: Col. C. 10,4; S.C.; Ga.;<sup>b</sup> La. Books, paintings, and statuary kept in a free public hall: Ga.,<sup>b,c</sup> La.<sup>c</sup> Institutions of purely public charity: Pa.,<sup>c</sup> O.,<sup>b</sup> Minn., Tex.,<sup>b</sup> S.C., Ga.,<sup>b,c</sup> La.

(E) Public property used exclusively (1) for any public purpose: Pa.;<sup>b</sup> O.;<sup>b</sup> Minn.; Kan. C. 11,1; W.Va.;<sup>b</sup> Tenn.<sup>b</sup> C. 2,28; Ark.; Tex. C. 11,9; Ore.<sup>b</sup> C. 9,1; Nev.<sup>b</sup> C. 10,1. Or for (2) any municipal purpose: Ind.<sup>b</sup> C. 10,1; Kan.; Va.<sup>b</sup> C. 10,3; S.C.<sup>b</sup> C. 9,1; Fla.<sup>b</sup> C. 12,1. (3) All public property: Ga.,<sup>b,c</sup> La.<sup>c</sup>

(F) So, any property (real or personal), held (1) for educational purposes: Ind.;<sup>b</sup> Ill.;<sup>b</sup> Kan.; Neb.;<sup>b</sup> Va.;<sup>b</sup> W.Va.;<sup>b</sup> N.C.;<sup>b</sup> Tenn.;<sup>b</sup> Ore.;<sup>b</sup> Nev.;<sup>b</sup> S.C.;<sup>b</sup> Ala.<sup>b</sup> C. 11,6; Fla.<sup>b</sup> C. 16,24. (2) For scientific purposes: Ind.,<sup>b</sup> Kan., W.Va.,<sup>b</sup> N.C.,<sup>b</sup> Tenn.,<sup>b</sup> Ore., Nev.,<sup>b</sup> S.C.,<sup>b</sup> Fla.<sup>b</sup> (3) For literary purposes: Ind.,<sup>b</sup> Kan., W.Va.,<sup>b</sup> N.C.,<sup>b</sup> Tenn.,<sup>b</sup> Ore.,<sup>b</sup> Nev.,<sup>b</sup> S.C.,<sup>b</sup> Fla.<sup>b</sup> (4) For charitable purposes: Ind.,<sup>b</sup> Ill., Kan., Neb.,<sup>b</sup> Va.,<sup>b</sup> W.Va.,<sup>b</sup> N.C.,<sup>b</sup> Tenn.,<sup>b</sup> Ark., Ore.,<sup>b</sup> Nev.,<sup>b</sup> Col., S.C.,<sup>b</sup> Ala.,<sup>b</sup> Fla.<sup>b</sup> (5) For religious purposes: Ind.,<sup>b</sup> Ill.,<sup>b</sup> Kan., Neb.,<sup>b</sup> Va.,<sup>b</sup> W.Va.,<sup>b</sup> N.C.,<sup>b</sup> Tenn.,<sup>b</sup> Ore.,<sup>b</sup> Nev.,<sup>b</sup> S.C.,<sup>b</sup> Ala.,<sup>b</sup> Fla.<sup>b</sup> (6) By agricultural or horticultural societies: Ill.;<sup>b</sup> Neb.;<sup>b</sup> Mo.<sup>b</sup> C. 10,6; Ala. So, (7) lots in towns, within one mile of the limits, to one acre in extent; and lots one mile or more distant from towns to five acres in extent, with buildings thereon, used exclusively for religious, school, or purely charitable purposes: Mo.,<sup>b</sup> Ala.

(G) In several, lands (1) the property of the United States, are exempt: Wis. C. 2,2; Minn. C. 2,3; Kan. C. Ordinance; Mo. C. 14,1; Nev. Ordinance. (2) All property exempt by United States laws: Cal. C. 13,1. (3) All property belonging to the state: Ill.; Neb.; Va.;<sup>b</sup> N.C.; Tenn.; Mo.; Cal.; Col. C. 10,4; Ala. (4) All property belonging to the United States: Cal.; Territories,\* U.S. R. S. 1851. (5) All property belonging to municipal corporations: Ind.;<sup>b</sup> Ill.;<sup>b</sup> Neb.; Va.;<sup>b</sup> N.C.; Mo.; Tex. C. 8,1; Cal.; Nev.<sup>b</sup> C. 8,2; Col.; Ala. (6) The property of religious corporations: Nev.,<sup>b</sup> Fla.<sup>b</sup> Or of charitable corporations: Nev.,<sup>b</sup> Fla.<sup>b</sup> Or of educational corporations: Nev.,<sup>b</sup> Fla.<sup>b</sup>

(H) In Colorado, the legislature may exempt for a time the increase in value of private lands caused by the planting of hedges, orchards, and forests: Col. C. 18,7.

(I) The personal property of every individual is exempt, to the value (1) of \$200: O.,<sup>b</sup> Minn., Kan. (of every *family*). (2) Of \$1,000: Tenn. (3) Household property to the value of \$500: La. Of \$250: Tex. C. 8,1.

(J) Growing crops are exempt: Cal. So, the direct products of the soil in the hands (1) of the producer: Tex. C. 8,19 (1879, p. 192); Tenn. C. 2,30; (2) and of his immediate vendee: Tenn. And no articles manufactured of the produce of the state shall be taxed otherwise than to pay inspection fees: Tenn. C. 2,30. Supplies for home or farm use are exempt: Tex.

(K) All wearing apparel is exempt: N.C.<sup>b</sup> Arms for muster: N.C.<sup>b</sup> All household furniture: N.C.<sup>b</sup> See also in I. Mechanical instruments of mechanics and agricultural implements of farmers: N.C.<sup>b</sup> Libraries: N.C.<sup>b</sup> Scientific instruments: N.C.<sup>b</sup> But the total value of exemptions under this paragraph, K, cannot exceed \$300: N.C.

Except as above, all laws exempting property from taxation are, in several states, void: Pa. C. 9,2; Mo. C. 10,7; Ark. C. 16,6; Tex.; Col. C. 10,6; Ga. C. 4,2,4.

NOTES.—<sup>a</sup> See Part III. for statutes. See also § 394. <sup>b</sup> In these states the Constitution only provides that this property *may* be exempted by law. <sup>c</sup> In these states, only those burying-grounds, etc., which are not held for personal or corporate profit.

§ 333. **Taxes Equal.** The Constitutions of many states provide that taxation shall be equal and uniform throughout the state,<sup>a</sup> or throughout each municipality



levying a tax:<sup>b</sup> N.J. C. 4,7,12; Pa.<sup>b</sup> C. 9,1; Ind. C. 10,1; Mich. C. 14,11; Wis. C. 8,1; Minn. C. 9,1; Kan. C. 11,1; Va.<sup>c</sup> C. 10,1; W.Va.<sup>c</sup> C. 10,1; N.C. C. 5,3; Tenn.<sup>c</sup> C. 2,28; Mo.<sup>b</sup> C. 10,3; Ark.<sup>c</sup> C. 16,5; Tex. C. 8,1; Ore. C. 1,32; 9,1; Nev. C. 10,1; Col.<sup>b</sup> C. 10,3; S.C. C. 9,1; Ga.<sup>b</sup> C. 7,2,1; Miss. C. 12,20; Fla. C. 12,1; La. C. 203; Wash.<sup>c</sup> U.S. R. S. 1924.

Lands belonging to persons resident out of the state cannot, in several, be taxed higher than lands belonging to residents: Wis. C. 2,2; Minn. C. 2,3; Kan. C. Ordinance; Mo. C. 14,1; Nev. Ordinance; Territories, U.S. R. S. 1851.

NOTES. — <sup>a</sup> Except as in § 339, note. <sup>b</sup> *i. e.*, in the same class of subjects; but <sup>c</sup> in the noted states, “no one species of property can be taxed higher than another species, of the same value.”

§ 334. **Valuation and Assessment.** In most states, the Constitution provides that all taxes levied shall be assessed in exact proportion to the value <sup>a</sup> of the property: Mass. C. 2,1,1,4; Me. C. 9,8; N.J. C. 4,7,12; Ind.; Ill. C. 9,1; Mich.<sup>a</sup> C. 14,12; Minn.<sup>a</sup>; Neb. C. 9,1; Va.; W.Va.; N.C.;<sup>a</sup> Tenn.; Mo. C. 10,4; Ark.; Tex.; Cal. C. 13,1; Ore. C. 9,1; S.C. C. 1,36; Ga.; Ala. C. 11,1; Miss.; La.;<sup>a</sup> Wy.<sup>b</sup> and Dak.<sup>b</sup> U.S. R. S. 1925. For citations, see also § 333.

In several, the legislature is to provide for a just valuation, (1) no time being specified: R.I. C. 4,15; Nev. C. 10,1; Col. C. 10,3; Fla. (2) There must be such valuation every five years: N.H. C. 2,6; Mich. C. 14,13; Va. C. 10,6; S.C. C. 2,33; 9,6. And (3) every ten years: Mass. C. 2,1,1,4; Me. C. 9,7.

In Louisiana, the assessment of all property shall never exceed the actual cash value thereof. Taxpayers have a constitutional right of testing the correctness of their assessments in the courts. The valuation put on property for purposes of state taxation must be taken as the proper valuation for local taxation: La. C. 203.

In California, cultivated and uncultivated land of the same quality and similarly situated are to be assessed at the same value: Cal. C. 13,2.

NOTES. — <sup>a</sup> In the noted states, the *cash* value. <sup>b</sup> See § 333, note <sup>c</sup>.

§ 335. **Purposes of Taxation.** The Constitutions of many states prescribe certain limits to the taxing power. Thus, taxes can be levied for the following purposes only: (1) In many, for the ordinary expenses of the state government and public state institutions: N.H. C. 2,5; Mass. C. 2,1,1,4; Mich. C. 14,1; Wis. C. 8,5; Minn. C. 9,2; Kan. C. 11,3; Va. C. 10,20; W.Va. C. 10,5; Ark. C. 3,31; Tex. C. 3,48; Ore. C. 9,2; Nev. C. 9,2; Col. C. 10,2; S.C. C. 9,3; Ga. C. 7,1,1; Fla. C. 12,2; La. C. 204.

(2) For the costs of collecting the revenue: Tex. (3) To pay any deficiency in the finances of the previous year: Wis.; Minn.; W.Va.; Ore. C. 9,6; Nev.; S.C. (4) To pay the interest on the state debt: Mich., Va., W.Va., Ark., Tex., Ore., Ga., Fla., La. (5) To pay the principal of the state debt: Mich.<sup>a</sup> Va., W.Va., Ark., Ga., Fla., La. So, in Texas, for the benefit of a sinking fund, which (tax?) shall not be more than two per cent of the state debt. (6) For educational purposes, generally: Mich.<sup>a</sup> Ga., Fla., La.; or for the support of free schools: W.Va., Ark., Tex. (7) To suppress insurrection, repel invasion, and defend the state in time of war: Ark., Ga., La.; so, to protect the frontier: Tex.; so, for the necessary defence of the government: N.H., Mass. (8) For the erection and repairs of public buildings: Tex.; for maintaining and erecting levees: La. C. 213. (9) To supply Confederate soldiers with wooden legs and arms: Ga., La. (10) For the enforcement of quarantine regulations: Tex. (11) To provide “such revenue as may be needful.” Neb. C. 9,1. (12) Taxes can be levied for public purposes only: Mo. C. 10,3; Tex. 8,3. (13) No tax can be levied for paying the interest on the bonds of any chartered company: Fla. C. 12,8.

But taxes for other purposes may be enacted according to the provisions of § 314: Ark.

NOTE. — <sup>a</sup> Specific taxes (§ 339) only are levied for these purposes.

§ 336. **Amount of State Tax.** The Constitutions of a few states limit the amount of state taxation for any one year.

Thus, in Alabama, not more than .75 per cent: Ala. C. 11,4. In two states, not more than .60 per cent: Col. C. 10,11; La. C. 209; or .40 when the state valuation reaches \$100,000,000: Col. In Texas, not more than .35 per cent: Tex.<sup>a</sup> C. 8,9; Amt. 1883. In Arkansas, not more than one per cent: Ark. C. 16,8. In Missouri, not more than .20 per cent; or .15 per cent when the state valuation shall exceed \$900,000,000: Mo.<sup>a</sup> C. 10,8.

NOTE. — <sup>a</sup> Exclusive of the tax to pay interest on the state debt.

§ 337. **Special State Taxes.** The Constitutions of four states give the legislature authority to levy a special tax in aid of the common schools: Miss. C. 8,10; so, in Florida, not less (1) than one tenth per cent: Fla. C. 8,5; (2) not greater than one fifth per cent: Ark. C. 14,3. (3) A tax may be levied of one twentieth per cent: Nev. C. 11,6.

§ 338. **Poll-Tax.** (A) By the Constitutions of two states, poll-taxes are declared oppressive, and prohibited: O. C. 12,1; Md. Decln. of Rts. 15.

(B) But in many states, the Constitution provides that a poll-tax may be imposed, (1) not to exceed \$1 per head: R.I.<sup>a</sup> C. 2,3; Va.<sup>b</sup> C. 10,5; W.Va. C. 10,2; Tenn. C. 2,28; Ark. C. 14,3; S.C. C. 9,2; Ga. C. 7,2,3; Fla. C. 12,6; (2) not to exceed \$1.50 per head: Ala. C. 11,1; La. C. 208; (3) not more than \$2 per head: N.C.<sup>a</sup> 5,1; Miss. C. 8,7; (4) not less than fifty cents per head: Tenn.; <sup>a</sup> (5) not less than \$2 per head: Cal. C. 13,12; Nev. C. 2,7; (6) not less than \$1 per head: Tex. C. 7,3; La.; (7) not more than \$4 per head: Nev. (8) Nothing is said about the amount: Va. C. 10,5.

(C) Poll-taxes may be imposed (1) on all male inhabitants between the ages of twenty-one and sixty: Tex., Cal., Nev.; (2) twenty-one and fifty: N.C.; (3) on all over twenty-one: Va., W.Va., Ark., La.

*Except*, paupers: N.C., Cal.; idiots: Cal.; insane persons: Cal.; the aged or infirm: W.Va., N.C., Tenn.; Indians not taxed or uncivilized: Cal., Nev.

No additional poll-tax can, in one state, be levied by any municipal corporation or by the State: S.C. C. 10,5.

Poll-taxes are, in several states, to be applied exclusively to the common-school fund: R.I.; Va.; <sup>c</sup> W.Va.; Ark.; Tex.; Cal.; S.C.; Ga.; Ala. C. 13,4; Miss.; La. C. 227. Or, in North Carolina, to purposes of education; and part of it, not more than one fourth, to the poor: N.C. C. 5,2.

NOTES. — <sup>a</sup> It seems counties and towns may also levy a poll-tax to the same amount. <sup>b</sup> To the amount of fifty cents. <sup>c</sup> Of the part of the poll-tax imposed by the State.

§ 339. **Income and License Taxes.** (A) By the Constitutions of five states, income taxes may be imposed: Va. C. 10,4; N.C. C. 5,3; Tenn. C. 2,28; Tex. C. 8,1; Cal. C. 13,11.

But by one, the tax is limited to such incomes as exceed \$600 a year: Va. And in two, it cannot be imposed on incomes derived from taxed property: N.C., Tenn.

(B) **License Taxes**, *Special*, *Specific*, or *Occupation* taxes, may, by the Constitutions of some states, be imposed. As, in detail, (1) upon pedlars: Ill. C. 9,1; Neb. C. 9,1; Va. C. 10,4; Tenn. C. 2,28; Ark. C. 16,5. (2) Hawkers: Neb., Ark. (3) Auctioneers: Ill., Neb. (4) Brokers: Ill., Neb., Va. (5) Pawnbrokers: Va. (6) Merchants: Ill., Tenn. (7) Commission merchants: Ill., Neb., Va. (8) Persons selling by sample: Va. (9) Showmen: Ill., Neb., Va., Ark. (10) Jugglers: Ill., Neb., Va. (11) Innkeepers: Ill., Neb. (12) Liquor dealers: Ill., Neb., Va. (13) Grocery keepers: Ill. (14) Toll bridges: Ill., Neb. (15) Ferries: Ill., Neb., Ark. (16) Insurance business: Ill., Neb. (17) Telegraph business: Ill., Neb. (18) Express business: Ill., Neb. (19) Venders of patents: Ill., Neb. (20) Generally, upon all persons or corporations using franchises or privileges: Ill.; W.Va. C. 10,1; N.C. C. 5,3; Tenn.; Ark. (21) Upon corporations generally: Mich. C. 14,10; Mo. C. 10,21. (22) Banks, and banking companies: Minn. C. 9,4; Kan. C. 11,2. (23) Railroads: Mo. C.

10,5. (24) Destructive domestic animals: Ga. C. 7,2,1. (25) Generally, upon all businesses which cannot be reached by the *ad valorem* system: Va. So, (26) upon trades: N.C. (27) Professions: N.C. So, (28) generally, upon persons or corporations doing business: Tex. C. 8,1.

Such taxes must be uniform upon each class upon which they operate: Neb. They cannot be imposed on mechanical or agricultural pursuits: Tex. Nor upon licenses: Fla. C. 12,6. In Louisiana, they may be imposed on all persons *except* clerks, laborers, clergymen, school teachers, those engaged in mechanical, agricultural, horticultural, and mining pursuits, and manufacturers of anything except liquor, tobacco, etc., and cotton-seed oil: La. C. 206.

#### Art. 34. Municipal Finance and Taxation. (See in Part III. for statutes.)

§ 340. **General Principles.** By the Constitutions of many states, the legislature shall not impose taxes upon counties, cities, or other municipalities, or upon the inhabitants or property thereof, but may by laws<sup>a</sup> vest in the corporate authorities thereof the power to tax: Ill. C. 9,9-10; Neb. C. 9,6-7; W.Va. C. 10,9; Tenn. C. 2,29; Mo. C. 10,10; Cal. C. 11,12; Col. C. 10,7; Fla. C. 12,6; La. C. 202. Compare § 510.

And in three, counties and townships shall have such powers of local taxation as may be prescribed by law: Minn. C. 11,5; Ark. C. 2,23; S.C. C. 9,8.

The principles of taxation are generally the same in municipal as in state taxation: Tenn.; Fla.; La. C. 218.

So, in several, such taxes must be uniform as to persons and property (except as in § 342): Ill. C. 6,9; Neb.; W.Va.; N.C. C. 7,9; S.C. And must be levied according to the value of the property: N.C., Tenn.

So, in Missouri, taxes for municipal purposes may be levied on all property subject to state taxation: Mo. C. 10,11. And the valuation of property for municipal purposes must be the same as for state purposes: La. C. 203. Or, in Missouri, not greater than the valuation for state purposes.

NOTE. —<sup>a</sup> Usually, by *general* laws only; see Art. 39.

§ 341. **Amount of Municipal Tax.** The Constitutions of a few states limit the amount of municipal taxation for any one year. Thus, in ten, the rates (A) of county taxation are limited.

(1) No county can assess more than one half per cent on the valuation: Ark. C. 16,9. Ala. C. 11,5. (2) Not more than three fourths per cent: Ill. C. 9,8. (3) Not more than ninety-five cents per \$100: W.Va. C. 10,7. (4) Not more than one per cent: La. C. 209. (5) Not more than one and one half per cent: Neb. C. 9,5. (6) Not more than two per cent: N.Y.<sup>b</sup> C. Amt. 1884, p. 739. (7) Not more than one half the state tax (*i. e.*, not more than one fourth per cent): Tex. C. 8,9; Amt. 1883. (8) Not more than twice the state tax, except for special purpose, and with the special approval of the legislature: N.C. C. 5,6. (9) The rate in counties not exceeding \$6,000,000 in valuation shall not in the aggregate exceed one half per cent; in counties between six and ten millions, it must not exceed four tenths per cent; in counties between ten and thirty millions, not greater than one half per cent; in counties over thirty millions, not more than thirty-five hundredths per cent: Mo. C. 10,11.

*Except*, that, in some states, certain taxes are not to be included in the amounts respectively above limited: as, (1) "special taxes authorized by law:" Ala. (2) Taxes for free schools: W.Va.; Ark. C. 14,3. (3) Taxes for debts already incurred: Ill., Neb., W.Va., Ark., Tex. (4) Taxes for the erection of public buildings: Tex. (but such taxes must not exceed one half per cent in any one year: Tex.). (5) Taxes, not over fifteen hundredths per cent, for roads and bridges: Tex. See also § 343.

In a few, municipal corporations generally may levy a greater rate than as above limited, with a vote (1) of the *property* tax-payers at an election: La.<sup>a</sup> (2) By vote of the electors of the county generally: Ill., Neb. (3) By three-fifths vote of such electors: W.Va.

(B) So, in some, no town or city may levy a tax (1) of more than one half per cent in any one year: Ark. C. 12,4; Ala. C. 11,7. (2) No town not having a special charter can so



levy a tax of more than one fourth per cent: Tex. C. 11,4; and cities having more than 10,000 population, not more than two and one half per cent: Tex. C. 11,5. (3) The rate in cities and towns having over 30,000 inhabitants may not exceed in the aggregate one per cent; between 10,000 and 30,000 inhabitants, not over six tenths per cent; between 1,000 and 10,000, not over one half per cent; under 1,000, not over one quarter per cent; and in school districts, for school purposes, not over four tenths per cent; but for school purposes these rates may be increased by a majority vote of tax-paying voters at a special election, and for the erection of public buildings, by a two-thirds vote of all voters, at such an election: Mo.

*Except*, taxes to pay valid indebtedness now existing or hereafter renewed: Mo., Ark., Ala.

NOTES. — *a* Such tax to be for public works. *b* See § 371, note *c*.

§ 342. **Prescribed Purposes.** In Wisconsin, the Constitution provides that each town and city shall raise, by tax, annually, for the support of the common schools, a sum not less than half the sum received for such purposes from the state school fund: Wis. C. 10,4. In North Carolina, no county, town, etc., shall levy a tax, except for its necessary expenses, without a special vote of the electors: N.C. C. 7,7. In Arkansas, the legislature may, by general law, authorize school districts to levy, by a vote of the qualified electors, a tax for school purposes, not to exceed one half per cent: Ark. C. 14,3. In Georgia, counties may levy taxes for schools under special authority of the legislature and a two-thirds vote of the county: Ga. C. 8,4,1. In Texas, counties may raise a special tax for common schools not exceeding one fifth per cent: Tex. C. Amt. 1883.

Counties, towns, etc., may levy taxes (1) for their current annual expenses: Tex. C. 11,6; (2) for educational purposes: Ga. C. 7,6,2; (3) for the interest and sinking fund of debts already created: Tex.; (4) for the building and repair of court-houses, gaols, bridges, and other necessary conveniences for the people of the county: Ga.; Miss. C. 12,16. The Constitution of South Carolina provides that there shall be an annual tax of one fifth per cent in each county for the support of its public schools: S.C. C. 10,5, Amt.

§ 343. **Special Taxes** for local improvements may be made; either (1) by general assessment: Ill. C. 9,9; Neb. C. 9,6; or (2) by betterment tax on contiguous property: Ill.; Minn. C. 9,1; Neb.; Ark. C. 19,27; Cal. C. 11,19.

But such betterment taxes must be consented to by a majority of property holders in the locality affected, and they must be *ad valorem* and uniform: Ark. So, in Louisiana, a special tax not exceeding one half per cent, nor for more than ten years, may be levied in aid of railroads or public improvements by vote of a majority of the tax-payers: La. C. 242. The betterment tax must be collected before the work is commenced: Cal.

§ 344. **Power to Contract Loans, etc.** The Constitutions of several states provide that the power of municipal corporations to tax, borrow money, contract debts, or loan credit, shall be restricted so as to prevent the abuse of such power: N.Y. C. 8,9; O. C. 13,6; Mich. C. 15,13; Wis. C. 11,3; Kan. C. 12,5; N.C. C. 8,4; Ark. C. 12,3; Ore. C. 11,5; Nev. C. 8,8; S.C. C. 9,9.

But in Nevada, that there can be no restriction on the power of municipalities to tax, borrow, loan, etc., for the purpose of getting a water supply.

§ 345. **Loans of Credit, etc.** (A) By the Constitutions of most states, no town, county, or municipality can give money or property (1) to any corporation having for its object a dividend of profits: N.H. C. 2,5; or (2) to any individual or corporation whatever: N.Y. C. 8,11; N.J. C. 1, Amt. 19 and 20; Pa. C. 9,7; O. C. 8,6; Ind. C. 10,6; Ill. C. separate section; Wis. C. 11,3; Mo. C. 4,47; 9,6; Ark. C. 12,5; Tex. C. 3,52 and 11,3; Cal. C. 4,31; Ore. C. 11,9; Col. C. 11,2; Ga. C. 7,6,1; Ala. C. 4,55; Fla. C. 12,7; La. C. 56. So, (3) in a few, to any railroad corporation: Ct. C. Amt. 25; Neb. C. 14,2.

Nor (B) can it loan its money or credit to such corporations respectively: N.H.; Ct.; N.Y.; N.J.; Pa.; O.; Ind.; Ill.; Tenn. C. 2,29; Mo.; Ark. C. 16,1; Tex.; Cal.; Ore.; Nev. C. 8,10; Col. C. 11,1; Ga.; Ala.; Miss. C. 12,14; Fla.;



La. (So, in Maryland, no county can loan its credit to any association or corporation : Md. C. 3,54.)

Nor, (C) in several, can such town, etc., become security for such corporation : N.H., N.J., Cal., Col., La.

Nor, in many, (D) can such municipal corporation become a stockholder or bondholder in such private corporation : N.H. ; Ct. ; N.Y. ; N.J. ; Pa. ; O. ; Ind. ; Ill. ; Neb. C. 12,1 ; Tenn. ; Mo. ; Ark. ; Tex. ; Cal. ; Ore. ; Nev. ; Col. C. 11,2 ; Ga. ; Ala. ; Miss. ; Fla. ; La. *Except*, it may own stock or bonds of railroad companies : Nev. Or of any corporation, if the stock be paid for at the time of subscription : Ind.

(E) Nor can the legislature authorize such town, etc., so to do : N.H., O., Mo., Tex., Cal., Ga., Ala., Fla. The same would follow from the constitutional provisions in other states.

So, (F) no municipality can become a stockholder, directly or indirectly, in any bank : Io. C. 8,4.

(G) In other states, no municipality can become indebted or issue bonds to aid a railroad for more than ten per cent of its valuation : Minn. C. 9,14 *b* ; Neb. (see § 346) ; and five per cent additional, on a two-thirds vote : Neb.

§ 346. **Limitations on § 345.** But in some states a county, town, etc., may give or lend its property or credit, or own stock, notwithstanding § 345 (1) on vote of the electors under authority of law : Neb. C. 14,2 ; (2) on a two-thirds vote of the electors, and with authority by the legislature : Miss. C. 12,14 ; (3) on a three-fourths vote of the electors : Tenn. C. 2,29 ; (4) by act of the legislature, approved also by the next legislature after publication in the locality interested : Md. C. 3,54.

## **Art. 35. Collection of Taxes.** (See in Part III. for statutes.)

§ 350. **Sworn List.** By the Constitution of California every tax-payer is required to make an annual statement of his taxable property under oath : Cal. C. 13,8.

§ 351. **Sale for Taxes.** The Constitution of Louisiana provides that there shall be no forfeiture for the non-payment of taxes : La. C. 210.

But there must be a sale of so much as is necessary : Tex. C. 8,13 ; La. So, the legislature are to provide for the sale of all "delinquent tax-lands : " Miss. C. 12,8. Such sale of real estate must be after order or judgment of some court of record : Ill. C. 9,4.

There must, in two, be reasonable notice to the owner : Ill. C. 9,5 ; La. And in two others, the occupant must always have personal notice by service before the time of redemption expires : Ill. ; Neb. C. 9,3.

§ 352. **Redemption.** By the Constitutions of a few states, the owner, tenant, etc., of real estate sold for taxes may redeem (1) at any time within two years from the sale : Ill. C. 9,5 ; Neb. C. 9,3 ; Tex. C. 8,13 ; (2) at any time within one year therefrom : La. C. 210.

Upon payment (1) of twice the purchase-money : Tex. ; (2) of the price plus twenty per cent and costs : La.

§ 353. **Tax-Titles.** By the Constitution of Louisiana, all tax deeds are *prima facie* evidence of the sale ; and no sale can be annulled for informality except on payment or tender of the price plus ten per cent interest : La. C. 210. In Texas, the deed vests a good title in the purchaser, subject to be impeached only for actual fraud : Tex. C. 8,13. The courts are "to apply liberal principles in favor of tax titles : " Miss. C. 12,8.

## **Art. 36. State Debts.**

§ 360. **Temporary Loans.** By the Constitutions of most states, the legislature may authorize a temporary loan, to meet casual deficits, etc., not exceeding, with all

other such debts, (1) \$50,000: R.I. C. 4,13; Mich. C. 14,3; Md. C. 3,34; Ore. C. 11,7; (Ariz.\* Bill of Rts. 25;) (2) \$100,000: N.J. C. 4,6,4; Wis. C. 8,6; Neb. C. 14,1; Col. C. 11,3; Ala. C. 11,3; (3) \$200,000: Tex. C. 3,49; Ga. C. 7,3,1; (4) \$250,000: Ill. C. 4,18; Io. C. 7,2; Minn. C. 9,5; Mo. C. 4,44; (5) \$300,000: Me. C. 9,14; Cal. C. 16,1; Nev. C. 9,3; (6) \$500,000: Ky. C. 2,35; (7) \$750,000: O. C. 8,1; (8) \$1,000,000: N.Y. C. 7,10; Pa. C. 9,4; Kan. C. 11,5; (9) the amount of such loans is not limited: Ind. C. 10,5; Va. C. 10,7; W.Va. C. 10,4; N.C. C. 5,4; S.C. C. Amt. 16.

But in Alabama, until such loan is paid, no new one can be negotiated. (The same follows in all states, unless the whole debt be less than the sum allowed.)

And in several, every such law shall provide annual taxes sufficient to pay the debt, principal and interest, (1) in five years: Wis.; (2) in ten years: Minn.; (3) when due: Kan.; (4) in two years: Mo.; (5) annual taxes sufficient to pay the interest: Neb.

Such provision for taxes, and appropriation to meet the debt, are irrepealable until the debt is paid: Wis., Minn., Kan., Neb.

For the method of passing such law, see § 315.

§ 361. **Other Debts** may, by the Constitutions of most of the states, be created for the following purposes only:<sup>a</sup> (1) to repel invasion or suppress insurrection: Me.; R.I.; N.Y. C. 7,11; N.J.; Pa.; O. C. 8,2; Ind.; Ill.; Mich. C. 14,4; Wis. C. 8,7; Io. C. 7,4; Minn. C. 9,7; Kan. C. 11,7; Neb. C. 14,1; Md.; Va.; W.Va.; N.C.; Ky.; Tex.; Cal.; Ore.; Nev.; Col.; Ga. C. 7,12,1; Ala.; La. C. 44. See § 360 for other citations.

(2) To pay the state debt: N.Y.; Pa.; O.; Va.; W.Va.; Ky.; Mo.; Ark. C. 16,1; Tex.; Ga.; Ala.; principal and interest: Va., W.Va.; interest only: Ind.

(3) For the erection of public buildings:<sup>b</sup> Col.; Fla. C. 12,7 (but not to an amount over \$50,000: Col.); for the support of state institutions or the completion of public works:<sup>b</sup> Fla.; for public improvements: Kan. C. 11,5 (not over the limit prescribed in § 360).

And (4) debts for purposes not above mentioned, but distinctly specified in the bill, may be incurred, in many states, if the law is ratified according to § 363, and provision for payment made according to § 362: R.I.; N.Y. C. 7,12; N.J.; Ill.; Io. C. 7,5; Kan. C. 11,6; Md.; N.C.; Ky.; Cal.; S.C. So, of debts exceeding the amount limited in § 360: Mo., Cal., Nev. But in some, no debts can be incurred except as in §§ 360, 361: O. C. 8,3; Wis. C. 8,4; Minn. C. 9,7; Neb.; Mo.; Ark.; Col.

In Maine the Constitution authorized a special war debt of \$3,500,000: Me. C. 9,15. Three states are forbidden to issue any interest-bearing treasury warrants or scrip: Va. C. 10,13; Ark. C. 16,1; S.C. C. 9,10. *Except*, in one, for the redemption of bonds previously issued, or for such debts as are expressly authorized by the Constitution: Va., S.C. (Washington Territory is forbidden to borrow money, or pledge the faith of the people for any loan: U.S. R. S. 1924.)

NOTES. — <sup>a</sup> In the noted states, these limitations do not apply after the bonds of the state shall have reached par. <sup>b</sup> See § 324.

§ 362. **Payment of Debts.** In several states, no debt <sup>a, b</sup> can be contracted by the legislature unless authorized by a law which shall at the same time make provision by taxation, etc., for its payment; thus, —

For its payment, principal, and interest, (1) when due: Io. C. 7,6; Minn.; Kan. C. 11,5-6; Neb.; or, (2) within thirteen years: Me.; Minn. C. 9,5; Mo.<sup>a, d</sup> C. 4,44; (3) within fifteen years: Md. C. 3,34; Mo. C. 4,44; Col. C. 11,4; (4) within eighteen years: N.Y. C. 7,12; (5) within twenty years: Io. C. 7,5; Cal. C. 16,1; Nev. C. 9,3; (6) within thirty years: Ky. C. 2,36; (7) within thirty-five years: N.J. C. 4,6,4; (8) for the payment of the interest (only), when due: Ill. C. 4,18; N.C.<sup>c</sup> C. 5,4; S.C. C. 9,7.

And this part of the law is, by the Constitutions of these states, declared irrevocable until the debt is paid: N.Y.; N.J.; Ill.; Io. C. 7,6; Minn.; Kan.; Md.; Cal.; Nev.; Col. In Virginia, no preference can be given to foreign bondholders: Va. C. 8,10. In most states, there are also constitutional provisions for a sinking-fund. See Mich. C. 14,2; Ky. C. 2,34; Va. C. 10,8; Pa. C. 9,11; Ga. C. 7,14,1.

NOTES. — <sup>a</sup> Except debts incurred to meet a casual deficit (§ 360). <sup>b</sup> Except debts incurred to repel invasion or suppress insurrection (§ 361). <sup>c</sup> And this condition ceases to apply whenever the bonds of the state touch par. <sup>d</sup> When the debt is over \$250,000.

§ 363. **Ratification by the People.** An act authorizing a state debt, <sup>a, b</sup> under § 361, must in several states be ratified by the people at a general election: <sup>a, b</sup> R.I.; N.Y.; N.J.; Ill.; Io.; Kan. C. 11,6; Ky.; Cal. And it requires a two-thirds vote of the people: Mo.; S.C. C. Amt. 16. For citations, see § 360.

NOTES. — <sup>a</sup> See § 362, note <sup>a</sup>. <sup>b</sup> See § 362, note <sup>b</sup>.

§ 364. **Limitations on the State's Power to contract Debts: Rebellion Debts.** By the Constitutions of four Southern States, the state shall never assume, pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of rebellion against the United States: Va. C. 10,10; N.C. C. 1,6; Ga. C. 7,11,1; Miss. C. 12,21. So, in Florida, all loans contracted by the state or its municipalities during the war, except those for school purposes, are void: Fla. C. 15,4.

For Compensation for Slaves, see § 31.

So, in two states, no county, city, or municipal corporation shall levy or collect any tax for the payment of any debt created for the purpose of aiding rebellion against the State or the United States: Va.; N.C. C. 7,13. And in one, no such debt shall ever be paid; S.C. C. 9,16. All debts must be by state bonds of an amount not under \$50 each, on interest, payable in twenty years: S.C. C. 9,14.

§ 365. **Repudiation.** The Constitution of North Carolina provides that all debts authorized or bonds issued by the legislature of 1868-70, or under the Convention of 1868 (except such as were issued to fund the old debt), shall never be paid, unless the law proposing payment be ratified by the people at a special election: N.C. C. 1,6. And the Constitution of Missouri provides that the claims audited by virtue of the act of 1874 to adjust the war debt of the State or any similar act shall never be paid by the State until they are paid to the State by the United States: Mo. C. 4,52. In Mississippi the "Union" and "Planter's Bank" bonds are repudiated by the Constitution: Miss. C. Amt. 1.

But in Arkansas, the Constitution prescribes that the legislature shall, from time to time, provide for the payment of all just and legal debts of the state: Ark. C. 16,2. Compare also § 362. By an amendment, however, the "Holford" bonds of 1869 are repudiated: Ark. 1879, p. 149.

## Art. 37. Municipal Debts.

§ 370. **Purposes.** The Constitutions provide (A) that no county, city, or village shall contract debts except for (1) county, city, and village purposes: N.Y. C. 8,11. (2) For making and repairing public roads and bridges: Col. C. 11,6. (3) For erecting necessary public buildings: Col. (B) No county can borrow money for the purpose of taking stock, as in § 345: Ind. C. 10,6. No county can contract debts in the construction of railways, canals, or works of internal improvement, except as in § 346: Md. C. 3,54. No county, city, or other municipality can ever issue interest-bearing evidences of indebtedness, except in payment of debts previously (to 1874) existing: Ark. C. 16,1. In Texas, counties and cities bordering on the Gulf may levy taxes and issue loans for the erection of sea-walls, breakwaters, and for sanitary purposes: Tex. C. 11,7. In Colorado, school-districts may contract a loan upon a majority vote of the tax-payers therein: Col. C. 11,7.

§ 371. **Amount.<sup>a</sup>** By the Constitutions of several states, no municipality can in the aggregate be indebted or contract debts to an amount exceeding (1) ten per cent on its assessed valuation: N.Y.<sup>b</sup> C. Amt. 1884, p. 739. (2) Five per cent: Me. C. Amt.

22; Ill. C. 9,12; Wis. C. 11,3, Amt.; Io. C. 11,3; W.Va. C. 10,8; Mo. C. 10,12. (3) Seven per cent: Pa. C. 9,8; Ga. C. 7,7,1. (4) Three per cent: Col.<sup>c</sup> C. 11,8. (5) Two per cent: Ind. C. 13,1. (6) Three tenths per cent, or six tenths per cent in counties having a valuation under \$5,000,000: Col. C. 11,6. (7) Eight per cent: S.C. C. Amt. 1884.

No county shall, in Oregon, create debts to exceed \$5,000: Ore. C. 11,10.

*Except*, in Oregon, to repel invasion or suppress insurrection; or, in Indiana, to provide for the protection of the people in time of war or great public calamity, on the petition of a majority of the property-owners in number and value; or, in Missouri, to erect a court-house or gaol; or, in New York and Colorado, to supply water to the city or town.

But in Colorado, counties may incur debt to a greater amount than as above limited by a majority vote of the tax-payers in such county (but only to double such amount).

NOTES. — <sup>a</sup> See also § 344, C. <sup>b</sup> Of counties containing cities over 100,000 in population, or of such cities only. Of cities and towns only.

§ 372. **Voting.** No municipality can, in a few states, contract any debt (except a temporary debt, incurred in anticipation of income) without the assent (1) of two thirds of its voters at a special election: Mo. C. 10,12; 9,19; Cal. C. 11,18; Ga. C. 7,7,1. (2) Of three fifths, at any election: W.Va. C. 10,8; (3) of the majority of the tax-payers: Col. C. 11,8.

§ 373. **Payment.** A municipality creating a debt must, by the Constitutions of several states, at the same time provide for its payment, principal or interest, and make provision for a tax or a sinking-fund therefor, to be fully paid (1) within twenty years: Ill. C. 9,12; Wis. C. 11,3, Amt.; Mo. C. 10,12; Cal. C. 11,18; (2) within fifteen years: Col.<sup>a</sup> C. 11,8; (3) within thirty years: Pa. C. 9,10; Ga. C. 7,7,2; (4) within thirty-four years: W.Va. C. 10,8. (5) The sinking-fund must be of two per cent annually: Tex. C. 11,5.

NOTE. — <sup>a</sup> Of cities or towns only.

§ 374. **Collection of Municipal Debts.** By the Constitutions of several Western states, private property shall not be liable to be taken and sold for the payment of corporate debts of municipal corporations: Ill. C. 9,10; Neb. C. 9,7; Mo. C. 10,13; Cal. C. 11,15; Col. C. 10,14.

## CHAPTER IV.

### LEGISLATION: CONTENT.

§ 390. **Note to Chapter.** This chapter contains all the miscellaneous provisions of the State Constitutions, many of which are usually, as has been said in § 1, treated only by legislation in the older states. None of the statutes of states or territories are incorporated with the text in this chapter, except certain United States statutes prescribing generally for the legislation of the territorial assemblies. See, generally, in Parts III. and IV. for the laws bearing on matters here treated.

### Art. 39. General Provisions.

§ 391. **Legislation in General.** Some of the older states have provisions in the Constitution attempting to define generally the duties of the legislature and the purposes and objects of legislation; see N.H. C. 1,31; 2,5; Mass. C. 2,1,1,4; Me. C. 4,3,1; Vt. C. 2,9; Ga. C. 3,7,22; Ala. C. 4,25. So, in several states, the legis-



lature are to pass such laws as may be necessary to carry into effect the provisions of the Constitution: N.J. C. 10,12; Ill. C. Sched. 19; Io. C. 12,1; Md. C. 3,56; Del. C. Sched. 7; W.Va. C. Sched. 22; Mo. C. Sched. 15; Tex. C. 3,42; Col. C. Sched. 4; Ala. C. 16,2.

And in Arkansas, the legislature are to pass such laws as will foster and aid the agricultural, mining, and manufacturing interests of the state: Ark. C. 10,1.

And in Maine, the legislature shall provide, as far as practicable, by general laws, for all matters usually appertaining to private or local legislation: Me. C. 4,3,13. So, in others, for all matters specified in § 395: N.Y. C. 3,18; N.J. C. 4,7,11; Wis. C. 4,32; Io. C. 3,30; Md. C. 3,33; Va. C. 5,20; W.Va. C. 6,39. The legislative power of the territories extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States: U.S. R. S. 1851.

The allowable province of legislation will, however, be best defined by the limitations and restrictions on legislation contained in this chapter.

§ 392. **Suspending Laws**<sup>a</sup> By the Constitutions of most states, laws can only be suspended by the legislature: N.H. C. 1,29; Mass. C. 1,20; Me. C. 1,13; Vt. C. 1,15; Pa. C. 1,12; O. C. 1,18; Ind. C. 1,26; Md. Decln. of Rts. 9; Del. C. 1,10; Va. C. 1,9; N.C. C. 1,9; Ky. C. 13,16; Ark. C. 2,12; Tex. C. 1,28; Ore. C. 1,22; S.C. C. 1,24; Ala. C. 1,22; La. C. 157; N.M.\* 1851, July 12, § 19. Or, in many, by authority derived from the legislature: N.H., Mass., Me., Vt., Pa., Md., Del., Ky., Ore., S.C., La., N.M.\*

NOTE. — <sup>a</sup> See § 127 for habeas corpus; § 88 for stay laws.

§ 393. **Laws Impairing Contracts.**<sup>a</sup> By the Constitutions of nearly all, the legislature are forbidden to pass laws impairing the obligation of contracts: Me. C. 1,11; R.I. C. 1,12; N.J. C. 4,7,3; Pa. C. 1,17; O. C. 2,28; Ind. C. 1,24; Ill. C. 2,14; Mich. C. 4,43; Wis. C. 1,12; Io. C. 1,21; Minn. C. 1,11; Neb. C. 1,16; Va. C. 5,14; W.Va. C. 3,4; Ky. C. 13,20; Tenn. C. 1,20; Mo. C. 2,15; Ark. C. 2,17; Tex. C. 1,16; Cal. C. 1,16; Ore. C. 1,21; Nev. C. 1,15; Col. C. 2,11; S.C. C. 1,21; Ga. C. 1,3,2; Ala. C. 1,23; 4,56; Miss. C. 1,9; Fla. C. Decln. of Rts. 16; La. C. 155; [N.M.\* 1851, July 12, § 14; Ariz.\* Bill of Rts. 19].

And by that of Louisiana, vested rights may not be divested, unless for purposes of public utility, adequate compensation being first made (compare Article 9). So, in one other, no laws taxing retrospectively sales, purchases, or other acts previously done, can be passed: N.C. C. 1,32. But the legislature may, in Ohio, by general laws, authorize courts to carry into effect, upon such terms as are just and equitable, the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings arising out of their want of conformity with the laws of the state: O. C. 2,23. In Colorado the legislature can pass no law for the benefit of a railroad or other corporation or association retrospective in its operation, or which imposes on the people of any municipality a new liability in respect to transactions or considerations already past: Col. C. 15,12. In New Hampshire retrospective laws for the decision of civil causes are forbidden: N.H. C. 1,23.

NOTE. — <sup>a</sup> See § 142, note <sup>a</sup>.

§ 394. **Laws to be General.**<sup>a</sup> (A) In many states, the Constitution provides that there shall be no special, local, or private law (1) in any case for which provision has been (or, in Illinois, Missouri, Texas, California, Alabama, *may be*) made by general law: Pa. C. 3,7; Ind. C. 4,23; Ill. C. 4,22; Kan. C. 2,17; Neb. C. 3,15; Md. C. 3,33; W.Va. C. 6,39; Mo. C. 4,53; Ark. C. 5,25; Tex. C. 3,56; Cal. C. 4,25; Nev. C. 4,21; Col. C. 5,25; Ga. C. 1,4,1; Ala. C. 4,23; Fla. C. 4,18.

(2) Or, in several, in any case where the relief sought can be given by any State court: Pa.; Va. C. 5,20; W.Va.; Ark.; Ala. And whether a general law can be

made applicable or not is declared, in Missouri, to be a judicial question, despite any legislative assertion to the contrary. In two, every statute is a public law unless otherwise declared in the statute itself: Ind. C. 4,27; Ore. C. 4,27. (B) Nor, in a few, can the legislature indirectly enact a special or local law by the partial repeal of a general law: Pa. C. 3,7; Mo.; La. C. 47. But laws repealing local or special laws may be passed: Pa., Mo., La.

So, in Georgia, no general law affecting private rights can be varied in any particular case, by special legislation, except with the free consent, in writing, of all persons to be affected thereby: Ga. C. 1,4,1. And in Texas, no man, or set of men, shall ever, by special law, be exempted or relieved from any public duty imposed by general laws: <sup>a</sup> Tex. C. 16,43. In New Jersey, no general law shall embrace any provision of a private, special, or local character: N.J. C. 4,7,4.

NOTE. — <sup>a</sup> Compare also §§ 17,391.

§ 395. **Local or Special Laws** in many cases are forbidden by the State Constitutions. Thus, in detail, are forbidden, in the several states, all such laws (1) laying out or opening roads or highways: N.Y. C. 3,18; N.J. C. 4,7,11; Pa. C. 3,7; Ind. C. 4,22; Ill. C. 4,22; Wis. C. 4,31, Amt.; Io. C. 3,30; Minn. C. 4,33, Amt. 1881, p. 22; Neb. C. 3,15; W.Va. C. 6,39; Mo. C. 4,53; Tex. C. 3,56; Cal. C. 4,25; Ore. C. 4,23; Col. C. 5,25; La. C. 46.

(2) Vacating roads, streets, plats, and public squares: N.Y.; N.J.; Pa.; Ind.; Ill.; Mich. C. 4,23; Io.; Minn.; Neb.; W.Va.; Mo.; Ark. C. 5,24; Tex.; Cal.; Ore.; Nev. C. 4,20; Col.; Fla. C. 4,17; La.

(3) Authorizing or providing for the sale or conveyance of real estate: Mich., Ark.

And so, in others, "providing for the sale or conveyance of the real estate of persons under disability:" N.J. C. 4,7,7; Ill.; Wis.; Minn.; Neb.; Va. C. 5,20; W.Va.; Ky. C. 2,32; Cal.; Nev.; Col. So, in two, of their personal estate: Wis., Minn. And in a few others, "providing for the sale of real estate of persons under disability by executors, administrators, guardians, or trustees:" Ind.; Md. C. 3,33; Ore. So, in others, "affecting the estates of minors or persons under disability:" Pa., Mo., Tex., Cal., La. Providing for the sale of church property, or property held for charitable use: W.Va. C. 6,39.

(4) Giving effect to informal or invalid deeds or wills: Md., Mo., Tex., Cal., Col., La. So, in one other, "authorizing deeds to be made for lands sold for taxes:" W.Va.

(5) Draining swamps: N.Y.

(6) Changing the law of descent: N.J., Pa., Ill., Neb., W.Va., Mo., Tex., Cal., Col., La.

(7) Authorizing the creation, extension, or impairing of liens: Pa., Mo., Tex., Cal.

(8) Relating to cemeteries, graveyards, or public grounds not of the State: Pa., Mo., Tex.

(9) In relation to interest on money: N.Y., Pa., Ind., Ill., Neb., W.Va., Mo., Tex., Cal., Ore., Col., La.

(10) Legitimizing any children (in Tennessee, any person) not born in lawful wedlock: Pa.; N.C. C. 2,11; Tenn. C. 11,6; Mo.; Ark.; Tex.; Cal.

(11) Changing the name of any person; N.Y., Pa., Ind., Ill., Wis., Io., Minn., Neb., Md., Va., N.C., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Fla., La. Or, in several, of any place: Pa., Ill., Neb., Mo., Tex., Cal.

(12) Adopting any person (in Pa., Mo., Tex., Cal., and La., any *child*): Pa., Tenn., Mo., Tex., Cal., La. So, in Wisconsin and Minnesota, constituting one person the heir of another.

(13) Declaring any person of age: Mo., Tex., Cal., Col. And so, in Louisiana, "emancipating minors."

(14) Granting divorces: Pa.; O.; Ind.; Ill.; Neb.; Md.; Va.; W.Va.; N.C. C. 2,10; Ky.; Tenn. C. 11,4; Mo.; Ark.; Tex.; Cal.; Ore.; Nev.; Col.; Fla.; La. Or, in one, concerning alimony: N.C. See also, § 430.

(15) Granting to any person or corporation any exclusive privilege, immunity, or

franchise: <sup>a</sup> N.Y., N.J., Pa., Ill., Minn.<sup>a</sup> (except municipal corporations), Neb., Mo., Cal., Col., La.

(16) Granting to any person or corporation the right to lay down railroad tracks: N.Y., N.J., Pa., Ill., Neb., Mo., Col. (17) Providing for building bridges, or chartering bridge companies: N.Y., Pa., Ill., Neb., W.Va., Mo., Tex., Cal., Col., La. *Except*, in several, bridges across streams forming the boundary of the state: N.Y., Pa., Mo., Tex., La.

(18) Chartering or licensing ferries: Pa., Ill., Wis., Minn., Neb., W.Va., Mo., Tex., Cal., Col., La.

(19) Chartering or licensing roads or turnpike companies: Cal. (20) Incorporating railroads: Tex. (21) Incorporating other works of internal improvement: Tex. (22) Creating corporations, or amending, renewing, extending, or explaining the charters thereof (see § 441): Pa.; Wis.; Minn.; Mo.; Territories, U.S. R. S. 1889; La. (23) Authorizing the construction of street railways: La. (24) Regulating labor: Pa., Mo., Tex., La. (25) Regulating trade: Pa., Mo., Tex., La. (26) Regulating manufacturing: Pa., Mo., Tex., La. (27) Regulating mining: Pa., Mo., Tex. (28) Regulating agriculture: La. (29) Creating banks: N.Y. C. 8,4. See § 490.

(30) Providing or changing methods for the collection of debts: Pa., Mo., Tex., La.; or (31) enforcing judgments: Pa., Mo., Tex., La.; or (32) prescribing the effect of judicial sales of real estate: Pa., Mo., Tex., La.

(33) Legalizing the unauthorized or invalid acts of any officer or agent of the state or a municipality: Mo., Cal., La. *Except*, in one, as *against* the state: Cal.

(34) Regulating the jurisdiction, fees, powers, or duties of aldermen, justices of the peace, constables, magistrates, etc. (compare No. 51): Pa., Ind., Ill., Neb., Mo., Tex., Cal., Ore., Nev., Col., Fla.

(35) Selecting or impanelling grand or petit jurors: N.Y., N.J., Ind., Neb., W.Va., Tex., Cal., Ore., Nev., Col.

Or laws (36) for the punishment of crimes and misdemeanors: Ind., Cal., Ore., Nev., Fla. Or (37) pardoning or commuting the sentence of any criminal: Ariz.\* Bill of Rts. 28.

Or (38) remitting fines, penalties, or forfeitures: Pa., Ill., Neb., W.Va., Mo., Tex., Cal., Col., La.

Or, (39) restoring to citizenship any person convicted of infamous crime: <sup>b</sup> N.C., Cal.

Or (40) for the protection of game or fish: Ill., Neb., Col. *But* in two, such laws may be enacted to apply only to localities specially designated: Tenn. C. 11,13; Tex. C. 3,56.

Or laws (41) locating or changing county seats: N.Y., Pa., Ill., Wis., Io., Minn., Neb., W.Va., Mo., Tex., Cal., Col.

Or (42) erecting new townships or counties, or changing county or township lines: Pa.; Mo.; Ga. C. 11,1,3.

Or (43) "providing for the bonding of cities, towns, or other municipalities:" Neb.

(44) Incorporating villages and towns: N.Y., Pa., Ill., Minn., Neb., W.Va., Mo., Tex. Or, in several, towns: Pa., Ill., Wis., Io., Neb., W.Va., Mo., Tex. Or, in a few, incorporating cities: Pa., Ill., Io., Neb., W.Va., Mo., Tex. Or, in several, amending the charters thereof: Pa., Ill., Wis., Neb., W.Va.,<sup>c</sup> Mo., Tex.

(45) Regulating county and township business: N.J., Pa., Ind., Ill., Neb., W.Va., Mo., Tex., Cal., Nev., Col., Fla.

(46) Regulating the affairs of municipalities generally: Mo., Tex.

(47) Regulating the election of county or township officers: N.Y. (township only), N.J., Ind., Ill., Neb., Cal., Ore., Nev., Fla.; or regulating their compensation: Ind.; Ill. C. 10,12.

(48) In relation to the fees and salaries of any officer: Ind., Cal., Col. *Except*, that



compensation may be suitably graded in proportion to population and necessary services required : Ind.

(49) Creating or altering fees or salaries during the term for which the officer is appointed : <sup>a</sup> N.Y. ; N.J. ; Ill. C. 4,22 ; Neb.

(50) Authorizing extra compensation to any public officer, agent, or contractor after his service has been rendered or the contract entered into : Mich. C. 4,21. See also § 216.

(51) Creating offices, or prescribing the powers and duties of municipal officers : Pa., Mo., Tex., Cal.

(52) For the assessment or collection of taxes for either state or municipal purposes : N.J. C. 4,7,12 ; Ind. ; Wis. ; Io. ; Minn. ; Mo. ; Tex. C. 8,3 ; Cal. ; Ore. ; Nev. ; Fla.

(53) Exempting property from taxation : Pa. ; Neb. C. 9,2 ; Mo. ; Tex. ; Cal. ; La.

(54) Providing for the management of the common schools : N.J., Pa., Ill., Neb., Mo., Tex., Cal., Col., La. So, in others, providing for their support : N.J., Pa., Ind., Mo., Tex., Ore., La. Or providing for the apportionment of the school fund : Wis., Minn.

(55) For extending the time for the collection of taxes : Wis., Minn., Md., Mo., Tex., Cal., La. Or, in three, for otherwise relieving any assessor or collector of taxes from due performance of his duties, or his sureties from liability : Mo., Tex., La.

(56) Refunding money paid into the state treasury : Pa., Md., Mo., Tex., Cal., La.

(57) Releasing persons from debts due to the state, or to any municipality therein ; <sup>e</sup> or, in California, to any person or corporation therein : Md., Cal. *Unless* such special law is recommended by the governor or treasury department : Md.

In one (58), releasing taxes or title to forfeited lands : W.Va.

(59) Regarding elections : N.Y. ; Pa. C. 3,7 ; 8,7 ; Ind. ; Ill. ; Neb. ; W.Va. ; Mo. ; Tex. ; Cal. ; Ore. ; Nev. ; Col. ; La.

(60) Regulating the practice in the courts : Pa., Ind., Ill., Neb., W.Va., Mo., Tex., Cal., Ore., Nev., Col., Fla., La. Or their jurisdiction : Mo. So, in one, concerning any civil or criminal actions : La.

(61) Providing for the change of venue in civil proceedings : N.Y., N.J., Pa., Ind., Ill., Neb., Mo., Tex., Cal., Ore., Nev., Col., Fla., La. Or in criminal proceedings : N.Y., N.J., Pa., Ind., Ill., Neb., Ky., Mo., Ark., Tex., Cal., Ore., Nev., Fla., La.

(62) Changing the rules of evidence in judicial proceedings : Pa., Mo., Tex., Col., La.

(63) Prescribing the limitation of civil (or, in Texas and California, criminal) actions : Mo., Tex., Cal., Col.

NOTES. — <sup>a</sup> Compare § 17. <sup>b</sup> § 223. <sup>c</sup> As to cities, etc., containing less than 2,000 population. <sup>d</sup> See § 215. <sup>e</sup> § 315.

§ 396. **Laws to be Uniform.** All general laws, or laws of a public nature, must by the Constitutions of many states be uniform in their operation throughout the state : <sup>a</sup> O. C. 2,26 ; Ind. C. 4,23 ; Wis. C. Amt. 4,32 ; Io. C. 1,6 ; 3,30 ; Kan. C. 2,17 ; Cal. C. 1,11 ; Nev. C. 4,21 ; Ga. C. 1,4,1 ; Fla. C. Decln. of Rts. 11 ; Ariz.\* Bill of Rts. 17.

NOTE. — <sup>a</sup> Compare §§ 17,394.

## Art. 40. Land Laws.<sup>a</sup>

§ 400. **Tenure.** By the Constitutions of a few states all land is declared allodial : N.Y. C. 1,13 ; Wis. C. 1,14 ; Minn. C. 1,15 ; Ark. C. 2,28. And so, in four, the ultimate property in land is declared to vest in the people, by right of sovereignty : N.Y. C. 1,11 ; Wis. C. 9,3 ; S.C. C. 6,3.

And all land to which the title fails by defect of heirs reverts or escheats <sup>b</sup> to the people : N.Y. ; Mich. C. 13,3 ; Wis. ; S.C.



The proceeds of escheated lands (or other property) are, by many State Constitutions, to be applied to the public schools: Mich.; Io. C. 9,2,3; Kan. C. 6,3; Neb. C. 8,3; Va. C. 8,7; W.Va. C. 12,4; Mo. C. 11,6; Cal. C. 9,4; Ore. C. 8,2; Nev. C. 11,3; Col. C. 9,5; S.C. C. 10,11; Ala. C. 13,3; Miss. C. 8,6; Fla. C. 8,4; La. C. 229.

NOTES. — <sup>a</sup> See Art. 110. <sup>b</sup> This word is improperly used, and misleading. See § 401, note <sup>a</sup>.

§ 401. **Feudal Tenures**, with all their incidents, are abolished by the Constitutions of a few states: <sup>a</sup> N.Y. C. 1,12; Wis. C. 1,14; Minn. C. 1,15; Ark. C. 2,28.

So, in two, all fines, quarter-sales, and like restraints upon alienations are specially declared void: N.Y. C. 1,15; Wis.

*Except* in one, (1) rents and certain services heretofore <sup>b</sup> lawfully created: N.Y. (2) And except the liability to "escheat" <sup>a</sup> for lack of heirs: N.Y. C. 1,13.

NOTES. — <sup>a</sup> Land being allodial (§ 400), it follows that there can be, properly speaking, no escheat. The word is, however, commonly used in America, and will hereafter be used in this book, to mean both escheat proper and the vesting of the state's title by right of sovereignty. <sup>b</sup> "Heretofore:" see Table of Constitutions for date.

§ 402. **Entails, Primogeniture, and Perpetuities.** (A) Entails <sup>a</sup> are, by declaration in two of the territories, entirely abolished: N.M.\* 1851, July 12, § 17; Ariz.\* Bill of Rts. 23 (except as in § 1313). So, in two states, the legislature is to regulate entails so as to prevent perpetuities: Vt. C. 2,36; N.C. C. 2,15.

(B) By the Constitutions of several states perpetuities <sup>b</sup> are forbidden: N.C. C. 1,31; Tenn. C. 1,22; Ark. C. 2,19; Tex. C. 1,26; Cal. C. 20,9; Nev. C. 15,4; N.M.\* *Except*, in two, for eleemosynary purposes: Cal., Nev.

(C) And by that of Texas, the law of primogeniture may never be in force: Tex., N.M.\*

NOTES. — <sup>a</sup> For statutes, see § 1313. <sup>b</sup> See Art. 144.

§ 403. **Mortmain.** The Constitution of Maryland declares all gifts, sales, and devises of land or personal property to religious sects or for religious uses, without the prior or subsequent sanction of the legislature, void: Md. Decln. of Rts. 38.

*Except*, in two states, a sale, etc., of land for a church, parsonage, or cemetery, and actually so used: Md.; Mo. C. 2,8. But such land must not, in Maryland, exceed five acres in extent.

The United States laws provide that in the territories no religious or charitable association or corporation shall hold real estate of a greater value than \$50,000: U.S. R. S. 1890.

§ 404. **Monopolies** are, by the Constitutions of several states, declared odious, and forbidden: Md. Decln. of Rts. 41; N.C. C. 1,31; Tenn. C. 1,22; Ark. C. 2,19; Tex. C. 1,26; N.M.\* 1851, July 12, § 17.

In California, the Constitution declares that the holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property: Cal. C. 17,2.

§ 405. **Long Leases.** In a few states there are constitutional provisions forbidding leases or grants of agricultural land reserving rent, for a longer period (1) than twelve years: N.Y. C. 1,14; Mich. C. 18,12; (2) than fifteen years: Wis. C. 1,14; (3) than twenty years: Io. C. 1,24; (4) than twenty-one years: Minn. C. 1,15.

§ 406. **Record of Conveyances.** In Vermont the Constitution provides that all conveyances of land shall be recorded: Vt. C. 2,35. So, in Louisiana, all mortgages: La. C. 176. So, in Louisiana, all "privileges" on real estate; but privileges for expenses of last illness or taxes need not be recorded, and they lapse in three years.

§ 407. **Lands of the United States.** A few states have constitutional provisions to forbid the legislature (1) from interfering with the title of the United States to its lands in the state: Wis. C. 2,2; Minn. C. 2,3; Kan. C. Ordinance; Mo. C. 14,1; Nev. C. Ordinance. Or (2) from interfering with any laws Congress may find necessary for securing the title of such land to *bona fide* purchasers: Wis., Minn., Kan., Mo. (3) In the territories, no law can be passed "interfering with the primary disposal of the soil:" U.S. R. S. 1851.

§ 408. **Public Lands.**<sup>a</sup> (A) In three states the Constitution provides that no public land of the state shall be sold or granted except to actual settlers: Tex. C. 14,4; Cal. C. 17,3; Fla. C. 16,11.

(B) The settler must occupy the land for three years in order to perfect his title: Tex. C. 14,6.

(C) *The amount granted* is (1) eighty acres to a single man, one hundred and sixty to the head of a family: Tex. (2) One hundred and sixty acres to any settler: Fla. (3) Three hundred and twenty: Cal.

(D) The right of the state to mines and minerals is, in Texas, released by the Constitution: Tex. C. 14,7. But in Arizona "the precious metals are the jewels of sovereignty, and inhere in the sovereign power; no person can acquire absolute title to any public domain in which such metals may be found without the express consent of such power:" Ariz.\* Bill of Rts. 21.

(E) In Texas the state may grant lands to railway companies, under special restrictions: Tex. C. 14, 3-5.

(F) In Colorado, the Constitution provides that laws shall be enacted for the preservation of forests upon the public lands: Col. C. 18,6.

(G) In one, no entry by warrant can now be made: W.Va. C. 13,2; and possession for ten years or payment of taxes for five years since 1865 gives good title as against the state: W.Va. C. 13,3.

NOTE. — <sup>a</sup> See Art. 111.

#### § 409. **Who may Alienate.**<sup>a</sup>

In one state, there are constitutional provisions rendering invalid purchases or contracts for the sale of lands with Indians: N.Y. C. 1,16.

NOTE. — <sup>a</sup> See §§ 102,1410.

### Art. 41. **Navigable Waters and Easements.**

§ 410. **Navigable Waters,** by the Constitutions of a few states, shall forever remain public highways, free to the citizens of the state and the United States, without impost or toll: Wis. C. 9,1; Minn. C. 2,2; S.C. C. 1,40; 6,1; Ala. C. 1,25.

So, in one other, the Constitution declares that no person or corporation can obstruct the navigation of the navigable waters of the state: Cal. C. 15,2. And, in one other, that no navigable stream can be dammed or bridged without authority of law; and no law shall prejudice the right of individuals to the free navigation of such stream, or preclude the state from further improvement of it: Mich. C. 18,4.

§ 411. **Special Streams.** The Constitutions of some states specially declare certain streams navigable, and forever free, as in § 410; as in four states, the Mississippi: Wis. C. 9,1; Minn. C. 2,2; Tenn. C. 1,29; Mo. C. 1,1. And in three of them, navigable waters leading into the Mississippi: Wis., Minn., Mo. And in one, navigable waters leading into the St. Lawrence: Wis. And so, in Minnesota, navigable waters bordering the state, with the rivers leading into the same.

§ 412. **Jurisdiction.** In several states the Constitution provides that the state shall have concurrent jurisdiction on all rivers bordering on the state so

far as they form the boundary of the state and any other state: Ind. C. 14,2; Wis. C. 9,1; Minn. C. 2,2; Mo. C. 1,1; S.C. C. 6,1.

§ 413. **Water Front.** By the Constitution of California, the right of eminent domain exists in the state to all frontages on navigable waters: Cal. C. 15,1. And no person or corporation can exclude the right of way to such water, when required for a public purpose: Cal. C. 15,2. And all tide lands within two miles of any incorporated city or town, fronting on the waters of any harbor or bay used for navigation, shall be withheld from grant or sale to any person or corporation: Cal. C. 15,3.

§ 414. **Wharves.** See § 413; also in Art. 117.

In two states, the Constitutions provide that no tax, toll, impost, or wharfage shall be imposed, demanded, or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be authorized by the legislature: S.C. C. 1,40; Ala. C. 1,25.

§ 415. **Drains.**<sup>a</sup> In Illinois the legislature are authorized to pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others; Ill. C. 4,31.

NOTE. — <sup>a</sup> See also § 92; for statutes, § 2253.

§ 416. **Franchises.** The right to collect rates for water furnished to a municipality is, in California, declared to be a franchise, not to be exercised except by authority of law and in the manner by law prescribed: Cal. C. 14,2. So, in Colorado, the county commissioners may empower reasonable maximum rates for the use of water, whether furnished by persons or corporations: Col. C. 16,8. And in Texas, the right to regulate tolls or freights, for the use of roads, bridges, ferries, landings, or wharves, shall always remain in the legislature: Tex. C. 12,3. So, in California, the legislature shall pass laws to regulate the charges of telegraph or gas companies, wharfingers, and warehousemen, where there is a public use: Cal. C. 4,33. And in South Carolina, the legislature shall regulate the public use of all franchises created or granted by the state (compare § 472): S.C. C. 12,5.

§ 417. **Hunting and Fishing.** The Constitution of Vermont provides that the inhabitants shall have liberty at seasonable times to hunt, fish, and fowl on lands not enclosed: Vt. C. 2,40.

§ 418. **Water.** The Colorado Constitution declares that the water of every natural stream (not heretofore appropriated) within the state is the property of the public: Col. C. 16,5; Ariz.\* Bill of Rts. 22. But the right to divert the unappropriated waters of any such stream to beneficial uses shall never be denied; priority of appropriation shall give the better right as between those using the water for the same purpose; and if the water is insufficient, those using it for domestic purposes have the preference; and those using it for agricultural purposes have the preference over manufacturers: Col. C. 16,6. No individual or corporation shall have the right to appropriate streams or ponds exclusively to their own private use except as may be provided by law: Ariz.\*

## Art. 42. Personal Property.

§ 420. **Record.** By the Constitution of Louisiana "privileges" may exist without record, except in cases where the legislature prescribe otherwise: La. C. 177.

§ 421. **Seal.** By the Constitution of Arkansas private (*i.e.*, not corporate) seals are abolished, and no distinction shall exist between sealed and unsealed instruments, in contracts between individuals, until otherwise provided by law: Ark. C. Sched. 1. See, for statutes, §§ 1564,1565.

§ 422. **Interest.**<sup>a</sup> The Constitution of Tennessee provides that the legislature may fix the rate of interest, and such rate shall be uniform<sup>b</sup> throughout the state, and may also provide

for a conventional (*i.e.*, to be specially contracted for) rate of interest not to exceed ten per cent: Tenn. C. 11,7. So, in Arkansas, the Constitution fixes the legal rate, in contracts where no rate is specified, at six per cent; but shall pass a law limiting the rate for which individuals may contract to ten per cent: Ark. C. 19,13. In Texas the legal rate is, by the Constitution, made eight per cent; the special contract rate is limited at twelve per cent; and all over twelve per cent is declared usurious, and the legislature are to pass usury laws: Tex. C. 16,11. In Maryland the legal rate is six per cent until otherwise provided by the legislature: Md. C. 3,57.

NOTES. — <sup>a</sup> For laws, see Part II., Div. I., Tit. 6. <sup>b</sup> See also § 395.

§ 423. **Money.** The Constitutions of New Hampshire and Massachusetts provide that the money mentioned in the Constitution shall be computed at 6s. 8d. to the ounce of silver: N.H. C. 2,97; Mass. C. 2,6,3.

§ 424. **Trust Funds.** By three state Constitutions, the legislature is forbidden to pass laws to authorize the investment of trust funds in the bonds or stock of private corporations: Pa. C. 3,22; Col. C. 5,36; Ala. C. 4,35.

§ 425. **Stock-jobbing.** The California Constitution provides that the legislature shall pass laws to regulate or prohibit the buying or selling of the shares of the stock of corporations in any stock board: Cal. C. 4,26. And that all contracts for the sale of stock on a margin or for future delivery are void, and the money paid therefor may be recovered: Cal.

§ 426. **Lotteries** are prohibited by the Constitutions of nearly all; and in all these states but Rhode Island, Wisconsin, Nebraska, Maryland, and Florida, the sale of lottery tickets is forbidden: R.I. C. 4,12; N.Y. C. 1,10; N.J. C. 4,7,2; O. C. 15,6; Ind. C. 15,8; Ill. C. 4,27; Mich. C. 4,27; Wis. C. 4,24; Io. C. 3,28; Minn. C. 4,31; Kan. C. 15,3; Neb. C. 3,21; Md. C. 3,36; Va. C. 5,18; W.Va. C. 6,36; Tenn. C. 11,5; Mo. C. 14,10; Ark. C. 19,14; Tex. C. 3,47; Cal. C. 4,26; Ore. C. 15,4; Nev. C. 4,24; Col. C. 18,2; S.C. C. 14,2; Ga. C. 1,2,4; Ala. C. 4,26; Miss. C. 12,15; Fla. C. 4,20; Ariz.\* Bill of Rts. 28. So, in several, "gift enterprises:" Ill., Neb., W.Va., Mo., Tex., Cal., Col., Ala.

So, in Nebraska, "games of chance" may not be authorized by the legislature. But in Louisiana, the legislature may grant lottery charters and privileges until 1895, each one to pay annually \$40,000 to the state treasury: La. C. 167.

## Art. 43. Law of Persons.

§ 430. **Marriage.** By the Constitutions of many states, the legislature can grant no divorce: <sup>a</sup> N.Y. C. 1,10; N.J. C. 4,7,1; O. C. 2,32; Mich. C. 4,26; Wis. C. 4,24; Io. C. 3,27; Minn. C. 4,28; Kan. C. 2,18; Ky. C. 2,32; Tenn. C. 11,4; S.C. C. 14,5; Miss. C. 4,22.

But in two, the legislature may enact general laws regulating divorce and alimony: N.C. C. 2,10; Tenn. So, of course, in all other states. In one, no contract of marriage otherwise duly made shall be invalid for want of conformity to the requirements of any religious sect: Cal. C. 20,7. In one, no absolute divorce can be granted except on the concurrent verdicts of two juries at different terms of the court; and the last jury shall determine the disabilities and rights of the parties: Ga. C. 6,15,1-2.

NOTE. — <sup>a</sup> The same effect would seem to follow in others from § 395.

§ 431. **Registration.** By the Constitution of Virginia, the legislature are to provide for the annual registration of births, marriages, and deaths: Va. C. 5,21.

§ 432. **Names.** In Tennessee the legislature has no power to change the names of persons, or to pass acts adopting or legitimating persons, but shall confer this power on the courts: <sup>a</sup> Tenn. C. 11,6.

NOTE. — <sup>a</sup> See § 430, note <sup>a</sup>.



§ 433. **Warehouses.** By the Constitution of Illinois, all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared *public warehouses*: Ill. C. 13,1.

The owners or managers of public warehouses are required to make public statements of grain or goods stored, and the warehouse receipts issued: Ill. C. 13,2. They are not to mix grain with grain of inferior grade: Ill.

The owner is to be always at liberty to examine such property stored, and the books of the warehouse relating thereto: Ill. C. 13,3.

§ 434. **Warehouse Receipts.** The Constitution of Illinois declares that the legislature shall pass laws to prevent the issue of false and fraudulent warehouse receipts: Ill. C. 13,6. And also laws for the inspection of grain: Ill. C. 13,7.

§ 435. **Regulation of Franchises by Law.** (See also § 414.) By the Constitution of Texas, all drawbacks and rebatement of insurance, freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service, of or to any cotton, grain, or other produce, to any carrier, shipper, merchant, or factor not the owner thereof, are prohibited: Tex. C. 16,25.

§ 436. **Carriers.** The Constitution of Illinois provides that all railroads and other common carriers shall weigh or measure grain at points where it is shipped, and receipt for the full amount, and shall be responsible for the delivery of such amount to the owner or consignee thereof at the place of destination: Ill. C. 13,4.

§ 437. **Cattle and Stock.** The legislature may pass laws for the regulation of live-stock and the protection of stock-raisers, having a local application; and also pass general and special laws for the inspection of cattle, stock, and hides, and the regulation of brands; *provided* that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby, and approved by them: Tex. C. 16,23.

§ 438. **Physicians.** The Constitutions of two states provide that laws may be passed prescribing the qualifications of medical practitioners, and to punish for malpractice (but, in Texas, that no preference shall be given to any one school of medicine): Tex. C. 16,31; La. C. 178.

## Art. 44. Law of Corporations.

§ 440. **Definition.** Corporation, as here used, is declared by the Constitutions of several states to mean all associations or joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships: N.Y. C. 8,3; Pa. C. 16,13; Mich. C. 15,11; Minn. C. 10,1; Kan. C. 12,6; N.C. C. 8,3; Mo. C. 12,11; Cal. C. 12,4; Ala. C. 14,13; La. C. 240.

§ 441. **Creation.** (A) By the Constitutions of most of the states, the legislatures are forbidden, generally, to create corporations by special act:<sup>a</sup> Me. C. 4,3, 14; N.Y. C. 8,1; N.J. C. 4,7,11; O. C. 13,1; Ind. C. 11,13; Ill. C. 11,1; Mich. C. 15,1; Wis. C. 11,1; Io. C. 8,1; Minn. C. 10,2; Kan. C. 12,1; Neb. C. 13,1; Md. C. 3,48; W.Va. C. 11,1; N.C. C. 8,1; Tenn. C. 11,8; Mo. C. 12,2; Ark. C. 12,2; Tex. C. 12,1; Cal. C. 12,1; Ore. C. 11,2; Nev. C. 8,1; Col. C. 15,2; Ala. C. 14,1; La. C. 247; Territories, U.S. R. S. 1889.

*Except* (1) municipal corporations: Me.; N.Y.; Mich.; Wis.; Minn.; Md.; N.C.; Tex.; Ore.; Nev.; Col.;<sup>b</sup> Ala.; La.; Territories, U.S. L. 1878,163; (2) cases where there is no general act: Me., N.Y., Wis., Md., N.C., Ala.; (3) educational corporations: Ill.,<sup>b</sup> Neb.,<sup>b</sup> Ark.,<sup>b</sup> Col.,<sup>b</sup> Ala.; (4) charitable corporations: Ill.,<sup>b</sup> Neb.,<sup>b</sup> Mo.,<sup>b</sup> Ark.,<sup>b</sup> Col.;<sup>b</sup> (5) penal or reformatory corporations: Ill.,<sup>b</sup> Neb.,<sup>b</sup> Mo.,<sup>b</sup> Ark.,<sup>b</sup> Col.;<sup>c</sup> (6) industrial corporations generally: Ala.; (7) corporations for encouraging immigration: Ala.; (8) manufacturing corporations: Ala.; (9) mining corporations: Ala.; (10) canal corporations: Ala.; (11) corporations for

improving navigable rivers and harbors: Ala.; (12) banking corporations: Md., Ind. So, a bank may be created by a vote of two thirds of each full house of the legislature: Mich.

(B) So, in two states, the Constitution provides that the legislature shall provide by general law only for the creation of (1) municipal corporations: Cal. C. 11,6; Fla. C. 4,22; (2) educational: Fla., Territories; (3) mechanical: Fla.; so "industrial:" Territories; (4) mining: Fla., Territories; (5) agricultural: Fla.; (6) religious and charitable and literary: Del. C. 2,17; Stats. 1875,1; Territories; (7) manufacturing: Del., Territories; (8) canning: Del.; (9) building and loan: Del.; (10) draining: Del., Territories; (11) and "other useful companies:" Fla.; or (12) "for the creation of corporations" (generally): S.C. C. 12,1; (13) or of railroads and wagon roads: Territories.

(C) And no exclusive privileges can be granted to a corporation: <sup>c</sup> Io. C. 8,12; Territories.

(D) Nor, in several, can the legislature by special act (1) extend, change, alter, or amend any franchise or charter (except as before; and see § 443):<sup>d</sup> Ill.; Mich. C. 15,8; Neb.; Mo.;<sup>d</sup> Cal.<sup>d</sup> C. 12,7; Nev.; Col.; or, in two, (2) remit the forfeiture of a charter now existing: Mo. C. 12,3; Cal.

(E) In one state, a bill to create corporations (other than religious, charitable, etc.) must be continued to the next legislature, and public notice be given of its pendency: R.I. C. 4,17. In Delaware, it must receive a two-thirds vote in each house: Del. C. 2,17.

(F) In Missouri, the legislature shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any municipality a new liability in respect to transactions or considerations already past: Mo. C. 12,19.

(G) In South Carolina, all laws creating corporations shall have provisions to prevent and punish fraudulent misrepresentations as to the capital, property, and resources of such corporations: S.C. C. 12,5.

(H) In Georgia, the legislature has *no* power to create private corporations, except banking, insurance, railroad, canal, navigation, express, and telegraph companies; nor to change election precincts, nor to establish bridges or ferries, nor to change names of legitimate children; but shall prescribe by law the manner in which such powers shall be exercised by the courts: Ga. C. 3,7,18.

NOTES. — <sup>a</sup> Compare also § 395. <sup>b</sup> "Which are under the control of the state." <sup>c</sup> Compare § 17. <sup>d</sup> By either general or special law.

§ 442. **Laws may be Repealed.**<sup>a</sup> In many states, the Constitution provides that all *general* laws for the creation of corporations may be altered or repealed: Me.<sup>b</sup> C. 4,3,14; N.Y. C. 8,1; N.J. C. 4,7,11; Pa. C. 16,10; O. C. 13,2; Mich. C. 15,1; Wis. C. 11,1; Io. C. 8,12; Kan. C. 12,1; Neb. C. 13,1; Md. C. 3,48; N.C. C. 8,1; Tenn. C. 11,8; Ark. C. 12,6; Cal. C. 12,1; 11,6; Ore. C. 11,2; Nev. C. 8,1; Col. C. 15,3; S.C. C. 12,1; Ala. C. 14,1.

So, in several, all charters or special acts creating corporations may be altered or repealed: Me.;<sup>b</sup> N.Y.; Pa.; Wis.; Md.; Del. C. 2,17; N.C.; Ark.; Ore.; Nev.; Col.; Ala. C. 14,10; 14,1.

And in Texas "all privileges or franchises are subject to control:" Tex. C. 1,17. And so all laws granting the right to collect freights, fares, tolls, or wharfage: Tex. C. 12,5. [But in Arizona, no corporation can be dissolved or its rights impaired except by judicial proceedings: Ariz.\* Bill of Rts. 29.]

NOTES. — <sup>a</sup> Compare § 17. <sup>b</sup> By general law.

§ 443. **Limitations on § 442.** But in Iowa, laws creating corporations can be so altered and repealed only on a two-thirds vote of each house of the legislature present: Io. C. 8,12. In Michigan, they cannot be altered or amended without a two-thirds vote of each house elected: Mich. C. 15,8.

And they must not be so repealed, etc., as to impair or destroy vested corporate rights: Tenn.; Ore.; Ga. C. 12,1,5. So, in several, not in such manner as to work injustice to the corporators or corporation creditors: Pa.; Ark.; Col.; Ga. C. 1,3,3; Ala. C. 14,10.

§ 444. **Existing Corporations.** The Constitutions of several states provide that no general or special law, for the benefit of corporations existing at the time of the adoption of the Constitution, shall be passed, except on condition that such corporation shall thereafter hold its charter subject to the provisions of the Constitution: Pa. C. 16,2; 17,10; Mo.<sup>a</sup> C. 12,21; Ark. C. 17,8; Tex.<sup>a</sup> C. 10,8; Col.<sup>a</sup> C. 15,7; Ga. C. 4,2,3; Ala. C. 14,3; 14,25; La. C. 234. No act of incorporation can be renewed or extended: Mich.<sup>b</sup> C. 15,8.

And in a few, that the exercise of the police power of the state shall never be so construed nor abridged as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state: Pa. C. 16,3; Mo. C. 12,5; Cal. C. 12,8; Col. C. 15,8; Ga. C. 4,2,2; La. C. 235. In several, that all existing charters or grants of special or exclusive privileges, under which a *bona-fide* organization had not taken place at the time of the adoption of the Constitution, are void: Pa. C. 16,1; Ill. C. 11,2; Neb. C. 13,6; W.Va. C. 11,3; Mo. C. 12,1; Ark. C. 12,1; Col. C. 15,1; Ala. C. 14,2.

NOTES. — <sup>a</sup> Of railroads only. <sup>b</sup> This restriction does not apply to municipal corporations.

§ 445. **Foreign Corporations.** The Constitution of Louisiana provides that foreign corporations may be licensed on a different principle from home corporations, provided it be uniform: La. C. 217. So, it seems, in Arkansas: Ark. C. 12,11. But in two states, no corporation organized out of the state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized in the state: Ark.; Cal. C. 12,15. In Arkansas no foreign corporation has power to condemn or appropriate private property (see also § 469).

§ 446. **Business.** By the Constitutions of a few states, no corporation can engage in any business other than that expressly authorized by its charter or the law under which it was formed: Pa. C. 16,6; Mo. C. 12,7; Cal. C. 12,9; Ala. C. 14,5; La. C. 237.

§ 447. **Office in the State.** The Constitutions of two states provide that every corporation organized or doing business in the state, other than religious, educational, or benevolent corporations, must have an office in the state for the transaction of business, where transfers of stock may be made and the stock-books shall be kept open: Cal. C. 12,14; La. C. 245. So, in several, of railroads: Pa. C. 17,2; Ill. C. 11,9; Neb. C. 11,1; Mo. C. 12,15; Ark. C. 17,2; Tex. C. 10,3; La. So, in two, of canals: Pa., Ark. And in one, of turnpikes: Ark. And of banks: Kan. C. 13,6.

And in several, all foreign corporations must have an authorized office and agent in the state, on whom process may be served: Pa. C. 16,5; Ark. C. 12,11; Col. C. 15,10; Ala. C. 14,4; La. C. 236.

§ 448. **Suits.** All corporations may, by several state Constitutions, sue and be sued in the courts like natural persons: N.Y. C. 8,3; Mich. C. 15,11; Minn. C. 10,1; Kan. C. 12,6; Neb. C. 13,3; N.C. C. 8,3; Cal. C. 12,4; Nev. C. 8,5; Ala. C. 14,12.

**Suits against Corporations** may, in two states, be brought in any county where it does business: Cal. C. 12,16; Ala.<sup>a</sup> C. 14,4; or, in one, where the contract was made or the liability incurred: Cal. And service may, in one, be made on an agent anywhere in the state: Ala.<sup>a</sup>

NOTE. — <sup>a</sup> Of *foreign* corporations only.

§ 449. **Liabilities of Stockholders.** [For *banks*, see § 485.] (A) The Constitutions of a few states provide that stockholders shall in no case be liable otherwise than for unpaid stock owned by them: Neb. C. 13,4; W.Va. C. 11,2; Mo. C. 12,9; Ore. C. 11,3; Ala. C. 14,8.



(B) So, in two others, each stockholder is liable for the amount of stock held or owned by him : Minn.<sup>b</sup> C. 10,3 ; Miss. C. 12,17. (C) And in one, that stockholders shall not be individually liable for the debts and liabilities of the corporation : Nev. C. 8,3. (D) But in some, each stockholder is liable, over and above his stock, in all cases, to a further sum equal in amount to such stock : O. C. 13,3 ; Kan.<sup>a,c</sup> C. 12,2.

(E) And in one, each stockholder is individually liable for all labor performed for the corporation or association : Mich. C. 15,7. (F) And in California, each stockholder is individually and personally liable for such proportion of all the debts and liabilities of the corporation as his shares bear to the whole subscribed capital stock : Cal. C. 12,3.

(G) In many, dues from corporations or their stockholders are to be secured in a manner provided by law : N.Y. C. 8,2 ; O. ; Ind. C. 11,14 ; N.C. C. 8,2 ; Mo. ; Tex. C. 12,2 ; Cal. C. 12,2 ; Nev. ; S.C. C. 12,4 ; Ala. And in one, it is provided that they shall be personally liable, under proper limitations : S.C. C. 12,5.

NOTES. — <sup>a</sup> Except in railway corporations. <sup>b</sup> Except in mechanical or manufacturing corporations. <sup>c</sup> Except in religious and charitable corporations.

§ 450. **Rights of Stockholders: Voting.** By the Constitutions of several states, stockholders may vote, one vote for each share, for each person to be elected, in all elections in corporations, by person or by proxy : Ill. C. 11,3 ; Neb. C. 13,5 ; W.Va. C. 11,4 ; Mo. C. 12,6 ; Cal. C. 12,12.

And they may cumulate all their votes on one candidate, or distribute them among as many candidates as they see fit : Pa. C. 16,4 ; Ill. ; Neb. ; W.Va. ; Mo. ; Cal.

§ 451. **Liabilities of Directors.** By the Constitution of California, directors or trustees are jointly and severally liable to creditors and stockholders for all moneys embezzled or misappropriated by the officers of corporations during their term of office : Cal. C. 12,3.

§ 452. **Issue of Stock.** By the Constitutions of many states, no corporation may issue stock or bonds except for money, labor done, or money or property actually received : Pa. C. 16,7 ; Mo. C. 12,8 ; Ark. C. 12,8 ; Tex. C. 12,6 ; Cal. C. 12,11 ; Col. C. 15,9 ; Ala. C. 14,6 ; La. C. 238. So, in two, no railroad : Ill. C. 11,13 ; Neb. C. 11,5.

All such fictitious increase of stock or indebtedness, in most states, shall be void : Pa., Ill., Neb., Mo., Ark., Tex., Cal., Col., Ala., La. And in Louisiana, any corporation issuing such shall forfeit its charter.

§ 453. **Increase of Stock.** The Constitutions of several states provide that no corporation may increase its stock except under general laws : Pa. C. 16,7 ; Ill.<sup>a</sup> C. 11,13 ; Neb.<sup>a</sup> C. 11,5 ; Mo. C. 12,8 ; Ark. C. 12,8 ; Cal. C. 12,11 ; Col. C. 15,9 ; Ala. C. 14,6 ; La. C. 239. And, with the consent of a majority of the stockholders, in value : Pa., Mo., Ark., Cal., Col., Ala., La.

Such consent must be given at a special meeting, and notice of the intention to increase the stock must be given ; thus, (1) thirty days' notice : Col., Ala., La. ; (2) sixty days' : Pa., Ill.,<sup>a</sup> Neb.,<sup>a</sup> Mo., Ark., Cal.

NOTE. — <sup>a</sup> Of railroads only.

§ 454. **Preferred Stock.** By the Constitutions of two states, no corporation can issue preferred stock without the consent (1) of all the stockholders : Mo. C. 12,10 ; (2) of two thirds of the stockholders : Ala. C. 14,9.

§ 455. **Duration of Corporations.** The Michigan Constitution provides that no corporation, except for municipal purposes, railroads, plank-roads, or canals, shall be created for a longer term than thirty years : Mich. C. 15,10. So, in Delaware, no act of incorporation can extend for more than twenty years, except for a company for public improvement : Del. C. 2,17.



§ 456. (A) **Real Estate** may be held by corporations, by a few state Constitutions, (1) such as is actually occupied by the corporation in the exercise of its franchises : Mich. C. 15,12. (2) In others, such as is necessary and proper for carrying on its legitimate business : Mo. C. 12,7 ; Cal. C. 12,9 ; La. C. 237.

(B) Except as above, no corporation can hold real estate for more than (1) five years : Cal. ; (2) six years : Mo. ; (3) ten years : Mich., La.

§ 457. **Liability of the Corporate Franchise.** By the California Constitution the legislature shall pass no laws permitting the leasing or alienation of any franchise so as to relieve it or the property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation and use of such franchise or any of its privileges : Cal. C. 12,10.

§ 458. **Ownership of Stock.** (Compare § 477.) In Georgia, the legislature cannot authorize any corporation to buy shares or stock in any other corporation in the State or elsewhere, or to make any contract or agreement with such corporation with the effect or purpose of lessening competition or encouraging monopoly ; and all such contracts or agreements are void : Ga. C. 4,2,4.

## Art. 46. Railroads.<sup>a</sup>

§ 460. **Railroads are Highways.** The Constitutions of many states declare all railroads to be public highways : Pa.<sup>b</sup> C. 17,1 ; Ill. C. 11,12 ; Neb. C. 11,4 ; W.Va. C. 11,9 ; Mo. C. 12,14 ; Ark.<sup>b,c</sup> C. 17,1 ; Tex. C. 10,2 ; Col. C. 15,4 ; Ala.<sup>b</sup> C. 14,21 ; La. C. 244.

And by those of several, they are free to all persons for the transportation of their persons or property therein, under the regulations prescribed by law : Ill. ; Neb. ; W.Va. ; Ark.<sup>b,c</sup> C. 17,3 ; Col. C. 15,6.

NOTES. — <sup>a</sup> For provisions which generally affect railroads with all other corporations, see Art. 44. <sup>b</sup> So, in these states, of canals also. <sup>c</sup> So, in these, of turnpikes.

§ 461. **Railroads are Common Carriers,** by the Constitutions of a few states : Pa.<sup>a</sup> C. 17,1 ; Mo. C. 12,14 ; Ark.<sup>a</sup> C. 17,1 ; Tex. C. 10,2 ; Cal.<sup>a,b</sup> C. 12,17 ; Col. C. 15,4 ; Ala.<sup>a</sup> C. 14,21 ; La. C. 244.

So, in Nebraska, the liability of railroads as common carriers can never be limited : Neb. C. 11,4. And, as such common carriers, they are, in California, subject to legislative control.<sup>c</sup>

NOTES. — <sup>a</sup> See § 470, note <sup>b</sup>. <sup>b</sup> So, in these states, of all transportation companies. <sup>c</sup> See also § 472.

§ 462. **Legislative Control.**<sup>a</sup> In several states, the Constitution provides that the legislature shall pass laws to correct abuses and prevent unjust discrimination<sup>b</sup> and extortion<sup>c</sup> in the rates of freight and passenger tariffs : Ill. C. 11,15 ; Neb. C. 11,7 ; W.Va. C. 11,9 ; Mo. C. 12,14 ; Ark.<sup>d</sup> C. 17,10 ; Tex. C. 10,2 ; Ga. C. 4,2,1 ; Ala.<sup>d</sup> C. 14,22.

NOTES. — <sup>a</sup> See § 416. <sup>b</sup> See § 465. <sup>c</sup> See § 463. <sup>d</sup> So, of canals.

§ 463. **Charges.** So, in several, the legislature is given express power to pass laws establishing reasonable maximum rates of fares and freight : Ill. C. 11,12 ; Mich. C. 19 A, 1 ; Neb. C. 11,4 ; W.Va. C. 11,9 ; Mo. C. 12,14 ; Tex. C. 10,2.

So, in one, the railroad commissioners (§ 472) : Cal. C. 12,22.

By the Constitutions of a few, no railroad shall charge for freight or passengers a greater amount for a less distance than for a greater : Pa. C. 17,3 ; Mo. C. 12,12 ; Ark. C. 17,3 ; Cal. C. 12,21. But excursion or commutation tickets may be issued at special rates : Pa., Mo., Ark., Cal.

In Georgia, no rebate or bonus shall be paid by a railway, directly or indirectly ; nor any act be done which shall mislead the public as to the real rates charged or received for freight

and passage : Ga. C. 4,2,5. By the California Constitution, a railroad, having once lowered its rates to compete with another carrier, cannot put them up again without the consent of the railroad commissioners : Cal. C. 12,20.

§ 464. **Free Passes.** By the Constitutions of five states, no railroad or transportation company can furnish passes or tickets, or tickets at a discount, (1) to members of the legislature or state or municipal officers : Mo. C. 12,24 ; Ark. C. 17,7 ; Cal. C. 12,19 ; Ala. C. 14,23. (2) To any person except officers or employees of the company : Pa. C. 17,8.

And acceptance of such a pass forfeits such office : Mo., Cal.

§ 465. **Discrimination.**<sup>a</sup> Two Constitutions provide that no discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company, between places or persons, or in the facilities for the transportation of the same classes of freight or passengers : Pa. C. 17,3 ; Cal. C. 12,21.

And five prohibit discrimination in charges or facilities in transportation between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise ; and no railroad shall make any preference in furnishing cars or motive-power : Pa.<sup>b</sup> C. 17,7 ; Mo. C. 12,23 ; Ark.<sup>c</sup> C. 17,6 ; Col. C. 15,6.

And in one, all corporations, being common carriers enjoying a right of way, shall carry the productions of the country on equal terms : Minn. C. 10,4. And in three others, no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, or coming from or going to any other state : Ark. C. 17,3 ; Cal. ; Col.

NOTES. — <sup>a</sup> See also § 462. <sup>b</sup> So, of canals also. <sup>c</sup> So of canal and turnpike companies.

§ 466. **Connecting Companies.** Every railroad has, in some states, a constitutional right to connect with, or cross, any other : Pa.<sup>a</sup> C. 16,12 ; 17,1 ; Mo. C. 12,13 ; Ark. C. 17,1 ; Tex. C. 10,1 ; Cal. C. 12,17 ; Col.<sup>a</sup> C. 15,4 ; 15,13 ; Ala.<sup>a, b</sup> C. 14,11 ; 14,21 ; La. C. 243.

Every railroad must, in several, receive and transport the passengers and freight or cars of any other company without delay or discrimination : Pa., Mo., Ark., Tex., Cal., Ala., La.

So, in Illinois, they must deliver grain at any elevator or warehouse which can be reached by their tracks ; and allow other warehouses or coal-banks to make connection with their tracks : Ill. C. 13,5. So, the legislature are to prohibit discrimination in contracts between railroads against other roads connecting or intersecting : Mich. C. 19 A, 1.

And in California, no railroad or other common carrier can combine or make any contract with the owners of any vessel that leaves port or makes port in the state, or with any common carrier, by which contract the earnings of the one doing the carrying shall be shared by the other not doing it : Cal. C. 12,20.

NOTES. — <sup>a</sup> § 467, note <sup>a</sup>. <sup>b</sup> § 467, note <sup>b</sup>.

§ 467. **Consolidation.** By the Constitutions of many states, no railroad can consolidate with a parallel or competing line : Pa.<sup>a, b</sup> C. 16,12 ; 17,4 ; Ill. C. 11,11 ; Mich. C. 19 A, 2 ; Neb.<sup>a</sup> C. 11,3 ; W.Va. C. 11,11 ; Mo. C. 12,17 ; Ark.<sup>b</sup> C. 17,4 ; Tex. C. 10,5 ; Col. C. 15,5 ; 15,13.<sup>a</sup> So, in one, of telegraph companies only : Ala. C. 14,11. Nor, in several, can such railway lease or purchase such line : Pa.<sup>a, b</sup> W.Va., Mo., Ark., Tex. Nor, in four, can any officer of the one act as officer of the other : Pa.<sup>a, b</sup> Mo., Ark., Tex.

Nor, in Texas, can a railroad in the state consolidate with any road organized in another state : Tex. C. 10,6. In others, it may so consolidate ; but will still be liable to the home jurisdiction : Mo. C. 12,18 ; Col.<sup>a</sup> C. 15,14 ; La. C. 246.

**Notice** of a proposed consolidation must be given to all the stockholders of both roads: Ill., Mich., Neb., Mo., La.

**The question** whether roads are parallel or competing lines is, in three states, declared to be one for the jury: Pa., Mo., Ark.

NOTES. — <sup>a</sup> So, in these states, of telegraph companies. <sup>b</sup> So, of canal companies.

§ 468. **The Rolling Stock** and movable property of railroads are, by the Constitutions of a few states, declared to be personal property; and the legislature may pass no law exempting such from execution: Ill. C. 11,10; Neb. C. 11,2; W. Va. C. 11,8; Mo. C. 2,16; Ark. C. 17,11; Tex. C. 10,4.

§ 469. **Location.** By the Constitution of Nebraska, no railroad organized in another state can exercise the right of eminent domain or acquire real estate or a right of way in the State until duly incorporated therein: Neb. C. 11,8.

In West Virginia, no railway may run within half a mile of a town of three hundred inhabitants without establishing a station for it: W. Va. C. 11,10. So, in Texas, no railroad can pass within three miles of a county seat without passing through the same and maintaining a depot therein, if the town will give right of way and land therefor, unless prevented by natural obstacles: Tex. C. 10,9.

§ 470. **Officers.** The Constitution of Illinois provides that a majority of directors must be citizens and residents of the state: Ill. C. 11,11.

And in four, that no president, director, officer, agent, or employee of a railroad or canal shall be interested, directly or indirectly, in the furnishing of material or supplies to such company, or in the business of transportation of freight or passengers as a common carrier over the company's works: Pa. C. 17,6; Mo. C. 12,22; Ark. C. 17,5; Cal. C. 12,18.

§ 471. **Ultra Vires.** In one, no company doing the business of a common carrier can engage in mining or manufacturing articles for transportation over its works; nor directly or indirectly engage in any other business; nor hold land except such as is necessary to its business; but mining or manufacturing companies may carry their products over their own railways or canals not exceeding fifty miles in length: Pa. C. 17,5.

§ 472. **Railroad Commissioners.** By the Constitutions of two states, a board of railroad commissioners is established: Neb. (see § 202); Cal. C. 12,22. In Pennsylvania, the secretary of internal affairs has similar duties: Pa. C. 17,11. (For statutes, see in Part III.)

§ 473. **Reports.** The Constitutions of two states provide that every railroad in whole or in part in the State shall make an annual report to the auditor: W. Va. C. 11,7; Ark. C. 17,13.

§ 474. **Liabilities of Railroads.** The Constitution of Arkansas provides that all railroads shall be responsible for all damages to person or property, under such regulations as are prescribed by the legislature: Ark. C. 17,12.

And that the legislature shall require, by suitable laws, the necessary means and appliances to secure the safety of passengers on railroads and other public conveyances: Ark. C. 19,18.

And in one, it is unlawful for any person or corporation to require of its employees, as a condition of their employment or otherwise, any contract or agreement whereby the company is released from liability on account of personal injuries received by such employees while in its service, by reason of the negligence of the company or its servants; and such contracts are void: Col. C. 15,15.

§ 475. **Damages for Death.** The Constitution of Texas provides that every person or corporation that may commit a homicide, through wilful act or omission or gross neglect, shall be responsible in exemplary damages to the surviving husband, widow, or heirs, notwithstanding any criminal proceedings that may or may not be had: Tex. C. 16,26.

And in two, that no act of the legislature shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property; and in case of death resulting

therefrom, the right of action shall survive for the benefit of such persons as the legislature may prescribe: Pa. C. 3,21; Ark. C. 5,32. And also, that no act shall prescribe any limitation of time within which such suits shall be brought against corporations, different from those fixed by general laws for actions against natural persons: Pa.

§ 476. **Street-Railways.** The Constitution of New York provides that no law shall be passed authorizing the construction of a street-railroad in a town or city without the consent (1) of one half in value of the abutting property owners: N.Y.<sup>a</sup> C. 3,18. And (2) in many, not without the consent of the local authorities: Pa. C. 17,9; Ill. C. 11,4; W.Va. C. 11,5; Mo. C. 12,20; Tex. C. 10,7; Col. C. 15,11; Ga. C. 3,7,20; Ala. C. 14,24; or (3) of the electors: Neb. C. 13,2.

NOTE. — <sup>a</sup> Except by process in the Supreme Court.

## Art. 48. Banks.

§ 480. **State Banks Forbidden.** The Constitutions of a few states forbid the creation or renewal of corporations with banking or discounting privileges: Wis. C. 11,4; Tex. C. 16,16; Ore. C. 11,1; Miss. C. 12,12. So, in Washington Territory, the United States laws forbid banks: U.S. R. S. 1924. And in several, any act establishing banks must first be approved by a majority of the people, at a general election: O. C. 13,7; Ill. C. 11,5; Mich. C. 15,2; Wis. C. 11,5; Io. C. 8,5; Kan. C. 13,8; Mo. C. 12,26.

State banks are forbidden in Illinois; and, in other states, the state may not hold stock in any bank: Ind.; Ill.; Kan. C. 13,5; Tenn.; Mo. C. 12,25; Ala. C. 14,20. See also § 326. Any banking law may be amended or repealed: Kan. C. 13,9.

But in others, such corporations may be formed under general laws: W.Va. C. 11,6; Cal. C. 12,5; Ala. C. 14,14–15. And such banking law must receive a two-thirds vote of the legislature: Minn. C. 9,13. So, in a few, no special charter can be granted for banking purposes: N.Y. C. 8,4; Ind. C. 11,2; Kan. C. 13,1. See also § 395 and § 441 (12).

§ 481. **Money and Banknotes.** In several, no corporation or individual can circulate as money anything but the lawful money of the United States: Ark. C. 12,10; Cal.; Ore.; Nev. C. 8,6; Wash. U.S. R. S. 1924.

So, all banknotes must be redeemable (1) in the lawful money of the United States: Kan. C. 13,4; (2) in gold and silver: Ala. C. 14,16. No note can be issued of less than \$1: Kan. C. 13,7.

§ 482. **Specie Payments.** In several, the legislature can pass no law sanctioning the suspension of specie payments by banks: N.Y. C. 8,5; Ind. C. 11,7; Ill. C. 11,7; Mich. C. 15,6; Io. C. 8,11; Minn. C. 9,13; Ala. C. 14,16.

§ 483. **Security of Notes.** In many, the legislature are to provide by law for the registry of all bills or notes issued as money, and shall require ample security for their redemption in specie: N.Y. C. 8,6; Pa. C. 16,9; Ind. C. 11,3; Ill. C. 11,8; Mich. C. 15,4; Io. C. 8,8; Minn. C. 9,13; Kan. C. 13,2.

§ 484. **Insolvency of Banks.** The Constitution makes it a crime for any officer or owner of a private or public bank to assent to the reception of deposits or the creation of debts by such bank after he has knowledge that it is in insolvent or failing circumstances, and he is individually responsible for such debts or deposits: Mo. C. 12,27; La. C. 241.

The bill-holders have preference over all other creditors of an insolvent bank: N.Y. C. 8,8; Ind. C. 11,8; Mich. C. 15,5; Io. C. 8,10; Minn. C. 9,13; Kan. C. 13,4; Ala. C. 14,17.



§ 485. **Stockholders** of a bank are, in a few states, individually liable for its debts, over and above their stock, to the amount of the stock held by them: N.Y. C. 8,7; Ind. C. 11,6; Ill. C. 11,6; Io. C. 8,9; Neb. C. 13,7; W.Va. C. 11,6.

In one, to double such amount of stock: Minn. C. 9,13. And in one, they are liable for all debts of the bank contracted while they are officers or such stockholders, each for his proportion, according to the amount of stock owned by him: Mich. C. 15,3. And in two, they are liable only to the amount of their stock: Md. C. 3,39; S.C. C. 12,6.

§ 486. **Interest.** The Constitutions of two states provide that no bank shall receive, directly or indirectly, a greater rate of interest than is allowed to individuals loaning money: Ind. C. 11,9; Ala. C. 14,19.

§ 487. **Limitation of Charter.** By the Constitutions of two, every bank shall be required to cease all banking operations within twenty years from the time of its organization, and promptly thereafter to close its business: Ind. C. 11,10; Ala. C. 14,18.

§ 488. **Directors.** By the Constitution of one, it is a penal offence for officers or directors of a bank to borrow money from it: S.C. C. 12,6.

## **Art. 49. Miscellaneous Corporations.**

§ 490. **Religious.** In one state, no religious corporation can be established in the state except such as may be formed under a general law for the purpose of holding title to such real estate as may be allowed them by law: Mo. C. 2,8.

In one other, the title to all property of religious corporations vests in trustees, elected by their members: Kan. C. 12,3.

In two, the legislature shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law: Va. C. 5,17; W.Va. C. 6,47.

§ 491. **Insurance Companies.** The Georgia Constitution provides that all foreign life-insurance companies doing business in the state shall deposit \$100,000 in good securities with the comptroller of the insurance commissioners of this state or the state where they are chartered: Ga. C. 3,12,1. So of companies in the state: Ga. C. 3,12,3. All companies must make semi-annual reports: Ga. C. 3,12,5.

## **Art. 50. Municipal Corporations.<sup>a</sup>**

§ 500. **Local Government.** It is in many states provided that the legislature shall provide by general law for the organization of cities, towns, and municipalities, their powers and duties: O. C. 13,6; Ill. C. 10,5; Mich. C. 15,13; Wis. C. 11,3; Kan. C. 12,5; Neb. C. 10,4-5; Va. C. 6,20; N.C. C. 8,4; Mo. C. 9,7; Ark. C. 12,3; Cal. C. 11,6; Nev. C. 8,8. The same would follow in other states from § 395 and § 441.

And so, in several, that the legislature shall create a uniform system of county, town, and municipal government: Wis. C. 4,23; Mo.; Cal. C. 11,4; Nev. C. 4,25; Ga. C. 11,3,1; Fla. C. 4,21.

So, in others, the legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local, legislative, and administrative character as they deem proper: Mich. C. 4,38; Wis. C. 4,22; Kan. C. 2,21.

In a few, the Constitution provides that any county may by vote adopt the township form of government : Ill. ; Neb. C. 10,5 ; Mo. C. 9,8 ; Cal.

Counties are, in several, to be governed by a board of county commissioners : Pa. C. 14,7 ; Ind. C. 6,10 ; Ill. C. 10,6 ; Nev. C. 4,26 ; S.C. C. 4,19 ; called, in one, the "board of supervisors : " Mich. C. 10,6.

In Virginia, each county is divided into three or more magisterial districts ; and in each district is elected one supervisor, one constable, one overseer of the poor, and three justices of the peace : Va. C. 7,2. And each magisterial district is divided into as many school districts as may be necessary : Va. C. 7,3.

Townships are, in one, governed by a board of trustees, consisting of a clerk and two justices of the peace, elected by the voters thereof : N.C. C. 7,5.

In a few, the Constitution provides that the legislature may charter cities in towns having (1) more than 12,000 inhabitants : Mass. C. Amt. 2 ; (2) more than 10,000 : Pa. C. 15,1 ; Tex. C. 11,4 ; (3) 20,000 : Minn. C. 11,2 (*i.e.*, it may be made into a county by itself).

In two, any city having a population of more than 100,000 may frame a charter for itself (by a special process, subject to certain restrictions) : Mo. C. 9,16 ; Cal. C. 11,8.

NOTE. — <sup>a</sup> For provisions bearing on municipal finance, see Arts. 34 and 37.

§ 501. **Municipalities.** The Constitutions of two states provide that each organized county shall be a body corporate, with such powers and immunities as shall be established by law : Mich. C. 10,1 ; Ga. C. 11,1,1.

So, each organized township : Mich. C. 11,2 ; N.C. C. 7,4.

All suits and proceedings by or against a county or township shall be in the name thereof : Mich., Ga.

Any county, city, town, or township may make and enforce within its limits all local police, sanitary, and other regulations not in conflict with general laws : Cal. C. 11,11.

In one, no municipal corporation can be authorized by the legislature to pass laws inconsistent with the general laws of the state : Ala. C. 4,50.

§ 502. **Officers.** The following persons are, by the Constitution, declared ineligible to hold municipal offices : in one state, persons in default as collectors or custodians of money or property of such municipality : Ill. C. 9,11.

In cities or counties having more than 200,000 inhabitants, no person can at the same time have a state office and a municipal office, or two municipal offices together in any municipality : Mo. C. 9,18. The fees or salaries of municipal officers cannot, in two states, be increased or diminished during their terms : Ill. ; Cal. C. 11,9. They must, in two, reside in their respective counties or towns : Ky. C. 8,11 ; Ore. C. 6,8. In one, they must have so resided one year : Col. C. 14,10. In one, they must be qualified electors : Col.

§ 503. **Citizens' Rights.** By the Constitution of Arkansas, any citizen of any county, city, or town may institute suits in behalf of himself and all others interested to resist an illegal exaction : Ark. C. 16,13.

## Art. 51. Intoxicating Liquors.

§ 510. **Regulation of Sale.** Several states have constitutional provisions concerning intoxicating liquors.

In Louisiana, there is a general declaration that the regulation of the sale of such liquors belongs to the police jurisdiction, and the State may enact laws regulating their sale and use : La. C. 170. So, in West Virginia, that the legislature may pass laws regulating or prohibiting such sale : W.Va. C. 6,46. In three states, the manufacture and sale of intoxicating liquors is forever prohibited in the state, except for medical, scientific, and mechanical purposes : Me. C. Amt. 1885, p. 339 (except cider) ; Io. C. Amt. 1882, p. 178 ; Kan. C. Amt. 1880 (1881, p. 323). But in Colorado, only the importation or sale of spurious or drugged liquors is forbidden : Col. C. 18,5.

§ 511. **Local Option.** The Texas Constitution provides that the legislature shall enact a law whereby the qualified electors of any city, county, town, or precinct may, by a majority vote, prohibit the sale of liquors within the prescribed limits : Tex. C. 16,20.

## **Art. 52. Labor.**

§ 520. **Day's Work.** The Constitution of one state declares eight hours a legal day's work on all public work : Cal. C. 20,17.

§ 521. **Wages.** The Louisiana Constitution provides that no law shall be passed fixing the price of manual labor : La. C. 49.

§ 522. **Lien.** The Constitutions of three states provide that mechanics, artisans, and material men of every class shall have a lien (1) upon the building and articles repaired by them for the value of their labor or material : N.C. C. 14,4 ; Tex. C. 16,37 ; Cal. C. 20,15. And (2) in two, also, upon personal property, for labor done upon it : N.C., Cal.

So, in two others, that the legislature shall pass laws to protect laborers on public works, railroads, and canals against failure of the contractors to pay their current wages when due, and to make the corporation or individual for whose benefit the work is done responsible for their ultimate payment : Tex. C. 16,35 ; La. C. 175.

§ 523. **Mines.** The Constitutions of three states provide that the legislature shall pass laws for the protection of miners (as by ventilation, escapement shafts, etc.) : Ill. C. 4,29 ; Ark. C. 19,18 ; Col. C. 16,2.

So, in one, for the drainage of mines : Col. C. 16,3. And in one, children under twelve may not be employed in mines : Col.

§ 524. **Vagrants.** The Constitution of Texas provides that the legislature shall enact effective vagrant laws : Tex. C. 3,46.

§ 525. **Paupers and Charity.** By the Constitutions of many states, the several counties shall provide poor-houses for the aged, infirm, and unfortunate : Kan. C. 7,4 ; Tex. C. 11,2 ; 16,8 ; Nev. C. 13,3 ; S.C. C. 11,5 ; Ala. C. 4,49 ; Miss. C. 12,29 ; Fla. C. 10,3 ; La. C. 163.

So, in one other, provision is made for orphan asylums : N.C. C. 11,8. In two, for idiot and inebriate schools : N.C. C. 11,9 ; Tex. C. 16,42. In many, for indigent deaf-mutes, blind and insane persons : N.C. C. 11,10 ; Ark. C. 19,19 ; Nev. C. 13,1 ; Col. C. 8,1 ; S.C. C. 10,7 ; 11,1 ; Miss. C. 12,27 ; Fla. C. 10,1. In one, for the support of indigent lunatics : Tex. C. 16,54. In one, there is a board of public charities : N.C. C. 11,7.

## CHAPTER V.

## THE SYSTEM OF JUDICATURE.

**Art. 55. The Courts.**

§ 550. **Note.** In discussing the various systems of courts, it is impossible to keep entirely separate the constitutional provisions and the provisions of the statutes. In this article, therefore, many statutory provisions of those states which have no constitutional provisions are incorporated, an asterisk being always used to note the fact; and thus an approximately complete view of the judicial systems of all the states and territories is presented. The chart appended (§ 551) is intended to give a general idea of the several courts of corresponding jurisdiction in all the states and territories, the horizontal lines indicating divisions of jurisdiction. Generally, throughout this work, the generic terms *supreme*, *superior*, *equity*, *probate*, *municipal*, *magistrates*, and *special*, are used as referring to classes A, B, C, D, E, F, and G, of the chart respectively. When a particular court of a state is referred to as such, and its name in such state, instead of the above generic name, is used, this is indicated by writing such local name of the court with capitals.

§ 551. **Citations to the Chart.** N.H. C. 1,35; Stats. Chapters 189,208,214,215; Mass. Chaps. 150,151,152,154,155,156,157; Me. C. 6,1-8; Stats. Chaps. 63,66,77, 132; Vt. C. 2,4-5; Stats. 695,778,796,821,1774,2015; R.I. C. 10,1-2; Stats. 179, 1-2; 192,1; 193,1; 195,1; 196,1; Ct. C. 5,1-2; Stats. 4,2,1; 4,5,1; N.Y. C. 6, §§ 2,6,12,15,18; Civ. C. § 2; C. Cr. P. §§ 22,37,74; N.J. C. 6, §§ 1,2,4,5,6,7; Stats. *Courts*, 1,17,28,51,59; *Chancery*, 1; *District Cts.* 1 (App.); *Justices Cts.* 1; *Orph. Cts.* 1; *Crim. Proc.* 23,26; 1883,137; Pa. C. 5, §§ 1,4,6,8,11,12,20,22; *Supr. Ct.* 1; *Com. Pleas*, 1; *Orph. Ct.* 1; Ann. Dig. 1874, 2; *Distr. Cts.*; *Quart. Sess.* 1 and 21; *Justices, etc.* 30; O. C. 4,1; Stats. 410,447,456,523,482,504,582,1785, 1816,1831; 1883, p. 382; 1884, p. 168; 1885, p. 16; Ind. C. 7,1; Stats. 1292, 1312,1342,1366,1488,3209; Ill. C. 6, §§ 1,11,20,21,23; Stats. Chap. 37, §§ 3, 18,216,240; Chap. 79, § 13; Mich. C. 6,1; Stats. 6382,6535-6592,6755,6814; Wis. C. 7,2; Stats. 2440,2443,2484-2523; Io. C. 5,1; Stats. 161-2; Minn. C. 6,1; Stats. 49,1; 64,1; Kan. C. 3,1; Stats. 18,49; 1881,37,51; Neb. C. 6,1; Md. C. 4,1; Del. C. 6,1; Va. C. 6,1 and 14; Stats. 156,1; 155,1; 154,1-2 and 20; 48,2; W.Va. C. 8,1 and 22; N.C. C. 4,2 and 14; Stats. 102,802,910,3818; Ky. C. 4, §§ 1,16,29; Stats. 28,13,1; 28,18,1; 1882,1324,1; Tenn. C. 6,1; Stats. 4869; Mo. C. 6,1; Ark. C. 7,1; Stats. 814; Tex. C. 5,1; Cal. C. 6,1; Stats. 10033,10121, 10085,10103,4426; Ore. C. 7,1; Nev. C. 6,1; Stats. 910; Col. C. 6,1; Stats. 3206; Territories, U.S. R. S. 1864,1865; S.C. C. 4,1 and 16; Civ. C. 9 and 34; Ga. C. 6,1,1; Stats. 279,480; Ala. C. 6,1; Stats. 539,718; Miss. C. 6, §§ 1,11,16,23; Fla. C. 6,1 and 16; La. C. 80,137; D. 2026,2119; Wash.\* 2113-4,1297,1689; Dak.\* C. Cr. P. 15; C. Civ. P. 18; Ida.\* Civ. C. 17,30; 1885, p. 95; Mon.\* Civ. C. 676,686,714; Wy.\* 106,1; Uta.\* C. Civ. P. 44,35,17; C. L. 166; N.M.\* 515,531, 561; Ariz.\* 185 and 2337; U.S. R. S. 1907,1908.



§ 551. General Chart of the Courts of all the States and Territories and the District of Columbia.

A. Supreme.	HIGHEST ORIGINAL AND APPELLATE.	SUPREME.			SUPREME JUDICIAL.	SUPREME COURT OF ERRORS.	COURT OF APPEALS.	COURT OF APPEALS, ERRORS AND APPEALS.	SUPREME (Civil) AND COURT OF APPEALS (Crim.)	COURT OF APPEALS.	SUPREME.	CT. ERRORS AND APPEALS.	A. See § 553.	
		N.H. Mich. Me. N.J. Pa. O. Ind. N.C.	Tenn. S.C. Ark. Miss. Cal. Ore. Nev. N.C.	Ida.* Mon. Wy. Uta. N.M. Wash. Ariz. D.C.	Mass.*	Ct.	Md. Va. W.Va.	Del.	Tex.	N.Y. Ky.	Ill. La.	SUPREME N.J.		
B. Superior.	HIGH COURTS JURISDICTION.	SUPERIOR.			SUPREME COURT OF CIRCUIT.	COMMON PLEAS.	CIRCUIT.	DISTRICT.	CIRCUIT.	DISTRICT AND CIRCUIT.	COMMON PLEAS.	SUPERIOR.	B. See § 554.	
		Mass.* N.C. Cal. Ga.	Ind. Ky. Tenn. Mich. Ark. Ore. Wis. Ala. Va. Miss. W.Va. Fla.	Ida.* Minn. Kan. Neb. Nev. Uta. N.M. Wash. Ariz. Dak.*	N.H. Me.*	R.I.*	Vt.*	N.Y.* O. Mo.	Tex. Col.	Io.	OVER AND TERMINER. GENERAL SESSIONS. N.Y.*	Pa. Del. S. C.		
C. Equity.	EQUITY COURTS.	CHANCERY.			SUPREME, ETC.	SUPREME AND SUPERIOR, ETC.	SUPERIOR, CIRCUIT, OR DISTRICT.	ORPHANS.	SURROGATE.	ORDINARY.	CHANCERY.	PREROGATIVE.	C. See § 555.	
		Vt. Tenn.* N.J. Mich.* Miss. Del.	R.I. Io.	N.H. Mass. Me. Ct. Pa. O.	Ind. Ill. Va. S.C. Ga. Fla. Territories.	Pa. Md. Del.	N.Y.	Ga.	N.Y. Miss.	ALL COURTS (i.e., Law and Equity are fused).	N.Y. N.C. Cal.	MAJORS COURT.		
D. Probate.	PROBATE.	PROBATE.			COUNTY.	SUPERIOR, CIRCUIT, OR DISTRICT.	ORPHANS.	REGISTERS.	SURROGATE.	ORDINARY.	CHANCERY.	PREROGATIVE.	D. See § 556.	
		N.H. Mass.* Me. Vt. Ark. S.C. O. Ill.	Mich. Minn. Kan. Mo. Ark. S.C. Ala. Wash.	Dak.* Ida.* Mon. Wy. Uta. N.M. Ariz.*	Ill. Wis. Neb.* Va. W.Va. Ky.	Tenn.* Tex. Ore. Cal. Fla.	Ind. Io. N.C.* Cal. Nev. La.	Pa. Md. Del.	Pa.* Del.	N.Y.	Ga.	MAJORS COURT.		
E. Municipal.	MINOR, COUNTY AND MUNICIPAL.	COUNTY.			MUNICIPAL.	POLICE.	CORPORATION.	DISTRICT.	CITY COURTS.	PARISH.	COMMON PLEAS.	INFERIOR.	HUSTINGS.	E. See § 558.
		N.Y.* Ky. Col. Tenn.* Ga.* Mo. Ark. Tex. Ore. W.Va.	Mass.* Me.* Mich. Ore. Nev. Cal. S.C. Fla.	N.H. Mass.* Me.* Ct. N.Y. Ill. Kan.*	Neb. Ark. Ga.* La. Ariz.* D.C.*	Va.* W.Va. Tenn. Mo. Ark. Ga.*	La.*	Ark.	N.C.*	Va.	QUARTER SESSIONS. N.Y.* N.J.* Ky.*	MAJORS COURT. O.* N.C.* S.C.*		
F. Magistrates.	JUSTICES OF THE PEACE AND THE PEACE AND MAGISTRATES.	JUSTICE OF THE PEACE.			MUNICIPAL.	POLICE.	CORPORATION.	DISTRICT.	CITY COURTS.	PARISH.	COMMON PLEAS.	INFERIOR.	HUSTINGS.	F. See § 559.
		N.H. Vt. Ct. N.Y. O. Ind. Ill. Mich.	Wis. Minn. Kan. Neb. Md. Del. Va. Ore. W.Va.	Ida.* Mon. Wy. Uta. N.M. Ariz.* D.C.*	N.H. Mass.* Me.* Ct. N.Y. Ill. Kan.*	Neb. Ark. Ga.* La. Ariz.* D.C.*	La.*	Ark.	N.C.*	Va.	N.Y.*	N.J.* O.	RECORDERS' COURTS. N.Y.* Pa.* Tenn.*	
G. Special.	SPECIAL LOCAL AND THE PEACE AND MAGISTRATES.	JUSTICE OF THE PEACE.			MUNICIPAL.	POLICE.	CORPORATION.	DISTRICT.	CITY COURTS.	PARISH.	COMMON PLEAS.	INFERIOR.	HUSTINGS.	G. See § 557.
		Mass.* Me. R.I. Ct.	N.Y. Pa. O. Ind.*	Ida.* Mich. Wis. Minn.	Kan. Neb. Md. Del.*	Va.* W.Va. N.C. Ky.	Tenn.* Mo. Ark. Cal.	N.Y.*	N.J.* O.	RECORDERS' COURTS. N.Y.* Pa.* Tenn.*	Miss. La.* Ariz.*			

§ 552. **Jurisdiction: General Principles.** In one state there are no constitutional provisions erecting courts; but the whole subject is left to the legislature: N.H. C. 2,4.

§ 553. **Jurisdiction, Special Provisions: The Supreme Court.** The courts of appeals<sup>a</sup> have in two states appellate jurisdiction, civil and criminal, (1) from the Supreme Court: N.Y. C. 6,6; N.J.\* *Errors*, 3; so, from the superior courts generally: Del.\* 113,5; (2) from the Circuit Court: N.J. *Errors*, 5; *Courts*, 12; C. 6,5,3; (3) from the Chancery Court or chancellor: N.J.\* *Chancery*, 114; 1878, 208; (4) from the Prerogative Court: N.J.\* *Courts*, 58; (5) from the Superior City Courts: N.Y.\* Civ. C. 190.

The United States Supreme Court has appellate jurisdiction from the supreme courts of the territories and of the District of Columbia: D.C.\* 846; U.S. 1879, 99, § 4; U.S. R. S. 1909, 1911.

In several states, the Constitution or laws provide that the governor and either branch of the legislature may require the opinion of the supreme court on questions of law in important or solemn occasions: N.H. C. 2,74; Mass. C. 2,3,2; Me. C. 6,3; Vt.\*<sup>b</sup> 795; R.I. C. 10,3; Fla.<sup>b</sup> C. 5,16.

(A) In a few states, the Supreme Court has original jurisdiction of all cases: N.H.\* 208,3; 252,1; Mass.\*<sup>d</sup> 150,5; Me.\* 77,2; R.I.\* 192,7 and 26 and 29; N.Y.<sup>d</sup> C. 6,6; Civ. C. 217; N.J. C. 6,5,2; Pa.\*<sup>c</sup> *Supr. Ct.* 17-18; D.C.\*<sup>e</sup> 760-769.

And, specially, it has, in some, jurisdiction of divorce, etc.: N.H. C. 2,76; Mass.\*; R.I.\*; D.C.\* See, for other states, in Part II., Division II.

It has, in a few states, original equity jurisdiction: N.H.\* 209,1; Mass.\* 151,4; Me.\* 77,6; R.I.\* 192,8; N.Y. C. 14,5; Civ. C. 217; Pa.\* *Equity*, 1-2 and 11.

But in most states, it has no original jurisdiction: Ct.\* 4,4,2; O.; Ind.; Ill.; Mich.\* 640,4; Wis.\* 2405; Io. C. 5,4; Minn.\* 63,1; Kan. C. 3,3; Neb. C. 6,2; Md.\* 56,7; Del.; Va. C. 6,2; W.Va. C. 8,3; Ky.<sup>f</sup> C. 4,2; Tenn. C. 6,2; Stats. 344,5246; Mo. C. 6,2; Ark. C. 7,4; Tex. C. 5,3; Cal. C. 6,4; Ore. C. 7,6; Nev. C. 6,4; Col. C. 6,2; S.C. C. 4,4; Ga. C. 6,2,5; Ala. C. 6,2; Miss. C. 6,4; Fla. C. 6,5; La. C. 81.

In one, the Constitution provides that no decision of the Supreme Court of Appeals shall be binding on inferior courts unless concurred in by at least three judges: W.Va. C. 8,4. And of course, in other states, there must be a full court.

(C) The supreme courts have generally power to issue (1) injunctions: Ind.\* 1147; Mich. C. 6,3; Wis. C. 7,3; Col. C. 6,3; S.C. C. 4,4; Ala. C. 6,2; Miss.\* 1404. So, only, where a corporation is a party defendant: Pa. C. 5,3; Minn. So, (2) writs of *quo warranto*: N.H.\* 208,1; Mass.\* 150,3; Me.\* 77,5; Vt.\* 782; R.I.\* 192,7; Pa.; O. C. 4,2; Mich.; Wis.; Minn.; Kan.; Neb.; Mo. C. 6,3; Ark. C. 7,4; Nev. C. 6,4; Col.; S.C.; Ala.; Fla. C. 6,5; La. C. 90; Ariz.\* 2341. So (3) of suits against the State or cases in which the State is a party: Me.\* 77,2; R.I.\*; Wis.\* 3200; Neb.; N.C. C. 4,9. So (4) of revenue cases: Ill. C. 6,2; Neb. So (5) writs of *habeas corpus*: N.H.; Me.\* 99,4; R.I.\*; Pa.\* *Supr. Ct.* 23; O.; Ill.\* 37,8; Mich.; Wis.; Kan.; Neb.; Va. C. 6,2; W. Va. C. 8,3; Mo.; Ark.; Tex.\*<sup>f</sup> 1069; Cal. C. 6,4; Nev.; Col.; S.C.; Ala.; Miss.\*; Fla.; La. C. 89; Ida.\* Civ. C. 19-20; Uta.\* Civ. C. 19-20. (6) Of *mandamus*: N.H.; Mass.; Me.\* 102,16; 77,5; Vt.\*; R.I.\*; Pa.; O.; Ill.; Mich.; Wis.; Minn.\*; Kan.; Neb.; Va.; W.Va.; Mo.; Ark.; Tex. C. 5,3; Cal.; Nev.; Col.; S.C.; Ala.\*; Fla.; La.; Ida.\*; Uta.\*; Ariz.\* (7) Of *prohibition*: N.H.; Mass.; Me.\*; Vt.\*; R.I.\*; Mich.\*; Wis.\* 2406; Minn.\*; Va.; W.Va.; Ark.; Cal.; Nev.; Fla.; La.; Ida.\*; Uta.\* (8) Of *certiorari*: N.H.; Mass.; Me.\* 102,13; Vt.\*; R.I.\*; Pa.\*; Ill.\*; Mich.\*; Wis.\*; Minn.\*; Mo.; Ark.; Cal.; Nev.; Col.; Ala.\* 572; Miss.\*; Fla.; La.; Uta.\*; Ariz.\* (9) Of *procedendo*: Mich., Wis., Kan. (10) Of writs

of error : N.H. ; Mass.\* ; Me.\* 102,1 ; Vt.\* ; R.I. ; Pa.\* ; Ill.\* ; Mich. ; Minn.\* ; Va.\* 156,4 ; Ark. (11) Of *supersedeas* : O.\* 442 ; Ill.\* ; Mich.\* ; Wis.\* ; Va.\* ; Ark. ; Ala.\* ; Miss.\* (12) Other original remedial writs : Pa.\* ; N.C.\* 945 ; Mo. ; Ark. ; Col. ; S.C. ; Ala. ; Miss.\* ; La. C. 90 ; Ida.\* (13) "All other writs and processes necessary to the furtherance of justice and the regular execution of the laws : " Mass.\* 150,3 ; Me.\* 77,5 ; Vt.\* ; R.I.\* ; O.\* ; Ill.\* ; Mich.\* ; Wis.\* ; Minn.\* ; Cal.\* ; Nev.\* ; Fla.\* ; Ida.\* ; Uta.\* ; Ariz.\* (14) It may, in others, issue all writs and process necessary for the exercise and enforcement of its jurisdiction : Tenn.\* ; Tex. ; Cal. ; Ga.\* 218 ; Fla. So in many states, see in Part IV.

In nearly all states, the supreme courts have appellate jurisdiction in civil law, criminal law, and equity : Mass.\* 150,3 ; 1883,223,6 ; Vt.\* 771,782,1699 ; Ct.\* 4,4,2 ; N.Y. C. 6,15 ; Crim. C. 517 ; Pa. C. 5,3 ; O. C. 4,2 ; Ind. C. 7,4 ; Stats. 1292 ; Ill. C. 6,2 ; Mich. C. 6,3 ; Stats. 6404 ; Wis. C. 7,3 ; Stats. 2405 ; Io. C. 5,4 ; Minn. C. 6,2 ; Kan. C. 3,3 ; Stats. 27,1 ; Neb. C. 6,2 ; Stats. 1,19,13 ; Md. C. 4,18 ; Stats. 71,2, and 37 and 39 ; Del. C. 6,7 and 12 ; Va. C. 6,2 ; Stats. 156,3 ; W.Va. C. 8,3 ; Stats. 1882,156 ; N.C. C. 4,8 ; Stats. 945 ; Ky.<sup>d</sup> C. 4,2 ; Stats. 28,22,1 ; Tenn. C. 6,2 ; Stats. 5296 ; Mo. C. 6,2 ; Ark. C. 6,4 ; Cal. C. 6,4 ; Ore. C. 7,6 ; Nev. C. 6,4 ; Col. C. 6,2 ; S.C. C. 4,4 ; Civ. C. 11 ; Ga. C. 6,2,5 ; Stats. 218 ; Ala. C. 6,2 ; Miss.\* 1405,2314 ; Fla. C. 6,5 ; Stats. 53,14 ; La. C. 81 ; Wash.\* 1140 ; Dak.\* C. Civ. P. 22 ; C. Cr. P. 18 ; Ida.\* Civ. C. 21 ; Mon.\* Civ. C. 677 ; C. Cr. P. 393 ; Uta.\* Civ. C. 19-21 ; Cr. C. 358 ; N.M.\* 515 ; Ariz.\* 862,2339-40. And also, in many, in probate or insolvency matters : N.H.\* 208,2 ; Mass.\* 156,5 ; Me.\* 63,23 ; Vt.\* 2269 ; R.I.\* 181,1 ; 192,25 ; Pa.\* *Orph. Ct.* 50 ; *Register*, 23 ; Mich.\* 6405 ; Wis.\* 2405 ; Md.\* 71,5 and 70 ; W.Va. ; Tenn.\* 3865 ; Mo. ; Ark. ; Tex.\* 1068 ; S.C.\* Civ. C. 56 ; Ala.\* 3916 ; Miss.\* 2309 ; La. C. 91 ; Fla. The same would follow in all states where probate jurisdiction is given to the superior courts ; see Chart, and § 556.

In Texas, the Supreme Court has appellate jurisdiction only in civil matters ; the Court of Appeals, in criminal, and in civil cases from the county court : Tex. C. 5,3 and 6 ; Stats. 1011 and 1068 ; C. Cr. P. 66.

In three, the supreme court has appellate jurisdiction from all inferior courts, but not (except the case of appeals from a single judge to the full bench) in equity, as it is the only court having equity jurisdiction : N.H.\* 208,1 ; 252,3 ; C. 2,76 ; Me.\* 77,3 ; 131,1 ; R.I.\* 192,8 and 29 ; 218,2.

So, specially, the Supreme Court has general appellate jurisdiction from (1) the Circuit Court : N.J. C. 6,5,3 ; (2) District Court : Cal.\* 10963 ; La. C. 91 ; Territories, U.S. R. S. 1869 ; (3) from the Court of Common Pleas : N.J.\* *Errors*, 6 ; in the District of Columbia, from the Police Court : D.C.\* 773 and 1073 ; and from justices of the peace : D.C.\* 774 ; and from the commissioner of patents : D.C.\* 780 ; (4) from the Superior Court : N.C.\* 1234 ; (5) from county courts : Vt.\* 782 ; Ill.\* 37,213 ; Wis.\* 2405 ; Tenn.\* 3895 ; (6) from the special courts : Me.\* 77,79 ; Ind.\* 1362 ; Ark.\* 5419 ; (7) from the Court of Chancery : Vt.\* 771 ; Tenn.\* 3872 ; (8) from the Superior Court of Cincinnati : O. 6710 ; 1883, p. 169 ; (9) from all courts of record : Wis.\* Ky.\* ;<sup>d</sup> (10) from municipal and police courts : N.H.\* 215, 13 ; (11) from city courts : Ill.\* 37,257 ; (12) from justices of the peace : N.H.\* 214,5 ; Me.\* 83,18 ; 132,15 ; (13) from the Court of Quarter Sessions and of Oyer and Terminer : Pa.\* *Supr. Cts.* 25 ; (14) from the state land commissioners : Md.\* 71,87. And of course, in all states, from the several superior courts.

The District of Columbia Supreme Court has the same jurisdiction as the Circuit Court of the United States. Any one of the justices may hold a criminal court of general jurisdiction. It has also jurisdiction of copyright and patent matters, bankruptcy, divorce, and equity jurisdiction : D.C.\* 760-1,763-6, 768.

In Kentucky, the Court of Appeals has appellate jurisdiction from the Superior Court, and the Superior Court from the Circuit and other courts : Ky.\* 1882,1324,2 and 5. The appellate jurisdiction of the Superior Court is only in cases of less importance ; felonies, real estate cases,



and cases over \$3,000, etc., go directly to the Court of Appeals: Ky.\* *ib.* 3. The Superior Court has original jurisdiction of escheats: Ky.\* *ib.* 22.

**Nisi Prius Courts.** In Pennsylvania, one Supreme Court judge holds a Nisi Prius Court in Philadelphia, for the trial of issues of fact; and has equity jurisdiction like the Supreme Court: Pa. *Supr. Cts.* 33-4, 36-7, 42; *Equity*, 9.

NOTES. — <sup>a</sup> The word is here used only of those Courts of Appeals which exist *above* a Supreme Court; see Chart. <sup>b</sup> The governor, only. <sup>c</sup> Except minor criminal cases. <sup>d</sup> Except civil cases involving less than \$1,000, and criminal cases not capital. <sup>e</sup> Except the writs below specified. <sup>f</sup> Of the Court of Appeals. <sup>g</sup> See also in Part IV. <sup>h</sup> See also § 75.

§ 554. **The Superior Courts** [*i.e.*, the Superior, Circuit, District, Supreme Court on circuit, etc. (see Chart)] have (A) original jurisdiction of all cases, civil or criminal, at law or equity, except of minor criminal cases and civil suits involving small sums: Mass.\*<sup>a</sup> 152,4-9; 1883,223; Me.\* 77,47; Ct.\*<sup>b</sup> 19,4,2-3; 4,3,2; 20,13,4; 4,1; Pa. C. 5,4 and 20; *Equity*,\* 1 and 8; O.\*<sup>b</sup> 456; C. 4,6; 1883, p. 383,6; Ind.\*<sup>b</sup> 1314; Ill. C. 6,12; Stats. 38,392;<sup>b</sup> Mich.<sup>b</sup> C. 6,8; Stats. 6466; Wis.<sup>b</sup> C. 7,8; Stats. 2420; Io. C. 5,6; Minn.<sup>b</sup> C. 6,5; Stats. 64,1-2; Kan.\*<sup>b</sup> 28,1; 31,308; Neb. C. 6,9; Stats. 19,24; Md. C. 4,20; Stats. 56,7; Del.\* 92,1-3; Va.\* 155,2; 1875,60; W.Va. C. 8,12; Stats. 36,3; 1881,3,3; N.C.\* 922; Ky.\*<sup>b</sup> 28,4,1; Cr. C. 13; Tenn.\* 4997-8; Mo.<sup>b</sup> C. 6,22; Stats. 1102; 1760; Ark. C. 7,15 and 11; Stats. 1356-7; 1956; Tex.<sup>b</sup> C. 5,8; Stats. 1117,1122; Cal. C. 6,5; Stats. 10075-6; Ore.;<sup>b</sup> C. 7,9; Nev. C. 6,6; Stats. 925,933; Col. C. 6,11; Ga. C. 6,4,1; Stats. 246,3080; Fla. C. 6,8; Stats. 52,2; La. C. 109; Wash.\* 2121; Dak.\* C. Civ. P. 27-30; C. Cr. P. 17; Ida.\* Civ. C. 26; Mon.\* Civ. C. 679,680; Uta\* Civ. C. 26; N.M.\*<sup>d</sup> 531-2,666; Ariz.\*<sup>b,c</sup> 2348. *Except*, of capital crimes: Mass.\* (B) They have original jurisdiction of all civil cases (1) in law: Vt.\*<sup>b,c</sup> 798; R.I.\*<sup>b,c</sup> 193,3-4; N.Y. Civ. C. 232,235; N.J. *Courts*, 60; Pa. C. 5,3-4; Ind.; Ala. C. 6,5; Stats. 657; Miss. C. 6,14; Stats. 1493. (3) In equity: N.Y., Pa. Ind. 1881,24. And often, probate jurisdiction. See § 556. (4) They have jurisdiction of claims against the State:<sup>d</sup> Mass.\* 152,3; 195,1; Neb.\* 2,1106; Va.\* 44,1. (5) They have generally jurisdiction to grant divorces. See Part II., Division II. (C) They have original jurisdiction of all criminal cases: Vt.\*<sup>b</sup> 799; R.I.\*;<sup>b</sup> Ala.; Miss.

(D) Specially, the Court of Common Pleas has jurisdiction of all civil causes: N.J.\*; Pa.\*<sup>c</sup> *Com. P.* 134 and 138-9; O.\*<sup>b</sup> 456; S.C.<sup>b</sup> C. 4,1 and 15. The Territorial District Courts have jurisdiction like the Circuit and District Courts of the United States: U.S. R. S. 1910. In two, the judges of the Supreme Court upon circuit have jurisdiction similar to that of the Superior Courts in other states: N.H.\* 211,1; Me.\* 77,47. In several, the Courts of General or Quarter Sessions or Oyer and Terminer, etc., have criminal jurisdiction in all cases: N.Y. Civ. C. 232; Crim. C. 22; N.J.\* *Crim. Proc.* 26 and 30; Pa.\* *Quart. Sess.* 15; *Crim. Proc.* 34-5; Del. C. 6,4; Stats. 94,1; S.C. C. 4,18. The Court of Oyer and Terminer has exclusive jurisdiction of capital cases, murder, and manslaughter: N.J. *Crim. Proc.* 23; Pa.\* *Quart. Sess.* 25-26; *Crim. Proc.* 35-6; Del.\* 93,1. In Iowa, the Circuit and District Courts have generally concurrent civil jurisdiction and appellate jurisdiction, — the former chiefly civil, the latter criminal: Io.\* 162,163; but the Circuit Court has exclusive probate jurisdiction: Io.\* 2312. In New York, the Court of Oyer and Terminer has general criminal jurisdiction, inferior to that of the Court of General Sessions: N.Y.\* C. Crim. P. 22 and 39; 1882,360. There is a Court of Claims, which decides claims against the state, with appeal to the Court of Appeals: N.Y. 1883,205. The County Court judge, with two justices of the peace, may hold courts of sessions for the county: N.Y. C. 6,15. In Nebraska, the judge of a District Court may pass sentence on a plea of guilty to felony: Neb. C. 6,9. In Pennsylvania, the judges of the Courts of Common Pleas are judges of the Courts of Oyer and Terminer, General Delivery, Quarter Sessions, and Orphans' Courts for their respective counties: Pa. C. 5,9.

**Criminal Courts** may, in some states, be established in counties having a certain population: Mo. C. 6,31; Tex. C. 5,1 (Criminal District Courts); Col. C. 6,24.



See also Special Courts, § 557.

**Appellate Jurisdiction.** The superior courts have appellate jurisdiction (1) from the probate courts: Vt.\* 2268; Ct.\* 4,5,11; O.\*<sup>c</sup> 6708,456; Ill.\* 37,226; Mich.\* 6779; Minn.\* 64,1; Kan. C. 3,10; Neb. C. 6,17; Del. C. 6,10; Stats. 96,4; Va.\* 154,4 and 7; W.Va.\* 1881,5,47; N.C.\* 116; Ky.\* 113,27; Tenn.\* 4999; Mo.\* 1102; Ark. C. 7,35; Tex. C. 5,8; Col.\* 1885, p. 187; Wash.\* 2121; Dak.\* C. Civ. P. 29; Ida.\* 1879, p. 12,2; Mon.\* Civ. C. 681; Wy.\* 47,232; Uta.\*; S.C.\* Civ. C. 55; Ga. C. 6,6,1; Ala.\* 3954; Fla. C. 6,8; Stats. 51,21; N.M.\*; Ariz.\* 2349 and 2801. (2) In states which have one, from the Insolvency Court: Mass.\* 152,5; Vt.\* 1810. (3) From all inferior courts and tribunals: Mass.\* 152,5; Vt.\* 798; Pa. C. 5,10; O.\* 1884, p. 169; Ill. C. 6,12; Mich.\* 6466; Wis. C. 7,8; Io.\* 161; Kan.\* 28,1; Neb.\* 19,24; W.Va. C. 8,12; Stats. 1881,3,2; N.C.\* 923; Ky.\* 1880,1525,3; Tenn.\* 5006; Mo.<sup>b</sup> C. 6,22-23; Ark. C. 7,14; Cal.\* 10077; Ore.; Nev. C. 6,6; Col.; S.C.\* Civ. C. 358; Ga. C. 6,4,4; Stats. 246; Ala.\* Stats. 657; Fla.\* Stats. 52,2; Wash.\*; Dak.\*; Wy.\* Civ. C. 511. (4) From justices of the peace or trial justices: Mass.\*; Vt.\* 1061,1673; R.I.\* 193,9; Ct.\* 20, 13,4,1; N.J.\* *Justices Cts.* 84,137; O.\*; Minn.\* 64,1; Md.\* 71,77; Del.\* 92,2; N.C.; Ky.\* 1876, March 20; Tenn.\* 3856; Mo.\*; Ark.\* 1363; 1966; Cal.\* 10974; Ga.\* 4157a; Ala.\*; Miss. \*2352; Fla.; La. C. 111; Wash.\*; Dak.\*; Ida.\* Mon.\*; Wy.\*; Uta.\* Civ. C. 854 and 26; N.M.\*; Ariz.\* 2349. (5) From the county courts: Neb. C. 6,17; W.Va.\* 1882,152; Tenn.\* 3863; Mo.\*; Ark.\* 1436; Col.\* 1885, p. 158; Ga.\* 286; Ala.\* 4724; Fla. (6) From Police Courts: Mass. 154,39; Ky.\* 1876, March 20, § 7; Ark.\*; Cal.\* (7) From Municipal Courts: Mass.\*; Ct.\* 20,13,4,1; N.J.\* 1879,84,34; Kan.\* 1881,37,60; Tenn.\* 3856,3863; La.\* C. P. 568. (8) From the Courts of Common Pleas: N.J.; O. 6709; 1885, p. 36. (9) From the District Courts: Mass.\* N.J. (10) From the [special] Superior Courts: O.\* 518. (11) From the county commissioners: Md.\* 71,89; Ark.\*; Miss.\* 2351. (12) From the Quarterly Courts: Ky.\* 28,23,1.

**Appellate Courts.** In Illinois, there are four Appellate Courts, — one each in the northern, central, and southern divisions of the state, and Cook County, — with appellate civil jurisdiction from the Circuit Courts, etc., and an appeal therefrom, in cases involving \$1,000, to the Supreme Court: Ill.\* 37,18 and 25. They are held by Circuit Court judges: Ill.\* 37,18. In Louisiana, the Courts of Appeal have minor civil and probate appellate jurisdiction: La. C. 95; 1882,125. So, in Illinois, the Appellate Courts have general appellate jurisdiction from the Superior Courts, except criminal cases and cases involving a franchise, a freehold, or the validity of a statute. In Louisiana, there are Courts of Appeal, with appellate jurisdiction only, in civil and probate matters, from the District Courts: La. C. 95.

NOTES. — <sup>a</sup> To the amount of \$1,000. <sup>b</sup> Except as otherwise provided. <sup>c</sup> Of the Common Pleas Court only. <sup>d</sup> See also § 75.

§ 555. **The Courts of Chancery (A)** have (1) in general, equity jurisdiction: Vt.\* 695; N.J.\* *Chancery*, 3; Mich.\* 6611; Del. C. 6,5; Stats. 95,1; Tenn.\* 5022; Ala.\* 616; Miss. C. 6,16. In Michigan, the Circuit Court is the court of chancery.

With appeal to the Court of Errors and Appeals: N.J. C. 6,2,5; Del. C. 6,7; to the Supreme Court: Vt.\* 771; Mich.; Tenn.\* 3872; Ala.; Miss. See also in §§ 553,554.

Also, they have jurisdiction (2) of divorce: N.J.\* *Divorce*, 1; Tenn.\* 5044; Miss.; and (3) of probate matters (see also § 556): Tenn.\* 5041-5; Miss.

The chancellor, as judge of the Prerogative Court, has, in New Jersey, appellate jurisdiction from the Orphans' Court: N.J. C. 6,4.

(B) But in other states, there is no special Court of Chancery, and equity jurisdiction is vested (1) in the Supreme Courts (and highest Courts of Appeals): N.H.; Mass.; Me.; R.I.; Ct.; N.Y.; Pa.\* *Equity*, 1-6; O.; Ind.; Ill.\* 22,1; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Va.; W.Va.; N.C.; Ky.; Mo.; Ark.; Tex.; Cal.; Ore.; Nev.; Col.; S.C.; Ga.; Ala.; La.; Territories, U.S. R. S. 1868.

(2) In the Superior Courts: Mass.; Pa.\* *ib.* 1-6 and 8; Ill.\*; Wis.; Io.; Minn.\*; Kan.; Neb.; Md.\* 65,1; Va.; W.Va.; N.C.; Ky.; S.C.; Ga.; Ala.; La.; Territories. (3) In the Special Courts, or many of them: Pa. *Equity*, 12; Ill.; Md.\*; (4) In the County Courts: W.Va. C. 8,27. (5) Justices of the peace: Tenn.\* 4899. For citations, see §§ 553-4.

(C) In many states, the distinction between courts of chancery and courts of law is abolished, and all courts may exercise both kinds of jurisdiction (see Part IV.): Ct.\* 1879,83; N.Y.\* Civ. C. 267,348; Ga. C. 6,4,2. (D) And in many others, the distinction between actions at law and suits in equity is abolished, and there is but one form of action. See in Part IV.

§ 556. Probate Courts (Orphans', Surrogates', etc., see Chart) have jurisdiction (A) of the probate of wills, the granting of letters testamentary and administration, and generally of the settlement of estates of deceased persons: <sup>a</sup> N.H.\* 189,2; C. 2,80; Mass.\* 156,2; Me.\* 63,6; Vt.\* 2018; R.I.\* 179,3; Ct.\* 18,11, 1,1,9; 18,11,1,2,1; N.Y.\* Civ. C. 2472; N.J.\* *Orph. Ct.* 2; *Courts*, 49; Pa.\* <sup>a</sup> *Register*, 5 and 18; Ann. Dig. 1874,6; O. C. 4,8; Stats. 524; Ill. C. 6,18-20; Stats. 37,220; Mich.\* 6759; Wis.\* 2443; Io.\* 2312; Minn. C. 6,7; Stats. 49,3; Kan. C. 3,8; Stats. 29,1; Neb. C. 6,16; Stats. 1,20,3; Md.\* 50,5; Del.\* 89,1; Va.\* 154,4; W.Va. C. 8,24; N.C.\* 103; Ky.\* 113,26; Tenn.\* 4980; Mo. C. 6,34; Stats. 1176; Ark. C. 7,34; Stats. 1384; Tex. C. 5,16; Cal.\* 11295; Ore.\* Civ. C. 869; Nev.\* 925; Col. C. 6,23; S.C. C. 4,20; Civ. C. 37; Ga.\* 331; Ala. C. 6,9; Fla. C. 6,11; Wash.\* 1299; Dak.\* Prob. C. 1; Ida. Civ. C. 31; Mon.\* Civ. C. 687; Wy.\* 47,1; Uta. Civ. C. 36; N.M.\* 562; Ariz.\* 1518. Of suits for legacies or distributive shares: N.J.\* *ib.* 2.

(B) Also, in many, of the appointment and removal of guardians (1) of minors: <sup>a</sup> N.H.\* 189,3; Mass.\*; Me.\*; Vt.\*; R.I.\* 168,2; Ct.\* 14,5,1; N.Y.\*; N.J.\*; Pa.\* *Orph. Ct.* 8; O.; Ill.; Mich.\*; Wis.\*; Io.\*; Minn.; Kan.; Neb.; Md.\* 50,6; Del.\* 96,7; Va.\*; W.Va.; N.C.\*; Tenn.\*; Mo.; Ark.; Tex.; Ore.\*; Nev.\*; Col.; S.C.; Ga.\*; Ala.; Fla.; Wash.\*; Dak.\*; Ida.\*; Mon.\*; Wy.\* 60,3; Uta.\*; N.M.\*; (2) of insane persons: <sup>a</sup> N.H.\*; Mass.\*; Me.\*; Vt.\*; Ct.\* 18,4,1,1; O.; Ill.; Mich.\*; Wis.\*; Io.\*; Kan.; Neb.; Va.\*; W.Va.; N.C.\*; Tenn.\*; Mo.; Ark.; Tex.; Ore.\*; Nev.\*; Col.; S.C.; Ga.\*; Ala.\* 693; Wash.\*; Dak.\*; Wy.\* 79,1; Uta.\*; N.M.\*; (3) of spendthrifts or drunkards, or others requiring guardianship: <sup>a</sup> N.H.\*; Mass.\*; Me.\*; R.I.\*; Ct.\* 18,4,2,3; O.; Ill.; Mich.\*; Wis.\*; Io.\*; Kan.\* 1727; Va.\*; W.Va.; N.C.\*; Tex.; Ore.\*; Dak.\*; Wy.\*

(C) And in most states, generally, of the management and accounting of such wards' estates: <sup>a</sup> N.H.\*; Mass.\*; Me.\*; Vt.\*; R.I.\* 179,9; Ct.\* 4,5,39; N.J.\*; Pa.\*; O.; Ill.; Mich.\* 6760; Wis.\*; Io.\*; Minn.; Kan.; Neb.\* 1,20,4; W.Va.; N.C.\*; Ky.\*; Tenn.\*; Mo.; Ark.\*; Tex.; Ore.\*; Nev.\* 934; Col.; S.C.\* Civ. C. 37-8; Ga.\*; Ala.\*; Fla.; Wash.\*; Dak.\*; Ida.\*; Mon.\*; Wy.\*; Uta.\*; N.M.\*

(D) Also, in many, of the adoption of children: <sup>a</sup> N.H.\* 189,4; Mass.\*; Me.\*; Ct.\* 14,4,1; Tenn.\* And in others, of the change of names: <sup>c</sup> Mass.\* Me.\* Tenn.\* Ark.\* And in others, of binding apprentices: <sup>d</sup> Ill.\* 37,93; Kan.\*; Neb.; W.Va.; N.C.\*; Tenn.\*; Mo.; Ark.\*; Tex.; Ga.\*; Ala.\*; Wash.\*; N.M.\* In Arkansas, of relieving minors by decree from the legal disability of nonage. <sup>d</sup>

(E) Also, in several, of the assigning of dower and homestead in the estate (1) of a decedent: <sup>f</sup> N.H.\*; Ct.\* 18,11,1,4,2; Minn.\*; Tenn.\*; Ark.\*; Ore.\*; S.C.; Ala.\* (2) In cases of lunacy: Ark.\* S.C.

(F) In many states, also, of trusts created by will: <sup>b</sup> N.H.\*; Mass.\* 141,27; Vt.\*

2300; Ct.\* 18,10,5; N.J.\*; Wis.\*; Io.\*; S.C.\* And in others, of trusts, generally :<sup>b</sup> Vt.\*; Ct.\* 18,10,3; N.J.\*; Va.\*

(G) In most states, of the sale of real estate (1) of a decedent :<sup>a</sup> N.H.\*; R.I.\* 179,10; O.\* 525; Ill.; Io.\*; Minn.\*; Md.\* 50,204; Tenn.\*; Mo.; Ark.\*; Ore.\*; Nev.\*; Ga.\*; Ala.\*; Fla.\* 51,20; Dak.\*; Mon.\* Prob. C. 1; (2) of a ward :<sup>a</sup> R.I.\* 179,11; Ct.\* 4,5,18; O.\*; Io.\*; Mo.; Ark.\*; Ore.\*; Nev.\*; Fla.\*; Ida.\*; Mon.\*; N.M.\* 656; (3) of a trust :<sup>a</sup> Io.\*

(H) And in many, of petitions or process for partition of the lands of decedents :<sup>a</sup> N.H.\* 189,5; R.I.\* 179,9; Minn.\*; Tenn.\*; Ark.\*; Tex.; Nev.\*; Ala.\*; Ida.\*; Mon.\*

(I) In several, of executing contracts of sale of land made by the decedent :<sup>a</sup> Ct.\* 4,5,29; O.\*

(J) In a few, of *habeas corpus* :<sup>c</sup> O.,\* Kan.\* (K) Of granting marriage licenses :<sup>d</sup> O.\*

(L) Of determining compensation for land taken in eminent domain :<sup>e</sup> O.\*

(M) They have jurisdiction of divorce suits :<sup>d</sup> Uta.\*

(N) Of suits for legacies and distributive shares :<sup>a</sup> N.J.\* *Orph. Ct. 3.*

(O) In New England, the judges and registers of probate are generally judges and registers of insolvency: Mass.\* 156,1; Me.\* 70,1; Vt.\* 1774; Ct.\* 18,11,2,1. And so, in other states, they have jurisdiction of insolvency cases: O.,\* Tenn.\*

(P) The Courts of Insolvency have original jurisdiction of all cases of insolvency :<sup>g</sup> Mass.\* 157,2; Me.\*; Vt.\* 1775.

And (Q) in some territories, the Probate Courts have civil jurisdiction (1) of suits involving not more than \$500: Ida.\*; Mon.\* Civ. C. 688; U.S. R. S. 1932. (2) Like justices of the peace: Wy.\* 28,2,3.

And (R) in several, criminal jurisdiction (1) concurrent with justices of the peace: Ida.\*; Wy.\* (2) Minor criminal jurisdiction, but greater than that of a justice of the peace: Mon.\* Cr. Pr. 6; 1881, p. 42. (3) Criminal jurisdiction concurrent with the Court of Common Pleas: O.<sup>h</sup> 6454; 1884, p. 89.

(S) In others, they have appellate jurisdiction in minor civil cases from justices of the peace: N.M.\*

In many states, the county courts have probate jurisdiction: N.Y. C. 6,15; Ill. C. 6,18; Wis.\* 2443; Neb. C. 6,16; Va.\* 154,4; W.Va. C. 8,24; Ky.\* 113,26; Tenn.\* 207; Tex. C. 5,16; Stats. 1789; Ore. C. 7,12; Col. C. 6,23; Fla. C. 6,11. See also § 560.

In others, the District Courts: Nev. C. 6,6; La. C. 109. In one, the Chancery Courts: Miss. C. 6,16. In one, the clerks of the Superior Court: N.C.\* 102. In two, the Circuit Courts: Ind.\* 1314; Io.\* 2312. In one, the Superior Courts: Cal.\* 11295. But in a few, special Probate Courts may be created in counties having over a certain population: N.Y. C. 6,15 (Surrogate); Ill. C. 6,20.

NOTES. — <sup>a</sup> See also in Part IV., Probate Code. <sup>b</sup> See Art. 176. <sup>c</sup> See in Part V. <sup>d</sup> See Part II., Div. 2. <sup>e</sup> See in Part III. <sup>f</sup> See also Art. 316. <sup>g</sup> See in Part IV. <sup>h</sup> In special counties.

§ 557. **Special Courts.** In some states, there is a general provision in the Constitution that the legislature shall have full power to erect inferior courts, civil and criminal: N.H. C. 2,4; Mass. C. 2,1,1,3; Ct. C. 5,1; N.Y. C. 6,19.

In Massachusetts, the Municipal Court of the city of Boston has extraordinary powers: Mass.\* 154,59 and 50.

In Maine, there are Superior Courts in Cumberland, Aroostook, and Kennebec Counties, having civil and criminal jurisdiction, and appellate from Police Courts: Me.\* 77,62 and 66 and 63,67; 1885,324.

In Rhode Island, there is a Municipal Court in Providence, with minor, civil, criminal, and probate jurisdiction: R.I.\* 179,2; and special Courts of Common Pleas: R.I.\* 195,1.

In New York, there is a Superior Court of the city of New York; a Court of Common Pleas for the city and county of New York; a Superior Court for Buffalo; and a City Court for Brooklyn, by the Constitution: N.Y. C. 6,12. And the Code recognizes a Court of Common Pleas for the city and county of New York, and also a Superior Court, District Courts, and



Court of General Sessions, in the same county; a Superior Court in Buffalo; city courts, having jurisdiction like that of the Supreme Court except in amount, in Brooklyn, Long Island City, and Yonkers; a city court in the city of New York; a Mayor's Court in Hudson; a Recorder's Court in Utica and Oswego; a Justice's Court in Albany, besides minor police or criminal courts not of record: N.Y.\* Civ. C. 2-3; 263 and 267; 315; 1882,410; 1883,26.

In Pennsylvania, there are four co-ordinate Courts of Common Pleas in Philadelphia, and two in Alleghany County: Pa. C. 5,6; Police and Magistrates' Courts in Philadelphia, etc.: *ib.* 12; Ann. Dig. *Mag. Cts.*\* 1 and 13; a District Court in Philadelphia, in Alleghany and in Cambria Counties: Pa.\* *Distr. Cts.* 1,41,64; and Criminal Courts in Danphin, Lebanon, and Schuylkill Counties: Pa.\* *Quart. Sess.* 40; Mayors' Courts in a few cities: Pa.\* *Mayors' Cts.* 1 and 38.

In Connecticut, there are in several counties special Courts of Common Pleas: Ct.\* 4,2,1; and District Courts: 4,2,4-5; and several city courts: 4,2,21.

In Illinois, there is a Superior Court in Cook County, and a Recorder's (Criminal) Court in Cook County: Ill. C. 6,26; also city courts in various cities, and various city courts with civil and criminal jurisdiction, like Circuit Courts: Ill.\* 37,240. There is a Commission of Claims, consisting of one judge of the Supreme Court and two judges of the Circuit Court, having jurisdiction of claims against the state: Ill. 26a,1-2 and 9. Some counties have special Probate Courts: Ill.\* 37,95a. (Such counties as have over 70,000 population: Ill.\* 37,216.)

In Ohio, there is a special Superior Court of Cincinnati, and also in Montgomery County, courts of record with general original civil jurisdiction: O.\* 482,493,504,512.

In Indiana, there are Superior Courts in every county containing a city with more than 40,000 inhabitants (Ind.\* 1342), having concurrent original, appellate, criminal, civil, and probate jurisdiction with the Circuit Courts: Ind.\* 1351. And there are criminal courts in Marion and Allen Counties, having unlimited criminal jurisdiction: Ind.\* 1369,1372.

In Wisconsin, there are Municipal Courts of Record in Milwaukee, Ripon, and Dane, — the former one has criminal, the latter two have civil, jurisdiction concurrent with the Circuit Court: Wis.\* 2484,2499,2515; and the county courts, of Brown, Dodge, Fond du Lac, Milwaukee, and Winnebago, have extensive civil jurisdiction other than probate: Wis.\* 2465.

In New Hampshire, any town may by vote establish a Police Court: N.H. 215,1.

In Michigan, there are Superior Courts in the cities of Detroit and Grand Rapids (Mich.\* 6535,6564) having concurrent jurisdiction with the Circuit Court: Mich.\* 6547,6576.

In Minnesota, there are Municipal Courts in the cities of St. Paul, Minneapolis, and Stillwater, having civil jurisdiction resembling that of justices of the peace, and criminal jurisdiction: Minn.\* 64,81-2 and 88 and 109 and 114 and 131-2 and 134.

In Baltimore City there are six courts, — the Supreme Bench of Baltimore City (having appellate jurisdiction from the other five), the Superior Court of Baltimore City, the Court of Common Pleas, and the Baltimore city court, having concurrent civil common law jurisdiction; the Circuit Court of Baltimore City, with exclusive equity jurisdiction, and unlimited ordinary civil jurisdiction; and the Criminal Court of Baltimore. But the Court of Common Pleas has exclusive jurisdiction in insolvency: Md. C. 4,27-30. And the judges of the Supreme Bench Court are the judges of these other five courts: Md. C. 4,27-32.

In Delaware, there is a Municipal Court in Wilmington, having criminal jurisdiction, which is a court of record: Del.\* V. 17, C. 207,14-15.

In Kentucky, there is a Law and Equity Court in Louisville, a City Court in Louisville and Lexington, and Police Courts: Ky. C. 4,40; 4,41; Civ. C. 768; 1884,567; and also a Court of Common Pleas for the counties of McCracken, Ballard, and Hinman; for those of Crittenden, Henderson, Livingston, Union, and Caldwell; for Warren County, and for Fayette, Bourbon, Bath, Madison, Scott, and Woodford Counties, respectively: Ky.\* 28,10,1-3; 1874, Feb. 6; 1884,370 and 1008; they are of record, having a seal, and criminal jurisdiction like the Circuit Courts: Ky.\* 28,10,7. There is a Criminal Court for the counties of Keaton, Campbell, Harrison, Bracken, Robertson, and Pendleton, and also in the sixteenth district; a Court of Record, with judge elected by the people, who holds office six years, and has criminal jurisdiction in lieu of the Circuit Court: Ky.\* 28,11,1-2 and 5; 1876, Feb. 28; 1884,417. And for the same counties (except Harrison and Robertson) a Chancery Court, with equity jurisdiction like the Circuit Court, and a judge or chancellor elected and holding office in like manner: Ky.\* 28,12,1-2 and 1884,1457; 8; and Quarterly Courts having special jurisdiction in many counties.

In Tennessee, there are a great many special Criminal, Circuit, Common Law, Chancery,



County, Probate Courts in the several counties and districts : Tenn.\* 130-205 ; 352 ; 354 ; 1835, 105 and 121.

In Virginia, there are special Circuit Courts in Portsmouth, Richmond, and other cities : Va.\* 155,3-4 ; a Chancery Court in Richmond, having probate and equity jurisdiction and other jurisdiction like that of a Circuit Court : Va.\* 155,5-6 ; a Court of Probate and Record, and a Hustings Court, held by the city judge (Va.\* 154,21-3), and having criminal jurisdiction. And there are special Corporation Courts in Williamsburgh, Manchester, Roanoke, and Winchester : Va.\* 154,43-4 ; 1874,209 ; 1884,418 and 170 ; a Circuit Court for Henrico County outside Richmond : Va.\* 155,13.

In West Virginia, the legislature have power to establish courts of limited jurisdiction in any city or county with appeal to the Circuit Court ; and there is a Municipal Court in Wheeling : W.Va. C. 8,19. Such County Courts exist in many counties ; and there is a Municipal Court in Huntington : W.Va.\* 1879, 33.

In Missouri, in St. Louis and Kansas City, there are Courts of Appeals, having together appellate jurisdiction from all counties in the state ; and appeals thence go to the Supreme Court : Mo. C. 6,12 ; C. Amt. 1884,1-2. There are special Common Pleas Courts in some counties : Mo.\* 1105.

In Texas, there is a special Criminal District Court for the counties of Galveston and Harris, with general criminal jurisdiction : Tex.\* 1482,1496.

In Nevada, there are several Recorder's Courts established in cities, with minor civil and criminal jurisdiction : Nev.\* 933-9.

In Arkansas, the legislature may authorize the judges of the county courts to hold severally a quarterly Court of Common Pleas in their respective counties, which shall be a Court of Record with criminal jurisdiction, and civil jurisdiction not involving the title to real estate : Ark. C. 7,32. There is a Pulaski Chancery Court : Ark.\* 5398.

In South Carolina, there is a city court in Charleston having jurisdiction of cases arising under city ordinances : S.C.\* 2125,2127 ; and a mercantile court, composed of the Charleston Chamber of Commerce : S.C.\* 2146.

In Louisiana, there is a special Court of Appeals in the parish of Orleans, with exclusive appellate, civil, and probate jurisdiction therein ; and also in New Orleans, a special civil (and probate) and a Criminal District Court ; and four city courts of New Orleans : La. C. 128,130, 136 ; 1882,128. Also a Recorder's [criminal] Court in Shreveport : La.\* R. S. 2119-2121.

In Colorado, there is a Superior Court in Denver, having jurisdiction like the district court : Col. 3206 ; \* and there are Criminal Courts in Arapahoe, Lake, and Pueblo Counties : Col.\* 1002.

In Georgia, there are numerous Corporate or Police Courts : Ga.\* 480 ; and a Police Court and a city court in Savannah : Ga.\* 4880,4903.

In Alabama, there is a city court of Montgomery, having law and equity jurisdiction ; and a Criminal Court in Mobile : Ala.\* 1881,214 ; 1881,208 ; 1879,110.

In California, there is a board of examiners, consisting of the governor, secretary of state, and attorney-general, which passes on claims against the state : Cal. 364,661,664.

In Washington Territory, there are special District Courts in Kittitas, Garfield, Chehalis, Whatcom Counties : Wash.\* 1883, pp. 46,47,48,50.

In Arizona, there are County Courts in several specified counties : Ariz.\* 1885,59 and 95 and 101 and 107.

§ 558. **The Municipal Courts** have generally (A) minor original jurisdiction, (1) criminal : O.\* 1817 ; Kan.\* 1881,37,51 ; W.Va.\* C. 8,27 ; Stats. Chaps. 34,35 ; N.C.\* 802,808 ; Ky.\* Cr. C. 13 ; 1876, March 18 ; Ark.\* 1966 ; Cal.\* 4426 ; D.C.\* 1049 ; (2) civil : N.Y.\* Civ. C. 340 ; Pa.\* 1879,41 ; Ill.\* 37,95 ; W.Va.\*<sup>a</sup> Ky.\*<sup>c</sup> 28,13,1-5 ; Tex.\* 1161-4. For their equity jurisdiction, see in § 556. For more detailed provisions, etc., see in Parts IV. and V. They have generally, also, jurisdiction of the violation of city ordinances, and of city taxes and licenses. They<sup>a</sup> have frequently probate jurisdiction ; see § 556.

(B) Municipal Courts generally have, in many states, minor criminal and civil jurisdiction, resembling that of justices of the peace or trial justices (§ 558) : N.H.\* 215,5 ; 252,8 ; Mass.\* 154,11 and 50 ; Me.\* 132,2 ; 83,3 ; Ct.\* 20,13,2,1 ; N.J.\*<sup>a, d</sup> *District Courts*, 6 (App.) ; 1878,87 ; 1879,84,25 ; O.\*<sup>b, e</sup> 1787,1822,1830 ;

Ill.\* 37,95; Va.\* 154,4; 1874,144; Ark.<sup>a</sup> C. 7,43; Tex.<sup>d</sup> C. 5,16; Ore.<sup>d</sup> C. 7,12; Civ. C. 868; Col.<sup>d</sup> C. 6,23; Ga.\* 282,297; Fla.<sup>d</sup> C. 6,11; Stats. 51,2; Ind.\* 3207.

But the Courts of Quarter or Special Sessions have the criminal jurisdiction, as above: N.Y.\* *Crim. C.* 56; N.J.\* *Crim. Procedure*, 23.

But in others, county courts have civil jurisdiction up to \$1,000 or other sum, and criminal jurisdiction of offences not infamous; also, appellate jurisdiction from the justices of the peace: Ill.\* 37,95; Neb. C. 6,16; Stats. 1,20,2; 1883,38,1; Tex.; Ore.; Col.\* 484.

They have criminal jurisdiction of misdemeanors; Mass.\*; O.\*<sup>c</sup> 1824; Va.\* 154,5; Tex.\* C. Cr. Proc. 72; Ore.; Ala.\* 718; or of cases not capital: Va.\* 154,5; 1875,271; civil, common law, and equity jurisdiction in all cases above \$20: W.Va. C. 8,27.

*Except* where the title to real estate is drawn in question: Ill., Neb., Ky.,<sup>c</sup> Tex.

(C) They have appellate jurisdiction (1) from justices of the peace or their courts: N.Y.\*<sup>d</sup> Civ. C. 3045; Ill.\*<sup>d</sup> 37,95; Va.\*<sup>d</sup> 154,4; 1874,144; W.Va.\*<sup>d</sup> C. 8,29; Ky.\*<sup>c</sup> 28,24; Tex.\*<sup>d</sup> 1165-6; C. Cr. Pr. 75; Col.;<sup>d</sup> (2) from Police Courts: Ky.\*;<sup>c</sup> (3) from Mayors' Courts: Ky.\*<sup>c</sup>

But, in other states, the city courts have jurisdiction generally concurrent with the Circuit Courts: Ill.\* 37,240. The county courts have concurrent jurisdiction with the Circuit Courts, in counties having a special Probate Court: Ill.\* 37,95a.

In New Jersey, there are District Courts in cities over 20,000 in population: N.J. *App. Distr. Cts.* 2; 1878,72; having jurisdiction to \$300 not involving the title to real estate: N.J. 1882,139.

In Virginia, there are Corporation or Hustings Courts in every town having 5,000 population: Va. C. 6,14; having civil jurisdiction like the Circuit Court, and criminal jurisdiction like the county court: Va.\* 154,38.

In Louisiana, the Parish Courts have jurisdiction of the affairs of absentees, of guardianship and emancipation of minors, and of insane persons: La.\* R. S. 2026. They have appellate jurisdiction from justices of the peace: La.\* R. S. 2047; and minor civil and criminal jurisdiction: La.\* C. P. 127.

NOTES. — <sup>a</sup> Of the City Court. <sup>b</sup> Of the Police Court. <sup>c</sup> Of the Quarterly Court. <sup>d</sup> Of the County Court. <sup>e</sup> Of Mayor's Courts. <sup>f</sup> Of the Recorders' Courts.

§ 559. **Justices of the Peace** have minor jurisdiction in civil matters not involving more than a small sum: N.H. C. 2,77; 214,1; Mass.\*<sup>a</sup> 155,12; Me.\*<sup>a</sup> 83,3; Vt.\* 821; R.I.\*<sup>a</sup> 196,26; Ct.\* 19,4,1; N.Y.\*<sup>b</sup> Civ. C. 2863; C. Crim. 56, 62; N.J.\* *Justices Courts*, 1; 1879,80; Pa.\* *Justices, etc.* 30; 1879,211; O.\* 585; Ind.\* 1433; Ill.\* 79,13; Mich. C. 6,18; Stats. 6814; Wis.\* 3572; Io. C. 1,11; 11,1; Stats. 3508; Minn. C. 6,8; Stats. 65,5; Kan.\* 1,81,2-3; Neb. C. 6,18; Md.\* 56,9; 68,\* 6; Del.\* 99,1; 100,1; Va.\* 48,7; 1880,108; W.Va. C. 8,29; N.C. C. 4,27; Stats. 834,887; Ky.\* 28,21,1; Tenn.\* 4898; Mo.\* 2835-6; Ark. C. 7,40; Tex. C. 5,19; Stats. 1539; Cal. C. 6,11; Stats. 10112; Territories, U.S. R. S. 1926-7; Ore.\* Civ. C. 881; Nev.\* C. 6,8; Stats. 1570; Col. C. 6,25; Stats. 1924-5; S.C.\* C. 4,22; Stats. 824-828; 845; Civ. C. 71; Ga. C. 6,7,2; Stats. 446,4132; Ala. C. 6,26; Stats. 757; Miss. C. 6,23; Fla. C. 6,15; Stats. 123,6; La. C. 125; D. 2047; Wash.\* 1710; 1883, p. 44; Dak.\* Just. C. 2; Ida.\* Civ. C. 36; L. 1883, p. 5; Mon.\* Civ. C. 715; Wy.\* 71,2; Uta.\* C. Civ. P. 45; N.M.\* 2321; Ariz.\* 196; D.C.\* 997; U.S. R. S. 1926-7; 1883,33.

Or not, in most states, involving the title to real estate: N.H.; Mass. 155,24; Me.; Vt.\*; R.I.; N.Y.\* Civ. C. 2863; N.J.\*; Pa.\*; O.\* 591; Ind.\*; Wis.\* 3573; Io.; Minn.\* 65,6; Kan.\* 1,81,8; Neb.\* 2,907; Md.\* 68,7; N.C.\*; Mo.\* 2837; Ark.; Tex.\* 1544; Cal.\*; Ore.\* Civ. C. 882; Nev.\*; Col.\* 1930; S.C.\* Civ. C. 78; Fla.\* 128,7; Territories, U.S. R. S. 1867; Wash.\* 1711; Dak.\*; Ida. Civ. C. 37; Mon.\* 1883, p. 46; Wy.\* 71,3; Uta.\*; N.M.\*; Ariz.\* 197; D.C.\* Nor for foreclosure of a mortgage: Wash.\*

But not, in some states, in chancery matters: Io., Mo.\*; nor of suits by the state to recover penalties and forfeitures: Tex.,\* S.C.,\* Fla.\*; nor replevin: N.J.\*; nor libel or

slander: N.J.\*; O.\*; Ind.\*; Wis.\*; Minn.\*; Kan.\*; Neb.\*; Md.\*; Ky. 1876, March 20, § 11; Mo.\*; Tex.\*; Ore.\*; S.C.\*; Fla.\*; Wash.\*; Wy.\*; N.M.\*; D.C.\*; nor false imprisonment: N.J.\* O.\* Wis.\* Minn.\* Mo.\* Ore.\* S.C.\* Fla.\* Wash.\* Wy.\* N.M.\*; nor malicious prosecution: O.\* Ind.\* Wis.\* Minn.\* Kan.\* Neb.\* Mo.\* Ore.\* S.C.\* Fla.\* Wash.\* Wy.\* D.C.\*; nor contract for real estate: O.\* Kan.\* Neb.\* Wy.\*; nor for breach of marriage contract: Ind.\* Minn.\* Md.\* Ore.\*; nor against an administrator for a debt due from the decedent: Wis.\* Minn.\* Mo.\*; nor assault: N.J.\* O.\* Wis.\* Kan.\* Neb.\* S.C.\* Wy.\* D.C.\*; nor for mechanics' liens: Md.\* Tex.\* Nev.\* Wash.\*; nor for divorce: Tex.\*; nor for *crim. con.* or seduction: Ore.\* S.C.\* Fla.\* Wash.\* Wy.\*

They have, in nearly all states, minor criminal jurisdiction.

(1) In various specified cases: Me.\* 132,2-5; R.I.\* 197,15; 1882,310; O.\* 610; Mich. C. 6,18; Del.\* 97,8; Va. 1878,311,25,1; W.Va.\* 98,2; Tenn.\* 5797; Ark. C. 7,40; Cal.\* 10115; Ore.\* *Just. Cts.* 2; Nev.; Col.\* 2042; Ala.\* 4628; Fla.\* 129,1; Dak.\* C. Cr. P. 19; Ida. Civ. C. 39; N.M.\* 2321; Ariz.\* 198; (2) of offences punishable only by fine or imprisonment in the county gaol: Miss.\* 2216; (3) to \$50 fine or thirty days: N.C. C. 4,27; Stats. 892; (4) to \$7 fine or thirty days: Ct.\* 20,13,2,1; (5) to \$200 fine: Ill.\* 38,381; Tex. C. 5,19; C. Cr. P. 76; (6) to \$100: S.C.; to \$300: Wash.\* 1886; 1883, p. 44; or six months: Uta.\* C. Civ. P. 48; or a year: Ariz.\*; (7) to \$100 or thirty days: Io. C. 1,11; Stats. 4660; Ky.\* Cr. C. 13; Dak.\* *Just. C.* 3; or six months: Wis.\* 4739; Ida.; Wy.\* 1877, p. 73, § 1; or three months: Minn. C. 6,8; 65,140; Neb. C. 6,18; Mon. 1881, p. 42; Cr. C. 6; (8) to \$20 fine or six months' imprisonment: N.H.\* 252,4; Me.; to \$20 fine or three months: R.I.\* 197,1; (9) to \$50 fine or six months' imprisonment: Mass.\* 155,45; (10) to \$10 fine: Vt.\* 1666; (11) of misdemeanor punishable by fine only: Ind.\* 1637; Mo.\* 2024; S.C.; (12) to \$500 fine or one year's imprisonment: Kan.\* 83,1; or six months: Nev.\* 936.

They are, in nearly all, conservators of the peace, and have jurisdiction accordingly: N.H.\* 254,7; Mass.\* 155,1; Me.\* 132,2; Vt.\* 2586; R.I.\* 197,5; Ct.\* 20,13,2,4; N.J.\* *Crim. Proc.* 1; O.\*; Ind. C. 7,15; Ill.\*; Mich. C. 6,19; Wis.\*; Neb.\* 3,262; Md. C. 4,42; Del.\* 97,2 and 7; W.Va.; N.C.\* 893; Ky. C. 4,34; Tenn.\* 398; Mo.\* 2822; Ark.; Nev.\* 2974; Col.\* 2041,976; S.C. C. 4,23; Ga.\* 445; 4130a; Ala.\* 758; Miss.\* 3112; La. C. 126; D. 1016; Wash.\* 1921; Dak.\*; Ida.\*; N.M.\* 2322.

They have jurisdiction of offences against municipal regulations: Me.\* 132,4; O.\* 1833; W.Va.\* 1885,36; La.\* D. 2053; N.M.\* So, in others, of all offences less than felony: Ark.\* 1966; Wy.\* 1877, p. 74, § 1. In Virginia, they have "the same jurisdiction they had when the Constitution was adopted:" Va. 48,6. In Columbia, they have no criminal jurisdiction: D.C.\* 998.

But always with right of appeal or writ of error to a higher court: N.H.\* 214,5; Mass.\* 155,28; Me.\* 83,18; 132,15; Vt.\* 1061,1673; R.I.\* 218,1; 219,1; Ct.\* 20,13,4,1; N.J.\* *Justices Cts.* 144; *Crim. P.* 83; Pa. C. 5,14; *Justices*, 53 and 85; O.\* 614,6583; Ind.\* 1499,1643; Ill.\* 37,389; 79,62; Mich.\* 7031; Wis.\* 4761; Io.\* 3575,4703; Minn.\* 65,113 and 158; Kan.\* 83,21; 81,120; Neb.\* 2,1006; Md. C. 4,42; Va.\* 48,10; 1878,311,25,2; W.Va.\* 110,79; 1882,145; N.C.\* 875,900; Tenn.\* 3856; Mo.\* 3039,2058; Ark. C. 7,41; Tex.\* 1638; Cal.\* 10974; Ore.\* *Just. Cts.* 67 and 108; Nev.; Col.\* 1978; S.C. C. 4,24; Ga.\*; Ala.; Miss.\* 2352 and 2355; La.\*; Wash.\* 1849,1858,1898; Dak.\* *Just. C.* 90 and 136; Ida.\* Civ. C. 665; Mon.\* Civ. C. 802; Cr. C. 504; Wy.\* 71,66, p. 433, § 34; Uta.\* 1884, 54,90; N.M.\* 2390; Ariz.\* 861; D.C.\* 1027.

So, in a few states, always in *criminal cases* only: N.C.; Tex. So in civil cases over \$20 in amount: Tex. Over \$5 in amount: Del.\* 99,24. In cases of infamous crimes, and in civil cases: Ct.\* 20,13,2,8.

NOTES. — <sup>a</sup> In these cases and in these states, certain justices of the peace are appointed trial justices, with jurisdiction as above; and ordinary justices have no such jurisdiction: Mass.\* 155,6; Me.\* 83,1; R.I.\* 196,2. <sup>b</sup> So, in these, they are judges of Special Sessions.



**Art. 56. Judges.** (Statutory provisions are not, except in §§ 560,561, incorporated with this article.)

§ 560. **Judges: Appointment.** The Constitutions of four states provide that *all judges* not specially provided for in the Constitution shall be elected (1) by the people of their respective districts: Pa. C. 5,15; O. C. 4,10; Minn. C. 6,9; Tenn. C. 6,4. (2) In one, by the legislature in joint session: Vt. C. Amt. 10. (3) In one, that all judges shall be appointed by the governor: Del. C. 3,8. (4) In three, by the governor and council: N.H. C. 2,46; Mass. C. 2,2,1,9; Me. C. 5,1,8.

In Delaware, there are five judges, of whom one is chancellor, one chief-justice, and the other three associate judges. The Court of Errors and Appeals is composed of the chancellor as chief and two of the other judges. The Superior Court and Court of General Sessions consists of the chief-justice and two associate judges. The chancellor holds the Court of Chancery. The Orphans' Court is held by the chancellor and one associate judge. The Court of Oyer and Terminer consists of all the judges except the chancellor: Del. C. 6,1-10.

**Judges of the Supreme Courts** are, by the Constitutions of most states, (A) elected by the people of the state: Pa. C. 5,2; O. C. 4,2; Ind. C. 7,3; Io. C. 5,3; Minn. C. 6,3; Kan. C. 3,2; Neb. C. 6,4; W.Va. C. 8,2; N.C. C. 4,21; Tenn. C. 6,3; Mo. C. 6,5; Ark. C. 7,6; Tex. C. 5,2; Cal. C. 6,3; Nev. C. 6,3; Col. C. 6,6; Ala. C. 6,12.

(B) In several, by the two houses of the legislature in joint committee: R.I. C. 10,4; Va. C. 6,5; S.C. C. 4,2; Ga. C. 6,12,1. (C) In others, by the electors of their respective judicial districts: N.Y. C. 6,13; Ill. C. 6,6; Md. C. 4,3; Ky. C. 4,4; Ore. C. 7,2. (D) In a few, they are appointed by the governor and confirmed by the senate: N.J. C. 7,2,1; Miss. C. 6,2; Fla. C. 6,3; La. C. 82; D.C.\* 750 (*i. e.*, by the United States President and Senate). (E) In one, they are "nominated by the governor and appointed by the legislature:" Ct. C. Amt. 26. (F) In the territories, they are appointed by the President and confirmed by the Senate of the United States: U.S. R. S. 1877. The judges of the Circuit Court compose the Supreme Court: Mich. C. 6,2; Wis. C. 7,4.

**Judges of the Court of Appeals** are, in two states, elected by the people of the state: N.Y. C. 6,2; Tex. C. 5,5. In New Jersey, they consist of the chancellor, the justices of the Supreme Court, and six judges, which latter are appointed by the governor and confirmed by the senate; and the secretary of state is clerk: N.J. C. 6,2,1; 7,2,1. In Maryland, they consist of seven of the chief judges of the Circuit Court and one judge specially elected from Baltimore: Md. C. 4,14. In Louisiana, they are appointed by the legislature in joint session: La. C. 96.

In Illinois, the Appellate Courts are held by a judge of the Supreme Court: Ill. C. 6,11.

**Judges of the Superior Courts** are, in most states, elected by the people of their respective districts, circuits, or counties: N.Y. C. 6,15; Pa. C. 5,15; O.<sup>a, b</sup> C. 4,3; Ind. C. 7,9; Ill. C. 6,13; Mich. C. 6,6; Wis. C. 7,7; Io. C. 5,5; Minn. C. 6,4; Kan. C. 3,5; Neb. C. 6,10; Md. C. 4,3; W.Va. C. 8,10; N.C. C. 4,10; 4,21; Ky. C. 4,21; Tenn. C. 6,4; Mo. C. 6,25; Ark. C. 7,17; Tex. C. 5,7; Cal. C. 6,6; Nev. C. 6,5; Col. C. 6,12; Ala. C. 6,12; La. C. 109.

In others, they are elected by the legislature in joint convention: N.J.<sup>a</sup> C. 7,2,2; Va. C. 6,11; S.C. C. 4,13; Ga. C. 6,3,2. In a few, they are appointed by the governor and confirmed by the senate: N.J. C. 7,2,1; Miss. C. 6,11; Fla. C. 6,7.

In several, the judges of the supreme court are the judges of the superior courts, one or more for each county: R.I.\* 193,1-2; N.J.<sup>b</sup> C. 6,5,2; Ore. C. 7,8; Territories, U.S. R. S. 1865. So, of course, in states where the judges of the supreme court on circuit correspond to the superior court: N.H., Me.

In Vermont, a judge of the Supreme Court is chief judge, and there are two associate judges elected by the people of the county: Vt. C. Amt. 24,2; Stats. 796. The Courts of Oyer



and Terminer are held by a justice of the Supreme Court: N.Y.\* C. Cr. P. 23; 1822,360. The judges of the Superior Court are composed of the judges of the Supreme Court of Errors and six other judges appointed in the same way: Ct.\* 4,3,1; 4,4,1; C. Amt. 26. Any two judges of the Court of Common Pleas constitute the Court of Quarter Sessions; any one of them, with a judge of the Supreme Court, the Court of Oyer and Terminer: N.J.\* *Crim. Proc.* 23 and 26. The Court of General Sessions in New York is held by a county judge with two judges of sessions: N.Y.\* C. Cr. P. 42. The Court of Quarter Sessions, by the judge of Common Pleas: Pa.\* *Quart. Sess.* 2.

**The Chancellors** are, in three, elected by the people of their respective districts: Ky.\* Civ. C. 774; Tenn. C. 6,4; Ala. C. 6,12.

In one, they are appointed in the same manner as judges of the Circuit Courts: Miss. C. 6,17. In one, the chancellor is nominated by the governor and confirmed by the senate: N.J. C. 7,2,1. The vice-chancellors are appointed by the chancellor: N.J.\* *Chanc.* 115; 1881,105. In one, the justices of the Supreme Court are chancellors, with jurisdiction throughout the State: Vt.\* 698. So, in one, the Circuit Courts are the Courts of Chancery: Mich.\* 6592. **The Chancellor** is, in New Jersey, the ordinary, surrogate-general, and judge of the Prerogative Court: N.J. C. 6,4,2.

**Judges of Probate** are, in most states, (A) elected by the people of their respective counties or other probate districts: Me. C. 6,7; Vt. C. Amt. 17; Ct. C. Amt. 9; N.J.\* C. 7,2,6; O. C. 4,7; Ill. C. 6,18 and 20; Mich. C. 6,13; Wis. C. 7,14; Minn. C. 6,7; Kan. C. 3,8; Md. C. 4,3; Mo. C. 6,34; S.C. C. 4,20; Ga.\* 319; Ala. C. 6,12; Wash.\* 1297; Mon.\* G. L. 332; Wy.\* 28,2,1; Uta.\* 173; Ariz.\* 1881,83,1.

But in several, (B) the judge of the County, Common Pleas Court (§ 554), or other Superior Court, is surrogate or probate judge for the county, except where the legislature provide otherwise in counties having more than a prescribed number of inhabitants: N.Y. C. 6,15; Pa. C. 5,22; 5,9; *Orph. Ct.*\* 2.

And in others, the County Court has probate jurisdiction. See § 556. So, in others, the Superior Court. See § 554.

So, in one, the judge of the County Court is judge of the Probate Court: Ark. C. 7,34. And in one other, the clerks of the Superior Court have probate jurisdiction: N.C.\* 102. In one, the town councils are courts of probate: R.I.\* 179,1; but any city or town may elect a judge of probate, or delegate to its council power to do so: R.I.\* *ib.* 2. In two, the judges of the Courts of Common Pleas for any county constitute the Orphans' Court: N.J.\* *Orph. Ct.* 1; *Courts*, 59; Pa.\* *Orph. Ct.* (Ann. Dig. 1874) 23, except in Philadelphia and two other counties; the Ordinary has ordinary probate jurisdiction: N.J.\* *Courts*, 49; and the Prerogative Court is the Supreme Court of Probate: N.J. C. 6,4,3.

**Judges of Special Courts** are, in most states, elected by the people of their respective cities, etc.: N.Y. C. 6,13; Pa. C. 5,15; Md. C. 4,31; Mo. C. 6,13.

In Louisiana, the judges of the New Orleans Court of Appeals are elected by the legislature in joint session: La. C. 128. The New Orleans District Court judges and the Shreveport recorder are appointed by the governor and confirmed by the senate: La. C. 130 and the City Court judges elected by the people: La. C. 135.

**Judges of Municipal Courts** are, in many states, elected by the people of their respective counties, cities, and towns: N.Y. C. 6,16; Ill. C. 6,18; Neb. C. 6,18; Va. C. 6,14; W.Va. C. 8,23; Ky.

In one, they are appointed by the executive: Me. C. 6,8.

In many, judges of the County Courts are elected by the people of the county: Vt.\* 796; Neb. C. 6,15; W.Va.; Ark. C. 7,29; Tex. C. 5,15; Ore. C. 7,11; Col. C. 6,22.

In others, they are appointed by the governor and confirmed by the senate: Ga.\* 279; Fla. C. 6,9; D.C.\* 1042 (*i. e.*, by the President and Senate of the United States).

Judges of the County Courts, Corporation, and Hustings Courts are, in one state, elected by the legislature in joint convention: Va. C. 6,13. In one, the County Courts are composed each of a president elected by the people of the county and two justices of the peace: W.Va. C. 8,23-24. So, in one, of a presiding judge and two associates, elected by the people of the

county: Ky. C. 4,29-30. So, in Tennessee, of the magistrates of the county: Tenn.\* 207. Judges of the inferior courts are chosen by the justices of the peace of each county: N.C.\* 802.

**Justices of the Peace**, or Trial Justices, are, in most states, elected by the people of their respective districts: Vt. C. Amt. 18; R.I. C. 10,7; Ct. C. Amt. 10; N.Y. C. 6,18; N.J. C. 6,7; 7,2,8; Pa. C. 5,11; O. C. 4,9; Ind. C. 7,14; Ill. C. 6,21; Mich. C. 6,17; Wis. C. 7,15; Io.\* 590; Minn. C. 6,8; Kan. C. 3,9; Neb. C. 6,18; Va. C. 7,2; W.Va. C. 8,27; Ky. C. 4,34; Tenn. C. 6,15; Mo.\* 2807; Ark. C. 7,38; Tex. C. 5,18; Cal. C. 6,11; Ore.\* 41,28; Nev. C. 6,8; Col. C. 14,11; S.C. C. 4,21; Ga. C. 6,7,3; Ala. C. 6,26; Miss. C. 6,23; La. C. 125; Wash.\* 1689; Mon.\* G. L. 462; Uta.\* 262; Ariz.\* 185; Territories, U.S. R. S. 1856.

*Except* in Chicago, Illinois, they are appointed by the governor, upon advice of the senate and recommendation of the judges: Ill. C. 6,28.

In a few, they are appointed by the governor: N.H.; Mass.\* 155,7; Me.\* 83,1; Md. C. 4,42; Del. C. 6,24; S.C.\*<sup>f</sup> 797; Fla. C. 6,15.

In one, they are elected by the legislature: N.C.\* 819. In Columbia, they are appointed by the President of the United States, by and with the advice of the Senate: U.S. 1878, 162, § 1.

NOTES. —<sup>a</sup> Of the Court of Common Pleas. <sup>b</sup> Of the Circuit Court. <sup>c</sup> Of the Superior Court. <sup>d</sup> Of the surrogate only. <sup>e</sup> See § 561, note <sup>f</sup>. <sup>f</sup> Of the Trial Justices.

§ 561. **Judges: Term of Office.** (See § 212.) (A) In some states, all judicial officers (except as below) hold office, by the Constitution, (1) for two years: <sup>a</sup> Neb. C. 6,20; (2) for four years: Ill. C. 6,32; (3) for five years: O. C. 4,10; (4) for seven years, or no longer: Me. C. 6,4; Minn. C. 6,9; (5) for eight years: Tenn. C. 6,4; (6) for ten years: Pa. C. 5,15; (7) for fifteen years: Md. C. 4,3. And in three states, (8) during life or good behavior: N.H. C. 1,35; 2,73; Mass. C. 1,29; 2,3,1; Del. C. 6,14. (B) **Judges of the Court of Appeals** hold office (1) for six years: N.J. C. 6,2,1; Tex. C. 5,5; (2) for eight years: La. C. 96; (3) for fourteen years: N.Y. C. 6,2.

(C) **Judges of the Supreme Court** hold office (1) for two years: <sup>a</sup> Vt. C. Amt. 26; (2) in the territories, for four years: Territories, U.S. R. S. 1864; (3) for five years or such greater term as the legislature may provide: O. C. 4,11; 1883, p. 383, § 2; (4) for six years: Ind. C. 7,2; Io. C. 5,3; Kan. C. 3,2; Neb. C. 6,4; Tex. C. 5,2; Ore. C. 7,3; Nev. C. 6,3; S.C. C. 4,2; Ga. C. 6,2,4; Ala. C. 6,15; (5) for seven years: N.J. C. 7,2,1; Minn. C. 6,3; (6) for eight years: Ct. C. Amt. 12; Mich. C. 6,2; N.C. C. 4,21; Ky. C. 4,3; Tenn. C. 6,3; Ark. C. 7,6; (7) for nine years: Ill. C. 6,6; Col. C. 6,7; Miss. C. 6,3; (8) for ten years: Wis. C. Amt. 7,4; Mo. C. 6,4; (9) for twelve years: Va. C. 6,5; W.Va. C. 8,2; Cal. C. 6,3; La. C. 82; (10) for fourteen years: N.Y. C. 6,13; (11) for fifteen years: Md. C. 4,3; (12) for twenty-one years: Pa.<sup>b</sup> C. 5,2; (13) during life or good behavior: R.I. C. 10,4; Del. C. 6,14; Fla. C. 6,3; D.C.\* 750.

(D) **Judges of the Superior Courts** hold office (1) for two years: <sup>a</sup> Vt.\* 796; (2) for four years: Io. C. 5,5; Kan. C. 3,5; Neb. C. 6,10; Ark. C. 7,17; Tex. C. 5,7; Nev. C. 6,5; S.C. C. 4,13; Ga. C. 6,3,1; La. C. 109; (3) for five years: N.J. C. 7,2,2; O. C. 4,12; (4) for six years: N.Y. C. 6,15; Ind. C. 7,9; Ill. C. 6,12; Mich. C. 6,6; Wis. C. 7,7; Ky. C. 4,23; Mo. C. 6,25; Cal. C. 6,6; Ore. C. 7,3; Col. C. 6,12; Ala. C. 6,15; Miss. C. 6,11; (5) for seven years: Minn. C. 6,4; (6) for eight years: Ct. C. Amt. 12; Va. C. 6,11; W.Va. C. 8,10; N.C. C. 4,21; Tenn. C. 6,4; Fla. C. 6,7; (7) for fifteen years: Md.; (8) during good behavior: Del. C. 6,14.

(E) **Chancellors** hold office (1) for six years: <sup>a</sup> Ky.\* Civ. C. 775; Ala. C. 6,15; (2) for four years: Miss. C. 6,17; (3) for seven years: N.J. C. 7,2,1; (4) for eight years: Tenn.; (5) during good behavior: Del.; for other states, see § 560.

(F) **Judges of Probate** hold office (1) for one year: <sup>a</sup> R.I.\* 179,1-2; (2) for two years: Vt. C. Amt. 24,5; Ct. C. Amt. 21; Wis. C. 7,14; Minn. C. 6,7; Kan. C. 3,8;

Neb. C. 6,15; Ark. C. 7,34; S.C. C. 4,20; Wash.\* 1297; Mon.\* G. L. 382; Wy.\* 28,2,1; Uta.\* 173; N.M.\* 407; (3) for three years: O. C. 4,7; Col. C. 6,22; (4) for four years: Me. C. 6,7; N.Y.\*<sup>d</sup> 1,5,4,10; Ill. C. 6,20; Mich. C. 6,13; Md. C. 4,40; Mo.\* 1177; Ga. C. 6,6,3; (5) for five years: N.J. C. 7,2,6; (6) for six years: N.Y. C. 6,15; Ala. C. 6,15; (7) during good behavior: Del. C. 6,14. For other states, see County Courts; compare § 556.

(G) **Judges of the Special Courts**<sup>e</sup> hold office (1) for four years: Ct. C. Amt. 20. (2) They cannot hold office for a longer term than five years: O. C. 4,10. (3) They hold office twelve years: Mo. C. 6,13; (4) fourteen years: N.Y. C. 6,13.

In Louisiana, the judges of the local Courts of Appeals and District Courts hold office for eight years, and those of the City Courts, four years: La. C. 129,130,135.

(H) **Judges of the Municipal Courts**<sup>e</sup> hold office (1) for four years: Me. C. 6,8; Ill. C. 6,18; (2) for six years: Va. C. 6,14. Judges of the County Courts hold office (1) for two years: Ct. C. Amt. 20; Neb. C. 6,15; Ark. C. 7,29; Tex. C. 5,15; (2) for three years: Col. C. 6,22; (3) for four years: Ky. C. 4,30; Ore. C. 7,11; Fla. C. 6,9; (4) for six years: Va. C. 6,13; W.Va. C. 8,23.

(I) **Justices of the Peace**<sup>a</sup> hold office (1) for one year: Va.\* 48,2; (2) for two years: Vt. C. Amt. 24,5; Ct.\* 1876,11,1; Wis. C. 7,15; Io.\* 590; Minn. C. 6,8; Kan. C. 3,9; Md. C. 4,42; Va. C. 7,2; Ark. C. 7,38; Tex. C. 5,18; Cal.\* 10110; Ore.\* 41,28; Nev.\* 937; Col. C. 14,11; S.C. C. 4,21; Miss. C. 6,23; La.\* 2044; Wash.\* 1695; Mon.\* G. L. 462; Ariz.\* 187; (3) for three years: Mass.\*<sup>c</sup> 155,9; R.I.\*<sup>c</sup> 196,4; O. C. 4,9; D.C.\* 994; (4) for four years: N.Y. C. 6,18; Ind. C. 7,14; Ill. C. 7,28; Mich. C. 6,17; W.Va. C. 8,27; Ky. C. 4,34; Mo.\* 2807; Ga. C. 6,7,1; S. 435; Ala.\* 754; Fla. C. 6,15; La. C. 125; D.C.\* U.S. 1878,162, § 1; (5) for five years: N.H. C. 2,75; N.J. C. 7,2,8; Pa. C. 5,11; (6) for six years: N.C.\* 819; Tenn. C. 6,15; (7) for seven years; Mass. C. 2,3,3; Me. C. 6,5; Del. C. 6,24; (8) for fifteen years: Md.

All judicial officers hold office, in many states, until their successors are qualified: <sup>e</sup> Ill. C. 6,32; Wis. C. 7,7; Io. C. 5,3 and 5; Minn. C. 6,3; Kan. C. 3,12; Neb. C. 6, 20; Md. C. 4,3; Ky. C. 4,3 and 23 and 30; S.C. C. 4,2; Ga. C. 6,2,4; 6,3,1. See also § 212.

NOTES. — <sup>a</sup> Some statutory provisions of several states are also inserted in this section, in order to make the treatment of the subject complete. See § 550. <sup>b</sup> They are not eligible for re-election. <sup>c</sup> Of trial justices; see § 559, note <sup>a</sup>. <sup>d</sup> Of the surrogates. <sup>e</sup> The statutory provisions corresponding to this paragraph are omitted.

§ 562. **Qualifications.** (See also Arts. 4 and 22.) (A) In several states, the Constitution provides that a judge of the Supreme Court must (1) be thirty years of age: Ill. C. 6,3; Neb. C. 6,7; Md.<sup>b,d</sup> C. 4,2; W.Va.<sup>b</sup> C. 4,4; Ky.<sup>b</sup> C. 4,8; Mo.<sup>d</sup> C. 6,6 and 13; Ark. C. 7,6; Tex. C. 5,2; Col.<sup>b</sup> C. 6,10 and 16; S.C. C. 4,10; Ga.<sup>b</sup> C. 6,14,1; Miss. C. 6,6; (2) thirty-five years of age: Tenn. C. 6,3; La. C. 82; (3) twenty-five: Wis.<sup>b</sup> C. 7,10; Ala. C. 6,14; Fla. C. 16,30.

(B) And in many, that he must be a citizen of the United States: Ill.; Wis.; <sup>b</sup> Neb.; Ky.; <sup>b</sup> Mo.; <sup>a</sup> Ark.; Tex.; Ore. C. 7,2; Col.; <sup>b</sup> S.C.; Ala.; La.; of the State: Md.; <sup>b,d</sup> Mo.; Tex.; Ga.; Ala.; La.

(C) And in several, he must have resided in the state (1) two years: Ky.,<sup>b</sup> Ark., Cal.,<sup>b</sup> Col.,<sup>b</sup> Miss; (2) three years: Neb.; Ore.; Ga.<sup>b</sup> Stats. 238; (3) five years: Ill., Md.,<sup>b,d</sup> W.Va.,<sup>b</sup> Tenn., Mo.,<sup>a</sup> S.C., Ala.

(D) In several, they "shall be learned in the law:" Minn. C. 6,6; Mo.; <sup>a</sup> Ark.; Col.; <sup>b</sup> Ala. C. 6,14; La.

In one, "they are to be selected from those who have been admitted to practise law, and who are most distinguished for integrity, law, and sound legal knowledge:" Md.<sup>b,d</sup> In one other, they must have held a judicial situation under the United States, or have practised law five years: Va. C. 6,5. In a few, they must have practised law or held a judicial position in a court



of record (1) for seven years: Tex., Ga.;<sup>b</sup> (2) for eight years: Ky.,<sup>b</sup> Ark.; (3) for ten years: La. In a few, they must have been admitted to practise in the Supreme Court of the state: Cal. C. 6,23; Fla. (E) In one state, they must be of good moral character: Ark. (F) In one other, by statute, they must not be officers in any railroad corporation in the state: Vt.\* 780.

(G) In many, they must reside in the circuit or district for which they are appointed: Ind. C. 7,3; Ill. C. 6,32; Wis.;<sup>b</sup> Minn.<sup>b</sup> C. 6,4; Kan. C. 3,11; Neb. C. 6,20; Md.;<sup>b, d</sup> Del.<sup>a</sup> C. 6,2; Va.<sup>b</sup> C. 6,11; W.Va.<sup>b</sup> C. 8,10; N.C.<sup>b</sup> C. 4,11; Ky.;<sup>b</sup> Mo.<sup>b</sup> C. 6,26; Ark.<sup>b</sup> C. 7,13; Ore. C. 7,2; S.C.<sup>b</sup> C. 4,13; Ala.<sup>b, c</sup> C. 6,4 and 7; Fla.<sup>b</sup> C. 6,7; La.<sup>b</sup>

NOTES. — <sup>a</sup> Of the three associate judges. <sup>b</sup> Of the judges of the superior courts also. <sup>c</sup> Of the chancellors. <sup>d</sup> Of the judges of the special courts also.

§ 563. **Judges: Retirement.** In several states, no judge can hold office after he has attained the age of seventy years: N.H.<sup>a</sup> C. 2,78; Ct.<sup>a</sup> C. 5,3; Amt. 12; N.Y. C. 6,13; Md. C. 4,3.

But in one, he may be continued in office by the legislature, after the age of seventy, for such further time as they think fit, not exceeding his term of office: Md.

NOTE. — <sup>a</sup> Of judges of the Supreme and Superior Courts only.

§ 564. **Compensation.** There are, in nearly all states, general constitutional provisions that judges shall receive a regular fixed compensation, but no other fees or perquisites: N.H.<sup>a</sup> C. 1,35; Mass.<sup>a</sup> C. 1,29; 2,2,1,13; Me.<sup>a</sup> C. 6,2; R.I.<sup>a</sup> C. 10,6; N.Y. C. 6,14 and 21; Amt. 1869; N.J.<sup>c</sup> C. 6,2,3; Pa. C. 5,18; O.<sup>a</sup> C.<sup>b</sup> 4,14; Ind.<sup>a, b</sup> C. 7,13; Ill.<sup>a, b</sup> C. 6,7; 6,16; Mich.<sup>b</sup> C. 6,9; Wis.<sup>a, b</sup> C. 7,10; Io.<sup>a, b</sup> C. 5,9; Minn.<sup>a, b</sup> C. 6,6; Kan.<sup>a, b</sup> C. 3,13; Neb. C. 6,13–14; Md. C. 4,6; Del. C. 6,14; Va. C. 6,22; W.Va. C. 8,16; N.C. C. 4,18; Ky.<sup>a, b</sup> C. 4,3; 4,25; Tenn. C. 6,7; Mo.<sup>a, b, c, d</sup> C. 6,33; Ark.<sup>a, b</sup> C. 7,10; 7,18; Tex.<sup>a, b, c</sup> C. 5,3 and 5 and 7; Cal.<sup>a, b</sup> C. 6,15 and 17; Nev.<sup>a, b</sup> C. 6,15; Col.<sup>a, b</sup> C. 6,18; S.C.<sup>a, b</sup> C. 4,9; Ga. C. 6,13,1; Ala.<sup>a, b</sup> C. 6,10; Miss.<sup>a, b</sup> C. 6,10 and 15; La.<sup>a, b</sup> C. 8,2,109.

This compensation cannot, in many, be increased or diminished during their term of office: Me.; O.; Ill.; Tenn.; Mo.; Tex.; Cal.; Nev.; Ga. C. 6,13,2; La. C. 114.

In several, it cannot so be diminished: Me.; R.I.; N.Y.; Ind.; Minn.; Md. C. 4,24; Va.; N.C.; Ky.; Ark.; S.C.; Ala.; Miss. In one, it cannot be so increased: Kan.

NOTES. — <sup>a</sup> Of judges of the Supreme Court. <sup>b</sup> Of the judges of the Court of Common Pleas or superior courts. <sup>c</sup> Of the judges of the Court of Appeals. <sup>d</sup> Of judges of Probate Courts.

§ 565. **Judges Interested.** In many states, the Constitution prescribes that no judge can sit in a case (1) where he is interested: Md. C. 4,7; Del.<sup>a</sup> C. 6,22; Tenn. C. 6,11; Ark. C. 7,20; Tex. C. 5,11; S.C. C. 4,6; Miss.<sup>b</sup> C. 6,9; or (2) where he is related to any of the parties by consanguinity: Md., Tenn., Ark., Tex., S.C., Miss.,<sup>b</sup> or by affinity: Md., Tenn., Ark., Tex., S.C., Miss.<sup>b</sup>

NOTES. — <sup>a</sup> Of Probate judges only. <sup>b</sup> Of Supreme Court judges only.

§ 566. **Courts of Record.**<sup>a</sup> (A) The Court of Appeals is specially declared a court of record: N.Y.\* Civ. C. 2; Md. C. 4,1; so, the supreme courts: N.Y.; Pa.\* *Supr. Ct.* 1; Mich. C. 6,15; Wis.\* 2397; Kan.\* 27,1; Mo.\* 1023; Ark.\* 1458; Cal. C. 6,12; Ore. C. 7,1; Nev.\* 946; S.C.\* 2091; Ida.\* Civ. C. 18; Uta.\* Civ. C. 17; N.M.\* 93,4; the appellate courts: Ill.\* 37,18; the superior courts: N.Y.\*; Pa.\* *Com. Pleas*, 1; Mich.; Wis.\* 2422; Md.; Kan.\* 28,1; Mo.\*; Ark.\*; Cal.; Ore.; Nev.\*; S.C.\* Civ. C. 32; Ida.\*; Uta.\*; N.M.\* 27,3; the criminal courts: Ind.\* 1366; the courts of oyer and terminer, etc.: N.Y.\*; Pa.\* *Quarter Sess.* 1; the inferior courts: N.C.\* 802; police courts: Ark.\* 821; the probate courts: N.H.\* 189,1; Mass.\* 156,1; 157,1; Me.\* 63,1; Vt.\* 1774; 2015; N.Y.\*;



N.J.\* *Orph. Ct.* 1; Pa.\* *Orph. Ct.* 4; O. C. 4,7; Mich.; Minn. C. 6,7; Kan. C. 3,8; Kan.\* 29,1; Neb. C. 6,16; Md.; Mo. C. 6,34; Ark.\*; Ore.; Col. C. 6,23; S.C.\* Civ. C. 35; Wash.\* 1299; Ida.\*; Wy. 28,2,2; Uta.\*; Ariz.\* 1518; so, the county courts: N.Y.\*; Ill.\* 37,89; Wis.\* 2448; Neb.; Ky.\* 23,17,5; Mo. C. 6,36; Ark.\*; Tex. C. 5,15; Ore.; Col. C. 6,24; Ga.\* 282; Fla.\* 51,3; the district courts: N.J.\* *Distr. Cts.* 3; Pa.\* *Distr. Cts.* 1; the justices of the peace courts: Md.; Ky.\* 28,18,2; the city courts: N.J.\* 1879,84,29; Ind.\* 3209; the courts of sessions: N.Y.\*; the commissioner of lands: Md.\* 16,1; and all the special courts: N.Y.\*; Ind.\* 1353; Mich.\* 6535,6564; Wis.\* 2499; Mo.\*; Col.\* 1006; Ga.\* 4880,4903. And the following courts are declared *not* of record: (1) justices of the peace: N.Y.\*; (2) police and municipal courts: N.Y.\*

(B) The police courts have a seal: O.\* 1786; Ark.\*; Cal.\* 10147; D.C.\* 1056; so, the probate courts: Kan.\* 29,2; Minn.\* 49,1; Mon.\* C. Civ. Pr. 510; Wy.\* 94,2; Uta.\* C. Civ. P. 65; N.M.\* 658; Ariz.\* 2360; the chancery courts: Miss.\* 2275; the superior courts: Mass.\* 154,28; Ill.\* 37,37; Kan.\* 28,8; Cal.\*; Ore.\* Civ. C. 894; Nev.\* 960; Col.\* Civ. C. 406; Wash.\* 2126; Mon.\*; Uta.\*; Miss.\*; N.M.\*; Ariz.\*; the supreme courts: Mass.\*; Cal.\*; Ore.\*; Nev.\*; Col.\*; Wash.\*; Mon.\*; Wy.\* 106,11; Uta.\*; Miss.\* 1410; N.M.\*; Ariz.\*; the special superior courts: Me.\* 77,70. All courts having a clerk have a seal: Ct.\* 4,6,14; so, the city courts: N.J.\* 1879,84,30; Ill.\* 37, 241; the common pleas courts: Pa.\* *Com. Pleas*, 7; the quarter sessions: Pa.\* *Quart. Sess.* 3; the county courts: Ill.\* 37,39; Tex.\* 1177; Ore.\*; Col.\* All courts of record have a seal: Mo.\* 1024.

NOTE. — <sup>a</sup> Undoubtedly many courts are courts of record, though not expressly so declared by statute. The word is commonly used in the United States to mean either a court with a seal, or a court whose records are "public" records, or evidence. It has been found impossible to make this section exhaustive.

§ 567. **Judges Acting as Attorneys.** The Constitutions of two states provide that no judge or justice of the peace shall act as attorney or be of counsel (1) in matters which may come into his jurisdiction: N.H. C. 2,79; 2,81; (2) in any action: W.Va. C. 8,16; nor can he originate any civil suit in such matters: N.H.

So, specially of judges and registers of probate: N.H. C. 2,81.

And of clerks of courts: N.H. C. 2,82.

And in many, no judge of any court of record can practise law or act as attorney in any court: N.Y. C. 6,21; Kan. C. 3,13; Neb. C. 6,14; W.Va. C. 8,16; Ark. C. 7,25; Cal. C. 6,22; Col. C. 6,18; Ala. C. 6,20; nor as referee: N.Y.

In others, no judge can sit in a case in which he has acted as counsel: Md. C. 4,7; Tenn. C. 6,11; Ark. C. 7,20; Tex. C. 5,11; S.C. C. 4,6.

§ 568. **Appeals.** In several states, there is a general provision that no judge shall sit at a general term (in banc) in review, or on appeal, of any decision made by him, or by any court of which he was at the time a sitting member: N.Y. C. 6,8; N.J.<sup>a</sup> C. 6,2,5-6; Ill.<sup>b</sup> C. 6,11; Md.<sup>a</sup> C. 4,15; W.Va.<sup>d</sup> C. 8,29; Ark. C. 7,20; Ore.<sup>c</sup> C. 7,6; S.C. C. 4,6.

NOTES. — <sup>a</sup> Of the judges of the Court of Appeals, only. <sup>b</sup> Of judges of appellate courts, only. <sup>c</sup> Of judges of the Supreme Courts, only. <sup>d</sup> Of judges of the County Court, only.

## Art. 58. Remedial Laws.

§ 580. **Laws General.** All laws relating to courts must, by a few of the Constitutions, be general and of uniform operation: Pa. C. 5,26; Ill. C. 6,29; Neb. C. 6,19; Col. C. 6,28; Ga. C. 6,9,1.

So, in several, the jurisdiction of all courts of the same grade or class, so far as regulated by law: Pa., Ill., Neb., Col., Ga. So, also, the practice of such courts: Ill., Neb., Col., Ga. And the effect of their judgments, decrees, or process, shall be uniform: Pa., Ill., Neb., Col., Ga.

§ 581. **Arbitration.** The Constitutions of several states provide that the legislature shall pass laws allowing parties to determine suits by arbitration: Ky. C. 8,10; Tex. C. 16,13; Col. C. 18,3; S.C. C. 5,1; Ala. C. 4,45; La. C. 165.

So, in others, that the legislature may establish "courts of conciliation:" O. C. 4,19; Ind. C. 7,19; Mich. C. 6,23; Wis. C. 7,16.

So, in one, that they may refer suits to a practising lawyer as referee: Fla. C. 6,17.

But such arbitrators, referees, or courts may not render final judgment, except upon submission by the parties and their agreement to abide such judgment: O., Ind., Wis.

§ 582. **Contempts.** The Constitutions of two states provide that the power of the courts to punish for contempts shall be limited by the legislature: Ga. C. 1,1,20; La. C. 166. In one, that the legislature shall have power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts, or in disobedience of process: Ark. C. 7,26.

§ 583. **Attorneys.** By the Constitution of Indiana, every person of good moral character, being a voter, shall be entitled to admission to practise in the courts: Ind. C. 7,21.

§ 584. **Codes.** (See also § 308.) The Constitutions of a few states provide for codes of civil and criminal practice: O. C. 14,2; Ind. C. 7,20; Wis. C. 7,22; Ky. C. 8,22; S.C. C. 5,3. So, in three, for codes of the general laws: Ind.; S.C.; Ala. C. 4,46.

The Constitution of one state provides that no general revision of the laws shall hereafter (1850) be made, and that, when a reprint is necessary, the legislature shall appoint a suitable person to collect such acts as are in force and arrange them without alteration: Mich. C. 18,15.

But in several, the Constitution provides that there shall be a revision and digest every ten years: Mo. C. 4,41 (beginning with 1875); Tex. C. 3,43 (1879); S.C. C. 5,3 (1882); Ala. C. 4,46 (1876).

§ 585. **Speedy Decisions.** The Constitution of California provides that no judge of the Supreme or Superior Courts shall receive his salary until he make affidavit that no cause in his court remains undecided that has been submitted for decision for the period of ninety days: Cal. C. 6,24. So, in one other, such judges must file their decisions within sixty days after the end of the term at which the causes were heard: S.C. C. 4,17. And in Georgia, the Supreme Court must dispose of every case at the first or second term after the writ of error is brought: Ga. C. 6,2,6.

## **Art. 60. Procedure.**

§ 600. **Forms of Action.** In several states, the Constitution provides that there shall be but one form of civil action: O. C. 14,2; N.C. C. 4,1; Nev. C. 6,14; S.C. C. 5,3.

§ 601. **Equity.** (See also § 555.) In several states, the Constitution provides that the legislature shall abolish the distinction between law and equity proceedings: O. C. 14,2; Mich. C. 6,5; N.C. C. 4,1; S.C. C. 5,3.

So, in one other, law and equity may be administered in the same action: Nev. C. 6,14. And in Georgia, the legislature may confer (and has conferred) upon the Common Law Courts all the powers of Courts of Equity: Ga. C. 6,4,2. But in Iowa, the Constitution provides that the law and equity jurisdiction (though often vested in the same courts) shall be kept distinct: Io. C. 5,6.

In two states, the testimony in equity is to be taken in the same manner as at law: N.Y. C. 6,8; Wis. C. 7,19.

§ 602. **Feigned Issues** are abolished by one State Constitution : N.C. C. 4,1.

§ 603. **Juries : Qualifications.** (For religious qualifications, see § 45.) The Constitution of Tennessee provides that no political test can be required for jurors : Tenn. C. 1,6. And that of Mississippi, that no property qualification can ever be required for jurors : Miss. C. 1,13. In New Hampshire, that great care should be taken that none but qualified persons should serve on juries, and that they should be fully compensated : N.H. C. 1,21. So, in Vermont, that great care should be taken to prevent corruption or partiality in the choice of juries : Vt. C. 2,31.

§ 604. **Disqualifications.** By the Constitutions of two states, no person can serve on a jury who is not a qualified elector of the state : Va. C. 3,3 ; Fla. C. 4,23. And so, in others, the legislature are to pass laws excluding persons from serving on juries in the same cases in which they are excluded from voting : Tex. C. 16,2 ; Cal. C. 20,11 ; Nev. C. 4,27.

In detail, (1) all persons convicted of bribery are excluded from serving on juries : Tex., Nev., Fla., La. ; (2) all persons convicted of treason : La. ; (3) of perjury : Tex., Nev., Fla., La. ; (4) of forgery : Tex., Nev., Fla., La. ; (5) of larceny : Nev., Fla. ; (6) generally, all persons convicted of infamous crimes : La. ; (7) of " other high crimes : " Tex., Nev., Fla. ; (8) all persons " under interdiction : " La.

*Unless they are restored to civil rights : Nev., Fla.*

§ 605. **Charging the Jury.** Several State Constitutions provide that the judge shall not charge juries as to matter of fact : Tenn. C. 6,9 ; Ark. C. 7,23 ; Cal. C. 6,19 ; Nev. C. 6,12 ; S.C. C. 4,26.

But they may state the testimony and declare the law : Tenn., Cal., Nev., S.C. So, they shall declare the law : Ark. So, the judges of the Supreme Courts shall instruct the jury in the law : R.I. C. 10,3.

§ 606. **Amendments** are, by the Constitution of Delaware, to be allowed by the courts on such terms as they deem reasonable, in civil cases : Del. C. 6,16.

§ 607. **Witnesses : Parties.** The Constitutions of two states provide that parties may be witnesses : Io. C. 1,4 ; Ark. C. Sched. 2. And in one, that parties may be compelled to testify by the opposing party : Io.

§ 608. **Parties Deceased.** But in one state, in actions by executors, administrators, and guardians in which judgment may be rendered either for or against them, neither party shall be allowed to testify against the other as to any transactions with, or statements to, the intestate, testator, or ward, unless called to testify thereto by the opposite party or required by the court : Ark. C. Sched. 2.

§ 609. **Depositions.** The Constitution of Delaware provides that evidence of witnesses aged or infirm, or about to leave the state, may be taken on interrogatories : Del. C. 6,16. So, that the courts shall have power to obtain evidence from without the state : Del.

§ 610. **Limitations.** In Alabama, the legislature has no power to revive any right or remedy which may have become barred by lapse of time or any statute : Ala. C. 4,56.

In Wisconsin, no appropriation can be made for any claim against the state, except judgments, unless filed within six years after the claim accrued : Wis. C. Amt. 8,2.

In Tennessee, the time between May 6, 1861, and Jan. 1, 1867, shall not be computed in any case affected by the Statutes of Limitation, nor shall any writ of error be affected by such lapse of time : Tenn. C. Sched. 4. So, in Florida, as to civil suits, the time between Jan. 10, 1861, and Oct. 25, 1865 : Fla. C. 15,3.

§ 611. **Payment into Court** may, by the Constitution of Delaware, be made by the defendant at any time pending an action for debt or damages ; and the plaintiff not accepting thereof shall recover no costs, if he recover no greater sum on the final decision : Del. C. 6,17.

§ 612. **Abatement.** The Constitution of Delaware provides that no action of which the cause survives shall abate by the death of a party : Del. C. 6,18.



## CHAPTER VI.

## GENERAL PROVISIONS.

**Art. 99. Amendments to the Constitution.**

§ 990. (A) **How Proposed in the Legislature.** Amendments to the Constitution may, in most states, be proposed in either house : Mass. C. Amt. 9 ; N.Y. C. 13,1 ; N.J. C. Art. 9 ; Pa. C. 18,1 ; O. C. 16,1 ; Ind. C. 16,1 ; Ill. C. 14,2 ; Mich. C. 20,1 ; Wis. C. 12,1 ; Io. C. 10,1 ; Kan. C. 14,1 ; Md. C. 14,1 ; Va. C. 12,1 ; W.Va. C. 14,2 ; Tenn. C. 11,3 ; Ark. C. 19,22 ; Cal. C. 18,1 ; Ore. C. 17,1 ; Nev. C. 16,1 ; Col. C. 19,2 ; S.C. C. 15,1 ; Ga. C. 13,1,1 ; Fla. C. 17,1.

But in one, they can only be proposed in the senate, and only on every tenth year, beginning with 1880 : Vt. C. Amt. 25,1. In one other, they can only be proposed in the house : Ct. C. Art. 11.

(B) They must be ratified (1) by a majority of the members present in each house : Minn. C. 14,1 ; Mo. C. 15,1-2 (elected) ; Ark. (elected) ; (2) by three fifths of the elected members of each house : O. ; Neb. C. 15,1 ; Md. C. 14,1 ; N.C. C. 13,2 ; (3) by two thirds of a quorum of each house : Me. C. 10,2 ; Ala. C. 17,1 ; Miss. C. Art. 13 ; (4) by two thirds of the elected members of each house : Ill. ; Mich. ; Kan. ; W.Va. ; Tex. C. 17,1 ; Cal. C. 18,1 ; Col. ; S.C. C. 15,1 ; Ga. ; La. C. 256 ; (5) by a majority of the elected members of each house of two successive legislatures : R.I. C. 13,1 ; N.Y. ; N.J. ; Pa. ; Ind. ; Wis. ; Io. ; Va. ; Ore. C. 17,1 ; Nev. C. 16,1 ; (6) by a majority of the senators and two thirds of the representatives, present and voting thereon, of two successive legislatures : Mass. C. Amt. 9 ; (7) by a majority of the elected members of each house and two thirds of the members of each house of the next succeeding legislature : Tenn. C. 11,3 ; (8) by three fifths of the first legislature and two thirds of the next, as in Tennessee : N.C. C. 13,2 ; (9) by two thirds of the first legislature, and three fourths of the next : Del. C. Art. 9 ; (10) by two thirds of each elected house of two successive legislatures : Fla. C. 17,1 ; (11) by two thirds of the elected senators and a majority of the elected members of the house, in the legislature proposing them, and by a majority of the elected members of each house of the next legislature : Vt. (12) After being proposed as above, they are to be published and must be ratified by two thirds of each house at the next legislature : Ct.

§ 991. **Ratification by the People.** In most states, the proposed amendment, having passed the legislature according to § 990, must then be ratified (A) by a majority vote of the people at the next election : Mass., Me., Vt., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Va., W.Va., N.C., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., S.C., Ga., Ala., Miss., Fla., La. (B) By a three-fifths vote at such election : R.I. For citations, see § 990.

§ 992. **Ratification by the Legislature.** And in one state, the proposed amendment, having passed both the legislature and the people according to §§ 990, 991, must again be ratified by two thirds of the elected members of each house of the next legislature after the election by the people ratifying it : S.C.

§ 993. **Restrictions.** In two, the legislature cannot propose amendments to more than one article in any one session : Ill., Col. ; nor to the same article oftener than



once in four years : Ill. Amendments cannot be submitted to the people oftener than (1) once in five years : N.J., Pa. ; (2) once in six years : Tenn. In Kansas and Arkansas, not more than thrée can be so submitted at the same election. If two or more are submitted at the same time, the electors must be permitted to vote on each separately : N.J. ; Pa. ; O. ; Ind. C. 16,2 ; Wis. ; Io. C. 10,2 ; Minn. ; Kan. ; Neb. ; Md. ; W.Va. ; S.C. C. 15,2 ; Ga. C. 13,1,1 ; La. While an amendment approved by one legislature is awaiting the action of the next, no other can be proposed : Ind.

§ 994. **General Revision.** There is, in most states, provision for a general revision of the Constitution by a convention called for that purpose. Thus, whenever two thirds (or, in New Hampshire, New York, Michigan, Wisconsin, Iowa, Delaware, West Virginia, Kentucky, Tennessee, Missouri, Alabama, Florida,<sup>a</sup> a majority ; and in Nebraska, three fifths) of the elected members of each house of the legislature vote that such convention is necessary, the question is referred to the people ; if they vote at the next election<sup>b</sup> for the convention, the legislature is to provide for holding the same : N.H. C. 2,99 ; Me.<sup>c</sup> C. 4,3,15 ; N.Y. C. 13,2 ; O. C. 16,2 ; Ill. C. 14,1 ; Mich. C. 20,2 ; Wis. C. 12,2 ; Io. C. 10,3 ; Minn. C. 14,2 ; Kan. C. 14,2 ; Neb. C. 15,2 ; Del. C. Art. 9 ; W.Va. C. 14,1 ; N.C. C. 13,1 ; Ky.<sup>b</sup> C. 12,1 ; Tenn. ; Mo. C. 15,3 ; Cal. C. 18,2 ; Nev. C. 16,2 ; Col. C. 19,1 ; S.C. C. 15,3 ; Ga. C. 13,1,2 ; Ala. C. 17,2 ; Fla.<sup>a</sup> C. 17,2.

And in some, the question of holding such a convention is regularly submitted to the people at stated times, at a general election ; as, every ten years, beginning with 1870 : Io. ; every twenty years, beginning (1) with 1866 : N.Y. ; (2) with 1871 : O. C. 16,3 ; with 1887 : Md. C. 14,2 ; with 1888 : Va. C. 12,2 ; every sixteen years, beginning with 1866 : Mich. ; every seven years : N.H. C. 2,99,100 (beginning 1884).

The delegates to such constitutional convention are, in all these states, to be elected by the people.

NOTES. — <sup>a</sup> By a majority of *two successive* houses. <sup>b</sup> The people must so vote in *two successive* elections. <sup>c</sup> By a two-thirds concurrent vote of [the members present of] both houses.

§ 995. **Ratification.** The Constitution, as so amended by the convention, must then be ratified by the people (1) at a general election : O. ; Neb. ; Md. ; W.Va. C. 14,1 ; (2) at a special election called for the purpose : Ill., Mo., Cal., Col.

§ 996. **Amendments to the United States Constitution** may not, by the Constitution of Tennessee, be ratified by any convention or assembly (legislature) of the State which was not elected after such amendment was submitted : Tenn. C. 2,32.

## PART II.

### PRIVATE CIVIL LAW.

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#### DIVISION I.—NORMAL LAW.

#### TITLE I.—PRELIMINARY AND GENERAL PROVISIONS.

#### CHAPTER I.—OF LAWS AND THEIR INTERPRETATION.

**Note to the Chapter.** \* These provisions apply to the interpretations of all other instruments or contracts, as well as statutes, in the noted states. † These provisions apply only to constructions of the code (or code of civil procedure, where there is no general code), and are contained therein. ‡ These only to constructions of the code of criminal procedure. || These only to that of the criminal or penal code.

#### Art. 100. Of Laws.

§ 1000. **Definitions.** Law is defined to be a solemn expression (1) of the will of the supreme power of the State: Cal. 4466; (2) of legislative will: La. 1. (3) Law is a rule of property and of conduct prescribed by the sovereign power: Dak. Civ. C. 2.

The common law is divided into (1) public law, or the law of nations; (2) domestic or municipal law: Dak. Civ. C. 4.

Laws are obligatory upon all inhabitants of the state indiscriminately (see also §§ 11, 17): La. 9.

§ 1001. **Language and Form of Proceedings.** The laws of several states prescribe that all writs, processes, proceedings, and records in any court (except, in Wisconsin and Arkansas, technical terms) shall be in the English language: N.H. 222, 1; Vt. 691; N.Y. Civ. C. 22; N.J. Amendments. 17; Mich. 7251; Wis. 2578; Ky. Civ. C. 115; Mo. 1035; Ark. 1466; Cal. 10185; Ore. Civ. C. 909; Col. Civ. C. 405; Ida. Civ. C. 70; Mon. C. Civ. P. 509; Uta. Civ. C. 91.

All acts or contracts in the French language are valid in Louisiana: D. 1522.

They must be on either paper or parchment: N.Y., N.J., Mich., Wis., Mo., Ark.

But in a few states, provision is made for the publication of laws (and of legal notices: N.J.) in newspapers printed (1) in the German language: N.J. *Statutes*, 44; *Sale of Lands*, 71; Md. 1882, 251. (2) In New Mexico, court records are kept in English and Spanish; and both may be taught in the schools: N.M. 1110; G. L. 1880, 93, 4. The language in which the law was originally passed governs: N.M. 2615.

§ 1002. **Of Rights.** The code of Dakota declares that all original civil rights are either (1) rights of person or (2) rights of property: Dak. Civ. C. 7. And that all rights may be surrendered or lost by neglect in the cases provided by law: Dak. Civ. C. 8.

§ 1003. **The Common Law** of England, so far as applicable, and not inconsistent with the Constitution and laws of the United States or the State, is, in

many states, adopted and declared to be in force: Vt.<sup>b</sup> 689; Pa. *Acts, etc.*, 1 and 3; Ind. 236; Ill.<sup>c</sup> 28,1; Kan.<sup>b</sup> 119,3; Neb. 1,15,1; Va. 15,1; W.Va. 1882,143,5; N.C. 641; Mo. 3117; Ark.<sup>c</sup> 566; Tex. 3128; P. C. 4; C. Cr. P. 27; Cal. 4468; Nev. 1883,1; Col.<sup>c</sup> 197; S.C. 2738; Fla.<sup>c</sup> 138,7; 83,1; La.<sup>†</sup> D. 976; Wash. || 1; Ida. 1874-5, p. 676; Mon.<sup>c</sup> G. L. 144; Wy.<sup>c</sup> 26,1; N.M. 1823; Ariz.<sup>b</sup> 3438; 1885,68.

Unless repealed (1) by legislative authority: Pa., Ill., Kan., Va., N.C., Ark., Tex., Col., Mon., Wy.; (2) by judicial decision: Kan., Wy.

But only as a rule of construction in the penal code: Tex. P. C. 3; Dak. C. Cr. P. 610; and no act is punishable unless made a penal offence by the state statutes:<sup>d</sup> Tex.

In a few, there is declared to be no common law in any case where the law is declared by the codes:<sup>d</sup> Fla. || 138,7; Dak. Civ. C. 6.

In Wyoming, "if a case ever arise in which an action for the enforcement of a right or redress or prevention of a wrong cannot be had under the code, the practice of the common law may be adopted, so far as may be necessary to prevent a failure of justice:"<sup>d</sup> Wy. Civ. C. 644. In Kentucky, the decisions of the English courts since July 4, 1776, are not of binding authority, but may be read in court and have such weight as the judges think proper to give them: Ky. 67,1. In some states, crimes and misdemeanors not provided for by State statute may be punished as under the common law or statute law of England as in force in the State under this section and § 1004; but the punishment in such cases may not exceed a limited fine, or imprisonment.<sup>d</sup>

NOTES. — <sup>a</sup> See also Part I. § 76. <sup>b</sup> As to such of the common law as is adapted to the condition and wants of the people. <sup>c</sup> As to such of the common law as is general, and not of a local nature. <sup>d</sup> See also in Part V.

§ 1004. **The English Statutes** made in aid of the common law are in the same way made part of the State law, (1) if enacted prior to the fourth year of James I.: Ind. 236; Ill. 28,1; Va. 15,2; W.Va. 1882,143,6; Mo. 3117; Ark.<sup>a</sup> 566; Col. 197; Wy. 26,1.

(2) So, in two states, all statutes introduced before the Declaration of Independence (which, in Rhode Island, have continued to be practised under): R.I. 259,3; Fla. 138,7.

(3) All English and colony statutes in force on May 10, 1776, not since repealed: Pa. *Acts, etc.* 1.

*Except* the second section of C. 6, 43 Eliz.; C. 8, 13 Eliz.; and C. 9, 37 H. VIII.; Ind., Ill., Col.

But in New York, it is expressly provided that none of the English statutes are to be considered as laws of the state: N.Y. 1828,21,3.

NOTE. — <sup>a</sup> See § 1003.

§ 1005. **Waiver of Laws.** By the codes of a few states, laws made for the preservation of public order or good morals cannot be abrogated by agreement; but a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest: Cal. 8513,8268; Ga. 10; La. 11; Dak. Civ. C. 2066.

§ 1006. **Old Laws in Force.** In New York, no colony laws are in force: N.Y. 1828,21,4. In New Mexico, the laws of descent, distribution, and wills contained in the treatises of Pedro Murillo de Lorde remain in force so far as consistent with the United States Constitution and the state laws: N.M. 2,1.

§ 1007. **Conflict of Laws.** Several state codes provide that the validity, form, and effect of all writings or contracts are determined by the laws of the place where executed: Ga. 8; Ore. Civ. C. 683; Mon. C. Civ. Pr. 611; La. 10. But if such writing, etc., is intended to have effect in the home State, it must be executed in conformity with the laws of such State wherever made; except wills of personal property made by persons domiciled out of the state:<sup>a</sup> Ga., La.; or *donatio causa mortis* made by such persons: La. See also in Title VI.

When the general public law and the local law for a county, city, etc., are in conflict, the latter prevails: Md. 1,10.

NOTE. — <sup>a</sup> See also §§ 2653,2657.

§ 1008. **Comity of States.** The Georgia code enacts that the laws of other states and foreign nations shall have no force and effect of themselves within the home state, except as is provided by the United States Constitution, or recognized by the comity of states; and the courts are to enforce this comity so long as its enforcement is not contrary to the policy or prejudicial to the interests of the State: Ga. 9.

§ 1009. **Customs.** Two codes provide that the customs of any business or trade shall be binding (shall be "*usage*:" Dak.) only when it is of such universal practice as to justify the conclusion that it became by implication part of the contract: Ga. 1; Dak. Civ. C. 2119.

Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent: La. 3.

§ 1010. **Laws of other States in Force** are, where not specially repealed, in the District of Columbia (1) those of Maryland existing Feb. 27, 1801: D.C. 92; (2) the Constitution and laws of the United States, where not locally inapplicable: D.C. 93.

In West Virginia, land titles and interests derived under Virginia laws prior to June 20, 1863, remain valid and are determined by the Virginia laws in force on that day: W.Va. 111,1.

**Art. 102. Construction of Statutes.** (See Glossary. For notes, see note to the section.)

§ 1020. **Meaning of Words.** In many states it is provided that all words and phrases shall be construed according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning: N.H. 1,2; Mass. 3,3; Me. 1,6; Ct. 22,7; Ind. 240; Mich. 2; Wis. 4971; Io. 45; Minn. 4,1; Kan. 104,1; Del. 5,1; Ky. 21,17; Mo. 3126; Tex. 3138; P. C. 10; C. Cr. Pr. 59; Cal. 16 and 5013 and 10016; Col. 3141; Ga. 4; Miss. 10; La. 14-15; 1946-7; Dak. Civ. C. 2097; C. Civ. P. 7; Ida. Civ. C. 12; Mon. G. L. 145; Wy. Civ. C. 653; Uta. Civ. C. 12; N.M. 1851; Ariz. 3.

Words are always to be construed according to their context, despite the provisions of this article: N.H. 1,1; Vt. 1; R.I. 24,1; N.Y.† Civ. C. 3343; O. 4947; Ind. 240; Ill. 131,1; Io.; Minn.; Kan.; Del.; N.C. 3765; Mo. 3125; Ark. 6338, 6345; Cal. 5014; Col.; La. 16,1948; Ida.; Mon. G. L. 151; Uta.; N.M.

But so only when the words themselves are dubious: La. 16. Laws *in pari materia* must be construed with reference to each other: La. 17.

Abstracts of titles and chapters and marginal notes are no part of the law: Me. For the effect of recitals in statutes as evidence, see in Part IV.

§ 1021. **Liberal Construction.** In many states, the code or revision provides that its provisions shall be liberally construed, to promote its objects: O. || 4948; Ind. 1288; 241; Ill. 131,1; Io.† 2528; Kan. 80,2; 119,3; Neb.† 2,1; Ky. 21,16; Ark. 6337; Tex. p. 718, § 3; C. Cr. P. 26; Cal. 4 and 5004 and 10004; Ore. || Cr. C. 787; Col. 3143; Civ. C. 445; Wash. 758,1686; Dak. Civ. C. 2129; C. Cr. P. 602; P. C. 10; Ida. Civ. C. 3; Mon. G. L. 147; Wy. Civ. C. 2; Uta. C. Civ. P. 3; C. L. 1834.

The rule of the common law that statutes in derogation thereof are to be construed strictly does not, in many, apply: N.Y.† Civ. C. 3345; O.; Io.†; Kan.; Neb. ||; Ky. 21,16; Civ. C. 733; Ark. 6362; Cal.; Ore. ||; Col. Civ. C. 446; S.C.† Civ. C. 448; Wash.; Dak. Civ. C. 2129; C. Civ. P. 3; Ida.; Wy.; Uta.

But it seems it does apply in one state: Pa. Acts, etc. 5.

All statutes are to be construed with a view to carry out the intention of the legislature: N.H. 1,1; Vt. 1; R.I. 24,1; Ind. 240; Ill.; Mich. 2; Wis. 4971; Io.



45; Minn. 4,1; Kan. 104,1; Del. 5,2; N.C. 3765; Ky. 21,15; Mo. 3126; Ark.; Tex. 3138; Cal. 11859; Ore. Civ. C. 685; Col.; Mon.; Ga. 4; La. 18; Ariz. 3.

"Keeping always in view (1) the old law, the evil, and the remedy: " Tex., Ga.\*; (2) "the reason and spirit of it, and the cause for which it was enacted:" La.

There is no distinction in the construction of statutes between civil, criminal, and penal enactments: Ky. 21,15; Tex. P. C. 9.

A substantial compliance with the laws is sufficient; and no proceeding is to be held void for want thereof unless so provided expressly in the statute (see also § 1045): Ga.

§ 1022. **Ambiguities and Contradictions.** Clerical and typographical errors are to be disregarded when the intent and meaning are obvious: Minn. 4,1.

Grammatical errors do not vitiate a law: Tex. 3139; Ga. 4.

In no place shall punctuation control interpretation: Tex.

Nor, it seems, shall "niceties of grammar" be attended to: La. 14,1946.

Transposition of words and clauses may be resorted to when the sentence is without meaning as it stands: Tex., Ga.

In the construction of a statute, the office of a judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted or omit what has been inserted: Cal. 11858; Ore.\* Civ. C. 684; Mon.\* C. Civ. P. 612.

When there are several provisions or particulars, such construction, if possible, is to be adopted as will give effect to all: Cal. 8541; Ore.\*; Dak. Civ. C. 2094; Mon.\*

When a law is clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit: La. 13.

When a general and a particular provision are inconsistent, the latter is paramount; so, a particular intent must control a general one which is inconsistent with it: Tex. || P.C. 5; Cal. 11859; Ore.\* Civ. C. 685; Mon.\* C. Civ. P. 613.

When a statute is equally susceptible of two interpretations, one in favor of natural right and the other against, the former prevails: Cal.\* 11866; Ore.\* Civ. C. 692; Mon.\* C. Civ. P. 620.

A penal law so indefinitely framed or doubtful as not to be understood, either by itself or in connection with other laws, is inoperative: Tex. P. C. 6. So, in California, if the provisions of any title, chapter, article, conflict with those of another title, etc., respectively, the provisions of each title, etc., prevail as to matters arising out of the subject-matter of such title, etc.: Cal. 4481-3.

If conflicting provisions are found in different sections of the same chapter or article, the last section prevails unless such a construction would be inconsistent: Cal. 4484.

So, in New York, in all cases of conflicting provisions in any part of the revision: N.Y. 1828,20,12.

When, to prevent fraud, or from any other motives of public good, the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent, etc.: La. 19.

The distinction of laws into odious and those entitled to favor, with a view of narrowing or extending their construction, cannot be made by those whose duty it is to interpret them: La. 20.

In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity; an appeal is to be made to natural law and reason or received usages, where positive law is silent: La. 21.

§ 1023. **Special Phrases.** The present tense includes the future: N.Y. || C. Cr. P. 955; O. 23,4947; Ill. 131,1; Wis. 4971; Ky. † Civ. C. 632; Tenn. † 48; Ark. 6344; Tex. 3138; Cal. 17,5014,10017; S.C. 35; Ga. 4; Ala. 1; Col. † Civ. C. 413; Dak. Civ. C. 2126; C. Cr. Pr. 604; Ida. Civ. C. 13; Mon. C. Civ. P. 522; Uta. C. Civ. P. 13; C. L. 5 and 1836; Ariz. † 3076.

So, in all these states except Ohio, Illinois, California, Idaho, and Montana, the *past* tense may include the future, but not generally in the criminal code.

In nearly all, the masculine gender includes the feminine and neuter: N.H. 1,3; Mass. 3,3; Me. 1,6; Vt. 2; R.I. 124,2; Ct. 22,9; N.Y. 1828,20,11; C. Cr. P. 955; N.J. *Practice*, 300; *Stats.* 9; Pa. || *Crimes*, 304; O. 23,4947,5913; Ind. 241,1286; Ill.; Mich. 2; Wis. 4971; Io. 45; Minn. 4,1; Kan. 104,1; Md. 1,6; Del. 5,1; Va. 15,9; W.Va. 1882,143,17; N.C. 3765; Ky. 21,12; Tenn. †; Mo. 3124; Ark. 6336; Tex. 3138; P. C. 23; Cal.; Ore. || Cr. C. 783; Col. 3141; Wash. 1339,756,965; Dak. Civ. C. 2124; C. Cr. P. 604; Ida.; Mon. G. L. 145 and 150; Wy. Civ. C. 647-9; Uta.; S.C.; Ga.; Ala.; Miss. 16; La. † 3556; N.M. 1851,2614; Ariz. 3.

In nearly all, the plural includes the singular, and the singular the plural: N.H.; Mass.; Me.; Vt.; R.I. 24,3; Ct.; N.Y.; N.J.; Pa. ||; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Md. 1,7; Del.; Va.; W.Va.; N.C.; Ky.; Mo. 3123-4; Ark. 6335; Tex.; Cal.; Ore. || Cr. C. 782; Col.; Wash. 1339,1920; Dak. Civ. C. 2125; C. Cr. P. 604; Ida.; Mon.; Wy. Civ. C. 649; Uta.; S.C.; Ga.; Ala.; Miss. 11; La. †; N.M.; Ariz.

*Man and woman* include male or female persons of any age: Wy.

*Said or such* refers to the person or thing last mentioned: N.H. 1,13; Vt. 15.

Roman and Arabic numerals are, in a few, declared part of the English language: Io.; Kan.; Tenn. 51; Mo. 3126; Col. Civ. C. 405.

And are always sufficient to express dates and amounts unless otherwise directed by statute: N.Y. Civ. C. 22; N.J. *Amendts.* 17; Wis. 2578; Tenn.; Ark. 1154; Cal. 10186; Ore. 909; Ida. Civ. C. 71; Ga. 5; Mon. C. Civ. P. 509.

*Heretofore and hereafter* in statutes mean any time previous or subsequent to the day the act takes effect: N.Y. † Civ. C. 3343; Ill.; Wis.; Io. † 53; Mo. 3121; Mon. G. L. 149. *Preceding* (and, in Georgia, *aforesaid*) and *following or succeeding* mean the *next* preceding or following: N.H. 1,12; Mass.; Me.; Vt. 15; R.I. 24, 20; Ct.; Ind. 240; Mich. 2; Minn. 4,1; Wis.; Va.; W.Va.; N.C.; Ky. 21,19; Mo. 3122; Tex. 3140; Ga. 5; Ala. 5; Ariz.

The terms *sheriff, constable, coroner*, or other words used for an executive or ministerial officer include deputies or agents, general or special: Ill. 131,1; Io.; Kan.; Tenn. 53; Ark. 5632.

So, in many, when a statute requires an act to be done, it may be done (if the law of the case permit agency) by an agent or deputy: Me. 1,6; O. † 4949; Ind. 240; Wis.; Kan. † 80,720; Neb. † 2,893; W.Va. 1882,143,16; Ky. † 678; Mo. 3126; Ark. † 6365; Cal. 865; Wash. 755; Wy. † Civ. C. 631.

*And* may be read *or*, and *or, and*: O. 23,4947.

Words importing joint authority to three or more (in Rhode Island, Connecticut, New York, West Virginia, Texas, and Georgia, two or more) persons are construed as giving it to a majority of such persons, unless expressed otherwise: N.H. 1,14; Mass.; Me.; Vt. 3; R.I. 24,4; Ct.; N.Y. 3,8,17,27; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Va.; W.Va.; N.C.; Ky. 21,3; Civ. C. 679; Tenn. 56; Mo. 3126; Ark. 6366; Tex. 3138; Cal. 15,5012,10015; Ore. Civ. C. 509; Dak. Civ. C. 2131; Ida. Civ. C. 11; Uta. C. Civ. P. 11; Ga.; Ala. 3; N.M.; Ariz.

By *year* and *month* is understood a calendar year or month: N.H. 1,8; Mass. 3,3; Me.; Vt. 12; R.I. 24,11; Ct.; N.Y. 19,1,3 and 4; N.J. *Stats.* 10; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Del.; Va.; W.Va. 1882,143,14; N.C.; Ky. 21,7; Civ. C. 732; Tenn. 50; Mo. 3126; Ark. 6359; Tex.; Cal. 5014; Col.; Wash. 759; Dak. 2123; Ida.; Mon.; Ga. 5; Ala. 8; Miss. 12; Uta.; Ariz.

*Year*, simply, means "year of our Lord:" N.H., Mass., Me., Vt., Ind., Ill., Mich., Wis., Io., Minn., Kan., Del., W.Va., N.C., Ky., Mo.

In every leap year, the increasing day and the day before shall, in all legal proceedings, be counted as one day: N.Y., N.C. Fractions of a day are disregarded: Dak.

Where any person's signature is required his mark is sufficient if he cannot write: Mass. 3,3; Me. 1,6; N.Y. || C. Crim. P. 958; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Del.; N.C.; Ky.† Civ. C. 732; Tenn.†; Mo.; Ark.† 6344; Tex. P. C. 31; 3140; Cal.; Nev. 319,2294; Col.; Dak. Civ. C. 2126; C. Cr. Pr. 607; Ida. 1874-5, p. 796,1; Civ. C. 13; Mon. G. L. 1169; Wy. Civ. C. 652; Uta.; Ga.; Ala. 1; N.M.; Ariz.†; his name being written near it by a person who signs his own name as witness: N.Y. ||; Ky.†; Tenn.†; Ark.†; Tex.; Cal.; Nev.; Col. Civ. C. 413; Dak.; Ala.; Ida.; Mon.; Wy.; Uta.; Ariz.† The signature must be at the end of the document signed: Ky. 21,26.

Except in signatures (where a person must sign by his mark or his proper handwriting), *writing* includes printing, engraving, lithography, etc.: N.H. 1,22; Mass.; Me.; Vt. 20; R.I. 24,20; N.Y. || C. Cr. P. 956; O. || 6794; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Del.; Va.; W.Va.; N.C.; Ky.†; Tenn.†; Mo.; Ark.† 6344; Tex. 3140; Cal.; Ore || Cr. C. 778-9; Col.; Dak. Civ. C. 2128; C. Cr. P. 605; Ida.; Mon.; Wy. Civ. C. 651; Uta.; Ga. 5; Ala.; N.M.; Ariz.

So, in New York, a document required to be partly written or printed may in part be both: N.Y.† Civ. C. 3343.

A person entitled to the execution of a writing may demand it made in ink, but otherwise writing made in any manner is valid: Dak. Civ. C. 2128.

*Swear* includes *affirm*, and *oath*, *affirmation*: N.H. 1,23; Mass. 3,3; Me.; Vt. 13; R.I. 24,10; Ct.; N.Y. || C. Cr. P. 957; N.J. *Stats.* 11; O. 1; Ind. 1285; Ill.; Mich.; Wis.; Io.; Minn.; Kan. 80,721; 104,1; Neb.† 2,894; Md. 1,8; Del.; Va.; W.Va. 1882,143,11; N.C.; Ky. 21,6; Civ. C. 680; Tenn.†; Ark. 6358; Tex.; Cal.; Nev. || 2293; Col.; Dak. Civ. C. 2126; C. Cr. Pr. 606; Ida.; Mon.; Wy.† Civ. C. 632 and 651; Uta.; Ga. 5; Ala.; N.M.; Ariz. See Part IV.

The time within which an act is to be done is computed by excluding the first day and including the last (or in Idaho and Utah, if the last be Sunday [or a holiday] it shall also be excluded): N.H. 1,32; Vt. 26; R.I. 24,12; N.Y. Civ. C. 788; Pa. 1883,122; O.† 4951; Ind. 1280; Ill.; Wis.; Io.; Minn. 66,82; Kan.† 80,722; Neb.† 2,895; W.Va. 1882,143,12; N.C.† 596; Tenn. 46; Mo.; Ark.† 6367; Cal. 12 and 5010 and 10012; Ore. Civ. C. 510; Dak. C. Civ. P. 6; Ida. Civ. C. 8; Mon. C. Civ. P. 519; Wy.† Civ. C. 633; Uta. C. Civ. P. 8; S.C. Civ. C. 407; Ga.; Ala. 11; Miss. 17; N.M.

So, when an act is to be done on a particular day of the month, if that day be Sunday or a holiday, the next day shall be deemed the one intended: Va.; W.Va. 1882,143,13; Ky. 21,9; Cal. 13,5011,10013; Ida. Civ. C. 9 and 47; Uta. Civ. C. 9; 1884,55,57; Dak. Civ. C. 2119. See also §§ 4137,4517.

But the above provisions do not apply to change the law of notes and bills: Pa., W.Va., Uta.

When a notice is to be given, or an act done, a certain time *before* any proceeding, there must be such time exclusive of the day of the proceeding; but the day on which the notice, etc., is given is included: Va.; Ky. 21,8; Civ. C. 681; Ore.

But in South Carolina, the day of giving the notice is excluded, and the day on which the act or proceeding happens, or the full time is completed, is included: S.C. Civ. C. 421.

Courts, etc., authorized to adjourn "from day to day" may adjourn from Saturday to Monday: Ky. 21,10.

But in New York, the day of publication, etc., is excluded, and the final day, or day of the proceeding, is included: N.Y. Civ. C. 787.

The word *county* or *town* may mean the county, etc., in which the subject-matter referred to is situate, belongs, or is cognizable: N.H. 1,26; Vt. 25; Wis. 4972.



The words *state paper* mean the newspaper designated by the legislature in which public acts, resolves, advertisements, and notices are required to be published: Me. 1,6.

When a person is required to be disinterested or indifferent, a relationship by consanguinity or affinity within the sixth degree according to the civil law, or within that of second cousins, will disqualify, except by written consent of the parties: Me., Ind. The words *shall have been* include past and future cases: Wis.† 4972. The words *usual* and *customary* mean "according to usage" (§ 1010): Dak. Civ. C. 2120. The word *verdict* includes the finding of a judge or referee: Dak. Civ. C. 2122.

Such abbreviations as are in common use may be used: N.Y.; Mich. 7251; Wis.; Ark. 1154; Cal.† 10186; Ore.; Col.; Ida. Civ. C. 71; Mon. C. Civ. P. 509; Uta.† C. Civ. P. 92.

§ 1024. **Maxims Adopted.** The codes of California and Dakota adopt the following maxims as part of the code, "to aid in its just interpretation, but not to qualify it:" Cal. 8509-8543; Dak. Civ. C. 2062-96. (1) When the reason of a rule ceases, so should the rule itself. (2) Where the reason is the same, the rule should be the same. (3) One must not change his purpose to the injury of another. (4) One must so use his rights as not to infringe on those of another. (5) He who consents to an act is not wronged by it. (6) Acquiescence in error takes away the right of objecting to it. (7) No one can take advantage of his own wrong. (8) He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession. (9) He who can and does not forbid that which is done on his behalf is deemed to have bidden it. (10) No one should suffer by the act of another. (See also §§ 1005, 1022.) (11) He who takes the benefit must bear the burden. (12) One who grants a thing is presumed to grant also whatever is essential to its use. (13) For every wrong there is a remedy. (14) Between those who are equally in the right or equally in the wrong, the law does not interpose. (15) Between rights otherwise equal, the earliest is preferred. (16) No man is responsible for that which no man can control. (17) The law helps the vigilant, before those who sleep on their rights. (18) The law respects form less than substance. (19) That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due. (20) That which does not appear to exist, is to be regarded as if it did not exist. (21) The law never requires impossibilities. (22) The law neither does nor requires idle acts. (23) The law disregards trifles. (24) Particular expressions qualify those which are general. (25) Contemporaneous exposition is in general the best. (26) The greater contains the less. (27) Superfluity does not vitiate. (28) That is certain which can be made certain. (29) Time does not confirm a void act. (30) The incident follows the principal, not the principal the incident. (31) An interpretation must be reasonable. (32) Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.

§ 1025. **Abrogation by the Courts.** When, to prevent fraud, or from any other motives of public good, the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent, or contrary to the public good: La. 19. The distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, cannot be made by those whose duty it is to interpret them: La. 20.

§ 1026. **Laws Silent.** In all civil matters where there is no express law, the court is bound to proceed and decide according to natural law and reason or received usages: La. 21.

**Art. 104. Enactment of Laws.** (For notes to Article, see note to the Chapter at § 1000.)

§ 1040. **Statutes take effect** throughout the state, in some states, immediately upon enactment (but due [§ 1041] publication is necessary in Wisconsin, Minnesota, Georgia, Louisiana, Utah): Wis. 329; Minn. 4,2; Mon. G. L. 785-6; Nev. 2; Ga. 3; La. 4-5; Mon. G. L. 148; Uta. 2. Compare also § 309.

In others, they take effect (1) on the thirtieth day after enactment: Mass. 3,1; Minn. 4,2; Ariz. 2; (2) ninety days after enactment: W.Va. 1882,143,8; (3) on the June 1st following enactment: Ct. 1883,60; Neb. 1,88,1; Md. 2,1; (4) ninety days



after the adjournment of the session at which they were passed : Mo. 3149 ; Tex. 3126 ; (5) in sixty days after such adjournment : Wash. p. 16, § 1 ; (6) on September 15th, March 15th in autumn sessions, following enactment : N.H. 1,36 ; (7) thirty days after the recess or adjournment of the legislature passing it : Me. 1,5 ; N.C. 2862 ; N.M. 2607 ; (8) on the January 1st following enactment : Vt. 29 ; (9) on the tenth day after adjournment of the legislature : R.I. 24,19 ; (10) on the twentieth day after enactment : N.Y. 1,7,4,12 ; Wis. 4975 ; N.C. ; S.C. 33 ; (11) on the July 4th following enactment : N.J. *Stats.* 13 ; Io. 34 (see below) ; (12) on the May 1st following : O. 77. (13) Acts which are to take effect by publication in the newspapers take effect on the twentieth day following such publication : Io. 33 ; (14) on the July 1st following enactment : Va. 15,3 ; (15) on the sixtieth day following enactment : Ky. 67,3 ; Cal. 323 ; (16) four weeks following adjournment : Ct. 6,20. (17) When the laws are published in a volume, which must be as soon as practicable after the close of the session : Kan. 56,1.

But acts may take effect immediately upon special vote of the legislature to that effect : Mo., Tex. Or if a special time be named in the act, they take effect at such time : Mass., Me., Vt., R.I., N.Y., N.J., O., Wis., Minn., Kan., Neb., Md., Va., W.Va., N.C., Cal., Mon., S.C., Uta., N.M.

In some, a two-thirds vote is necessary to make them take effect immediately, or at such special time : Mo., Tex. So, in one other, a two-thirds vote of all the members elected : W.Va.

And no general law can, even with such vote, take effect before publication : Minn., Md. See also § 309.

§ 1041. **Publication.** Laws only take effect upon due publication, in some states ; and are considered duly published, and take effect accordingly, (1) at the place where the state gazette is published, the day after publication ; elsewhere thirty days after : La. 6 ; D. 2168 ; elsewhere, twenty days after, or three days for each hundred miles of distance : Ga. 3 ; elsewhere, allowing a day for each fifteen miles of distance from the seat of government : Mon. G. L. 785 ; (2) upon proclamation by the governor after notice from all the Circuit Court clerks that the laws have been received : Ind. 239 ; (3) immediately upon publication in the state paper : Wis. 329 ; (4) within forty days after the session adjourns all laws must be published once in every established newspaper in the state : Minn. 5,42.

After such publication, no one can allege ignorance of the law : Ga. 7 ; La. 7.

§ 1042. **Repeal** of a statute does not (nor does its expiration by limitation expressed in the law : W.Va.) affect acts and proceedings previously had, or offences done or penalties incurred or rights accrued prior to the repeal : N.H. 1,33 ; Mass. 3,3 ; Me. 1,5 ; Vt. 28 ; R.I. 24,16 ; N.Y.<sup>a</sup> 1828,21,5-6 ; N.J. *Stats.* 3 ; O. 79 ; Ill.† 131,4 ; Wis.<sup>a</sup> 4980,4981,4974 ; Io. 45 and 50,51 ; Minn. 4,3 ; Kan. 104,1 ; Neb. 1,88,2 ; Va. 15,13 ; W.Va. 13,9 ; 1882,143,9 ; N.C.<sup>a</sup> 3868 ; Ky. 21,23 ; Tenn. 47 ; Mo. 3150 ; Ark. 6342 ; Tex. p. 718, § 5 ; P. C. 15 ; Cal.<sup>a</sup> 329,5006 ; Wash.<sup>a</sup> 1682 ; Dak. Civ. C. 2133 ; Ida. 1874-5, p. 858,2 ; Civ. C. 14 ; Mon.<sup>a</sup> G. L. 70, C ; Uta.<sup>a</sup> Civ. C. 5 ; Miss.<sup>a</sup> 4,5.

Laws may be repealed, either expressly or impliedly, by contradictory or irreconcilable provisions in a later law : La. 22-3. The provisions of § 303, A, are enacted by statute : Tex. 3125. See § 303 ; and also in Part IV.

But in two states, every law repealing or amending a previous law must recite the law so amended sufficiently to show the effect of the amendment or repeal : Ct. 1877,2 ; Ark. 6364.

So, in many states, actions pending and penalties incurred at the time of repeal are not affected by it : N.H. 1,34 ; Me. ; Vt. ; R.I. 24,17 ; Ct. 1881,1 ; N.Y. ;<sup>a</sup> N.J. *ib.* 4 ; O. ; Wis.<sup>a</sup> 4981-2 ; Io. ; Minn. ; Kan. ; Neb. ; N.C. 3764 ; Ky.<sup>a</sup> p. 138, § 3 ; Tenn.<sup>a</sup> 44 ; Mo. 3152 ; Ark. 6343 ; Tex. ; Cal.<sup>a</sup> 8 and 18 and 10008 ; Ida. ; Mon. G. L. 152 ; Uta. ;<sup>a</sup> Miss. [This would seem to follow from the principal provision in the other states noted above.]

When any limitations imposed by previous laws have begun to run, the time already expired is deemed part of the new limitation prescribed: Mass.<sup>a</sup> 223,8; Minn.<sup>a</sup> 121,7; Ky.<sup>a</sup> *ib.* § 4; Cal.<sup>a</sup> 9; 10009; Wash.<sup>a</sup> 1683; Dak.<sup>a</sup> C. Civ. P. 5; Mon.<sup>a</sup> G. L. 70, E; Uta.<sup>†</sup> C. Civ. P. 6.

But in other states the new statute applies only to such periods of limitation as begin to run after its enactment: Mich. 8737; Wis. 4976.

NOTE. — <sup>a</sup> See § 1043, note<sup>a</sup>.

§ 1043. **Re-enactment.** No act or part of an act repealed is, in most of the states, deemed to be revived by the repeal of the repealing act, unless so expressed: N.H. 1,35; Mass. 3,3; Me. 1,5; Vt. 28; R.I. 24,18; Ct. 1881,1; N.Y.<sup>a</sup> 1828,21,8; N.J.<sup>†</sup> *Stats.* 5; O. 78; Ind. 248; Ill.<sup>†</sup> 131,3; Mich. 3; Wis. 4979; 4973; Io. 45; Minn. 4,3; Kan. 104,1; Neb. 1,88,3; Va. 15,14; W.Va. 1882, 143,10; Ky. 21,22; Mo. 3148; Ark. 6341; Tex. 3127; Cal. 18,328,5020; Col. 3142; Wash.<sup>a</sup> 1685; Dak. Civ. C. 2132; Ida. 1874—5, p. 858,1; Mon. G. L. 146; Uta.<sup>a</sup> Civ. C. 14; C. L. 2; S.C. Civ. C. 459; G. S. 34; Miss. 6; Fla. 138,11; La. 23; Ariz. 4.

Unless both laws were passed at the same session: Va., Ky.

The provisions of any statute, so far as they are the same as any prior statute, are regarded as a continuation, not a new enactment: Mass.<sup>a</sup> 223,2; Ill. 131,2; Wis.<sup>a</sup> 4985; Minn.<sup>a</sup> 121,9; Kan.; N.C. 3766; Ky.<sup>a</sup> p. 138, § 5; Mo.<sup>a</sup> 3160; Tex. p. 719, § 19; Cal. 5,325,5005,10005; Wash.<sup>a</sup> 761,1681; Ida.<sup>a</sup> Civ. C. 4; Uta.<sup>a</sup> Civ. C. 4.

The repeal of an act is not to be construed as a declaration that any act or part of an act expressly or impliedly so repealed was previously in force: N.Y.<sup>a</sup> 1828,21,9; Wis.; Cal. 4504.

No statute is considered still in force merely because consistent with the provisions of the code; but is held to be repealed, unless expressly continued in force by the code or other revision: Io. 47; N.C. 3867; Tenn. 42; Tex. p. 718, § 4; Cal. 18,10018; Wash. 762,1684; Dak. C. Civ. P. 9; Mon. G. L. 70, B; Miss. 3. But in two, expressly otherwise: Mo. 3161; S.C. 2739. For other states, there are generally contained in the codes, chapters expressly repealing such previous laws as are no longer in force.

NOTE. — <sup>a</sup> As to acts repealed or re-enacted by the code or other revision, only.

§ 1044. **Laws not Retroactive.** A law can prescribe only for the future: Ga. 6; La. 8.

It can have no retrospective operation: Ky.<sup>†</sup> <sup>a</sup> 21,14; Cal.<sup>†</sup> <sup>a</sup> 3,5003; Ga.; La.; Dak.<sup>†</sup> <sup>a</sup> C. Civ. P. 2; Uta.<sup>†</sup> C. Civ. P. 2.

It cannot impair the obligation of contracts: Ga.; La. 8 and 1945. See also §§ 142,393.

In Arkansas, whenever by the decision of a Circuit Court a construction is given to a statute, every act done in good faith in conformity therewith and before reversal by the Supreme Court is so far valid that the party doing it is not liable to any penalty or forfeiture for any such act that is adjudged lawful by such decision of the Circuit Court: Ark. 6340.

§ 1045. **Acts Void.** Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed: La. 12.

§ 1046. **Penalties.** In one state, any person injured by the violation of a statute may recover from the offender such damages as he may sustain thereby, although a penalty or forfeiture be provided by the statute: Ky. 21,24.

## Art. 105. Of Property and Ownership.

§ 1050. **Definitions.** The codes define property to be anything of which there may be ownership: Cal. 5654; Dak. Civ. C. 159.

**Ownership** of a thing is the right of one or more persons to possess it and use it to the exclusion of others : Cal. ; Dak. ; La. 488.

All property has an owner, whether that owner is the State and the property public, or an individual and the property private : Cal. 5669 ; Dak. Civ. C. 168 ; La. 493.

**Estate, Things.** See Glossary.

Jurisprudence is applicable to persons, things, and actions : La. 448.

There are three kinds of rights to things : (1) full and entire ownership, (2) a right to the mere use and enjoyment, (3) a right to servitudes upon immovables : La. 487.

**Things** are defined to be either *common*, or *public*, or *private* : La. 449 and 459. **Things Common** are those the ownership of which belongs to nobody in particular, and which all men may freely use (air, water, etc.) : La. 450. **Things Public** are those of which the property is vested in a whole nation (or town), and the use of which is allowed to all members thereof, — such as navigable rivers, seaports, highways, streets, squares in towns, etc. . La. 453-4.

Things are also divided into those which are or are not susceptible of ownership : La. 481.

Some things can never be the object of ownership, — as things in common ; some others lose this quality by application to a public purpose, but resume it when they cease to be so applied (roads, public places, etc.) : La. 482. **Estates Private** are those which belong to individuals : La. 459.

§ 1051. **Subjects of Property.** There may be ownership (1) of all inanimate things which are capable of appropriation or manual delivery : Cal. 5655 ; Dak. Civ. C. 160. (2) of all things which may be held and transferred by individuals : La. 483.

(3) Of domestic animals, obligations, copyrights, trade-marks, and statute rights : Dak. See also in § 5. See Art. 400.

§ 1052. **Kinds of Property.** Property (or *things* : La.) is either (A) corporeal or incorporeal : La. 460 ; (B) real or personal : Ind. 1285 ; Mich. 9433 ; Wis. 4972 ; Io. 45 ; Kan. 104,1 ; Cal. 5657 ; Dak. Civ. C. 162 ; Ida. Civ. C. 13 (see also Glossary, *Property*) ; or movable or immovable : Cal. ; La. 461.

**Corporeal** things are such as are made manifest to the senses (land, crops, money) : La.

**Incorporeal** things are not, — as rights of inheritance, servitudes, obligations : La.

**Immovable** things are, in general, such as cannot move themselves or be removed : La. 462.

Things immovable (1) *by nature* are lands, buildings, etc. : La. 463-4. So also standing crops, fruits of trees ungathered, growing timber : La. 465. Things immovable (2) *by destination* are those which the owner of a tract of land has placed upon it for its service and improvement : La. 468.

Things incorporeal are not of themselves capable of this distinction ; nevertheless, they are placed in one or the other class according to their object, by the rules of law : La. 470.

§ 1053. **Rights of Owners.** The owner of a thing owns also all its products and accessions<sup>a</sup> and accretions : Cal. 5732 ; Dak. Civ. C. 209 ; La. 498 and 504 ; whether natural or artificial : La. Also all its *civil fruits* (revenues yielded by agreement or operation of law) : La. 499.

**Perfect Ownership** gives the right to use, enjoy, and dispose of one's property in the most unlimited manner, provided it is not used contrary to law : La. 491. But persons residing out of the state cannot dispose of the property they possess here in a manner different from that prescribed by its laws : La.

NOTE. — <sup>a</sup> For the right of accession in detail, see Art. 117 and Title 5.

§ 1054. **Division of Ownership.** The ownership of property is (A) either *absolute* [in Louisiana, *perfect*] or *qualified* [in Louisiana, *imperfect*] (as in §§ 1303-5) : Cal. 5678 ; Dak. Civ. C. 171 ; La. 490.

Ownership is perfect or absolute (1) when perpetual, and unincumbered with any real right towards any other person than the owner : La. ; (2) when a single person has absolute



dominion over the property, and may use or dispose of it according to his pleasure, subject only to general laws : Cal. 5679 ; Ga. 2246 ; Dak. Civ. C. 172.

It is imperfect or *qualified* (1) when it is to terminate on a certain time or condition, or if charged with a usufruct, servitude, etc. : La. ; (2) when it is shared with one or more persons, when the time of enjoyment is deferred or limited, and when the use is restricted : Cal. 5680 ; Dak. Civ. C. 173.

When an immovable is subject to a usufruct, the owner possesses the *naked ownership* : La.

Imperfect ownership only gives the right of enjoying and disposing of property when it can be done without injuring the rights of others in the same : La. 492.

(B) Ownership is further divided into *absolute* and *conditional* : Cal. 5707 ; Dak. 196.

Conditional ownership is defined to be where the time of beginning or end of enjoyment is determined not by computation but by events : Cal., Dak.

(C) The ownership of a thing is vested in him who has the immediate dominion of it, not in him who has a mere beneficiary right : La. 489.

**§ 1055. Merger.** He who has once acquired the ownership of a thing by one title cannot afterwards acquire it by another title, unless it be to supply a deficiency in the first title : La. 495.

But a thing due a person under one title may also be due to him under another : La.

**§ 1056. Possession** and ownership of a thing are entirely distinct : Ga. 2349 ; La. 496. The right of ownership exists independently of the exercise of it : La.

The union of right to possession and ownership makes perfect title : Ga. The possessor of a thing is not entitled to accessions and accretions, but must return them to the owner : La. 502 ; unless the possessor held it *bona fide* : La.

A *bona-fide possessor* is one who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant ; he ceases to be such from the moment these facts are made known to him, or declared to him by the institution of a suit : La. 503.

**§ 1057. Alienation.** Individuals have the free disposal of the property which belongs to them, under the restriction established by law : La. 484. But the property of municipal or other corporations is administered according to laws or regulations which are peculiar to them, and can only be alienated in the manner prescribed in the act of incorporation : La.

**§ 1058. Acquisition of Ownership (A)** is (1) by inheritance, either legal or testamentary, (2) by the effect of obligations, (3) by operation of law : La. 870.

(B) In California, it is (1) by occupancy, (2) by accession, (3) by transfer, (4) by will, (5) by succession : Cal. 6000 ; Dak. Civ. C. 580.

## Art. 106. Transfer.

**§ 1060. Definitions.** *Transfer* is an act of the parties or of the law by which the title to property is conveyed from one living person to another : Cal. 6039 ; Dak. Civ. C. 599.

A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general, except that a consideration is not necessary to its validity : Cal. 6040 ; Dak. Civ. C. 600.

**§ 1061. What may be Transferred.** Property of any kind may be transferred, except as otherwise provided in this article : Cal. 6044 ; Dak. Civ. C. 601. (For real estate, see Art. 142.)

**§ 1062. Mode of Transfer.** A transfer may be made without writing in every case in which a writing is not expressly required by statute : Cal. 6052 ; Dak. Civ. C. 604.

**§ 1063. Effect. (A)** A transfer vests in the transferee all the actual title to the thing transferred which the transferer then has, unless a different intention is expressed or is necessarily implied : Cal. 6083 ; Dak. Civ. C. 619.

(B) The transfer of a thing transfers also all its incidents, unless expressly excepted ; but the transfer of an incident to a thing does not transfer the thing itself : Cal. 6084 ; Dak. Civ. C. 620.



## TITLE II. — REAL PROPERTY.

**Note to the Title.** — \* These provisions apply to personal property also. † These to personal property only.

## CHAPTER I. — LAND TENURES.

**Art. 110. Forms of Tenure.**

§ 1100. **Land Allodial.**<sup>a</sup> In five states, it is expressly enacted that all lands are allodial: <sup>b</sup> Ct. 18,6,1; N.Y. 2,1,1,3; N.J. *Conveyances*, 73; Ky. 63,1,2; Ga. 2221.

And all feudal tenures are, in three, abolished: Ct., N.Y., Ga.

In New Jersey, the statute 12 Car. II. C. 24 is re-enacted, by which tenure by knight's service, and socage *in capite*, was abolished, with all its incidents: N.J. *Conveyances*, 69.

And all feudal tenures are abolished of lands originally granted by or under the state: N.J. *ib.* 73.

And in two states, all tenures are declared to be in free and common socage: <sup>c</sup> N.J.<sup>d</sup> *ib.* 70–71; S.C. 1761.

NOTES. — <sup>a</sup> See also the constitutional provision, § 400. <sup>b</sup> But compare § 1101. <sup>c</sup> And see § 1103. <sup>d</sup> This seems inconsistent with the principal provision above.

§ 1101. **Title of the State.** In four states, the Commonwealth is deemed to have possessed the original, and has the ultimate, property in all lands in the state: N.Y. 2,1,1,1; Ky. 63,1,1; Cal. 40; Ga. 2350.

In Louisiana, the national domain comprehends all the landed estate and all the rights which belong to the nation, whether it is in the actual enjoyment of the same or has only a right to re-enter: La. 486.

The legislature can pass no law interfering with the primary disposal of the soil (compare § 407): Dak. Civ. C. 168.

§ 1102. **Incidents of Tenure.** Where feudal tenures are abolished, it would seem that all the incidents thereof are also abolished, including escheat; and that the so-called escheat now existing is properly an enactment of the state as sovereign, and not a consequence of tenure. See N.Y. 2,1,1,3.

And the following are expressly abolished: (1) *Wardships*: N.J. *Conveyances*, 69; (2) *ousterlemains*: N.J.; (3) *values* and *forfeitures of marriages*: N.J.; (4) *fincs* for alienations: N.Y. C. 1,15; N.J.; (5) all *quarter-sales* and other restraints on alienation reserved in grants of land: N.Y.; (6) all liveries, primer seisin, homage, aids, escuage, etc. (as in 12 Car. II. C. 24): N.J.

But in the states where feudal tenures are preserved, as well as in other states by anomaly, the following are expressly preserved: (1) *Rent service* in socage tenures, with the distress incident: N.Y.<sup>a</sup> 2,1,1,4; N.J. *Conveyances*, 72; (2) *fealty* incident to such tenure: N.J.

NOTE. — <sup>a</sup> See also the constitutional provision, §§ 400–403.

§ 1103. **Guardianship in Socage**, where it exists, belongs first to the father, then to the mother, then to the nearest and eldest relatives of full age not under legal incapacity: N.Y. 2,1,1,5.

Among relatives of the same degree males are preferred: N.Y.

The rights and authority of a guardian in socage are superseded by those of an ordinary guardian: N.Y. 2,1,1,7.

§ 1104. **Who may hold Lands.** (For *aliens*, see in Division II.) In New York, any citizen of the United States is capable of holding lands and of taking them by descent, devise, or purchase: N.Y. 2,1,1,8.

An Indian may purchase, hold, and convey lands; but is only liable on contracts and subject to taxation and civil jurisdiction when he has become a freeholder to the value of \$100: N.Y. 1843,874.

In Indiana, no person except a citizen of the United States, an alien at the time in good faith resident therein, or an Indian, negro, or mulatto, can take, hold, convey, or pass lands by devise or descent: Ind. 2915.

§ 1105. **Who may Convey.** See § 1410. All persons of full age not under legal incapacity may alien lands, or any interest in them, immediate, future, or contingent, by deed or will, according to law: Ala. 2144. Every person capable of holding land may alien at pleasure, except idiots, insane persons, or infants: N.Y. 2,1,1,10. No purchase or contract with Indians is valid except under legislative authority: N.Y. *ib.* 11-12. See also in Division II.

§ 1106. **Quia Emptores.** This statute is expressly declared to be in force in New Jersey: N.J. *Conveyances*, 68.

## Art. 111. Of the Acquirement of Title.

§ 1110. **Settlers.** (A) In New Hampshire, the state land commissioners have power to sell public lands as they deem expedient: N.H. 8,1.

(B) In Maine, the state land agent may convey any lots which have been surveyed according to law, at the price of thirty-five cents an acre to actual settlers; and no more than one lot, not exceeding 200 acres, shall be sold to any one person; the purchaser gives two notes, payable in labor on the roads, and must establish his residence on the lot within two years from the date of the certificate, which is then given him. If the purchaser fails to perform any of the duties required of him, or to pay his notes, he forfeits all right to his land, and the land agent may dispose of it to another. When the conditions are complied with, the land agent gives the settler an absolute deed: Me. 5,27-8,31 and 34. Timber lands are sold to the highest bidder by sealed proposals: Me. 5,45.

(C) In New York, the commissioners of the land office direct the surveyor-general to sell the public lands at a price to be fixed by them; and they also fix the amount to be paid down; the rest is secured by a bond payable in six years with annual interest at six per cent; the purchaser thereupon receives a certificate, and, upon complying with the conditions of the bond, a patent for the land: N.Y. 1,9,5, §§ 18-20,23,25,27.

(D) In Pennsylvania, the acts relating to settlers and land warrants are all old, and probably there remains no land now open to settlement: Pa. *Land Office*. So, in Massachusetts, Vermont, Rhode Island, Connecticut, Indiana, Illinois, Iowa, Delaware and Missouri.

(E) In Ohio, the auditor of the state is land agent, and may sell the public land, where there are no laws relating to the subject, to actual settlers only, at twenty-five per cent of the appraised value; the settler makes affidavit of good faith and intent to make actual settlement within twelve months; upon actually residing on it within eighteen months, he receives a deed: O. 8459,8464-5.

(F) In Michigan, the state university lands may be sold at \$12 per acre, and the state school lands and salt spring lands at \$4 per acre, after having once been offered at public auction; fifty per cent to be paid down, the balance at the option of the purchaser, with seven per cent interest: Mich. 5262-3; 5290-1. For non-payment of principal or interest, the certificate is void, and the state land commissioner may retake possession: Mich. 5267. The minimum price of the state building lands is \$8 per acre, terms as above: Mich. 5288-9. And of the internal improvement lands and swamp lands, \$1.25 per acre: Mich. 5296,5391. Of the agricultural college lands, \$3 per acre, one fourth paid down, interest on balance: Mich. 5370. A gratuitous patent for swamp lands issues to a settler for 80 acres which he has occupied for five years and drained: Mich. 5436.

(G) In Wisconsin, every person who settles upon and improves public lands may purchase 160 acres at the following prices: \$1.25 per acre for swamp lands; the price of lands never offered at public sale is fixed at \$3 per acre: Wis. 196,202,205,206*a*.; 1885,383. But no lands are subject to private entry until they have once been offered at public auction: Wis. 207. And by a later provision of the same statute, all lands may be entered upon and

settled, 200 acres to each person, at \$1.25 per acre. The applicant receives a certificate on making payment of the amount required to be paid on the sale: Wis. 213.

(H) In Minnesota, the minimum price of school lands is \$5 per acre, and also of "agricultural college" and swamp lands: Minn. 38,6 and 55 and 76. The terms are, fifteen per cent down, balance any time within thirty years, at five per cent interest: Minn. 38,7; 1885,195 and 201. A certificate is given the purchaser, which becomes void upon non-payment of interest: Minn. 33,8-9.

(I) In Kansas, the school lands (survey sections 36 and 60) are sold from time to time at auction, at not under \$3 per acre; the purchaser paying ten per cent down, and giving bond to pay the residue in twenty years, with interest at six per cent: Kan. 92,193 and 198; 1883,140. University lands, at least three fourths appraised value, in the same way: Kan. 115,21.

(J) In Nebraska, the educational lands are sold at auction at not less than the appraised value; in no case less than \$7 per acre; the terms are ten per cent down (or fifty per cent down in lands not prairie), the remainder in twenty years, with six per cent interest: Neb. 1,80,7-8. A certificate issues upon the sale, and a deed when full payment has been made: Neb. *ib.* 13 and 15.

(K) In Virginia, any person may purchase waste or unappropriated lands at \$1 per acre of the state treasurer, who gives a receipt for which the auditor gives a certificate, and thereupon the register of lands issues a grant or warrant: Va. 39,1; 103,4. All entries must be surveyed within two years: Va. 108,9. No entry can be made under warrant on land which has been settled continuously for ten years previously, and upon which taxes have been paid at any time within such ten years by such settler; but the state title is relinquished to such person: Va. 103,41. (L) In West Virginia, no entry on land can now be made: W.Va. 111,2; all waste and unimproved lands are to be sold by the land commissioner for the benefit of the schools under decree of court: W.Va. 175,4-5 and 9; 1882,95; 1885,46.

(M) In North Carolina, all lands (except swamps or lands covered by water) may be entered upon by a person who has a *bona-fide* intention of becoming resident in the state, whether a citizen or not at such time, at a price of twelve and a half cents an acre for not more than one hundred acres; or fifteen cents an acre if more than one hundred acres, to be paid before the December 31st in the second year thereafter: N.C. 2751,2754,2764,2766; 1885,185. Upon the treasurer's receipt, the auditor issues a certificate, which is assignable, and the secretary of state issues a grant: N.C. 2778-9. (N) In Tennessee, it appears that school lands may still be sold, and upon full payment a certificate will issue: Tenn. 954*a* (Thompson & Steeger).

(O) In Missouri, the saline, seminary, and state lands may be sold at private sale at \$1.25 per acre, in sections, half or quarter sections, and payment is made at the time, whereupon a patent issues: Mo. 6102-3,6105. School lands may be sold at the same price if a majority of the householders in the town so vote, payment to be made in one year, with ten per cent interest: Mo. 6117 and 6122. Swamp lands may be sold by the counties at auction, or at private sale for not less than \$1.25 per acre: Mo. 6153.

(P) In Arkansas, overflowed and swamp lands may be sold at auction (subject to the pre-emption rights of actual settlers, and after notice) by the state commissioner at not less than \$2 per acre: Ark. 4191-4. A certificate issues to the purchaser: Ark. 4195. Lands not so sold may at any time be entered at the same prices: Ark. 4197. Internal improvement lands may be sold at auction, or after offer at auction by private sale, at a minimum price of \$1.25 per acre in both cases, not exceeding 640 acres to any one person; price to be paid in cash: Ark. 4325-6. A certificate issues at once, and a deed in fee upon payment completed: Ark. 4305. Seminary lands are sold in the same manner and terms, but not more than eighty acres to any one person, at \$1 per acre: Ark. 4274. Saline lands are sold like internal improvement lands, but not more than forty acres at once, at \$1.25 per acre: Ark. 4275. School lands (the sixteenth section) may be sold, whenever a majority of the township so vote, for not less than three fourths the appraised value, at auction, only forty acres at once; one quarter down, balance in three annual instalments, at eight per cent: Ark. 6277-6285.

(Q) In Texas, every person aged eighteen, a citizen of Texas, not the proprietor of 160 acres of other lands, who settles and occupies in good faith vacant land, may purchase a lot not exceeding 160 acres, at \$1 per acre; the survey must be made within three months, and a patent issues upon payment of the purchase-money within twelve months of the survey: Tex. 3924-5; 3923,3930. Every person who is the head of a family is entitled to receive 160 acres, and every single man aged eighteen, 80 acres of vacant land, as a gift, upon simple settlement and application, such settler not being the owner of other lands in the



state: Tex. 3937-9. It must be surveyed within twelve months, and the settler is entitled to a patent after three years' residence on the land: Tex. 3941,3944.

(R) In California, settlers may purchase lands, not exceeding 320 acres in the case of school lands, and full title vests upon payment: Cal. p. 416, vol. i. § 1; vol. iii. p. 162, § 1. Swamp lands are sold at \$1 per acre to persons owning in all not over 640 acres of land, payable twenty per cent in fifty days after survey, balance when required by statute, with interest at seven per cent: Cal. 3440a; vol. iii. p. 162; 3443. Settlers have a preferred right of purchase for six months after settlement: Cal. 3442. School lands are sold at \$1.25 per acre, payable as before, to actual settlers having not over 320 acres of land in all with that sought to be purchased: Cal. 3494-5 and 3500. A certificate issues upon the first required payment, and a patent when payment completed: Cal. 3514,3519.

(S) In Oregon, the board of land commissioners may sell school lands to actual settlers, not more than one half section to each, at \$2 per acre, or at an appraised value, one third down, balance at the pleasure of the purchaser, with ten per cent interest; he receives a certificate at once and a deed when fully paid: Ore. 29,9-10 and 20. Apparently, however, so much of this as limits the quantities and price of land to be sold is repealed by a later statute: Ore. 29,21. And by a subsequent contradictory statute (which, however, neither repeals nor amends the above) all school lands are to be sold in quantities not exceeding 320 acres each to actual settlers at an appraised price, one third down, remainder in one and two years, with ten per cent interest. Certificate and deed issue as above. No land can be sold for less than \$1.25 per acre: Ore. 29,25-29. There are special laws applying to the La Grande district: Ore. 29,53-57. Swamp lands may be sold at \$1 per acre to settlers who improve and drain them: Ore. 29,61-2. Agricultural college lands, at \$2.50 per acre, to persons not holding over 320 acres of land in the state; one quarter down, rest in three years, at ten per cent: Ore. 29,76-7. See also Ore. Laws, 1878, p. 41.

(T) In Nevada, the minimum price of lands is \$1.25, or, if within the twenty-mile Central Pacific Railway limit, \$2.50 per acre; but the board of regents may increase the price of any lands before application to purchase. No person can purchase more than 320 acres; and occupants have a preferred right: Nev. 3815,3823-4. Timber lands must be paid for in full at time of purchase; agricultural or grazing lands may be purchased on payment of one fifth down, balance in nine annual instalments, with interest at ten per cent: Nev. 3820, p. 403. One hundred and sixty acres of salt lands may be located: Nev. 3831.

(U) In Colorado, all citizens have the right to settle upon and occupy the public lands in quantities not exceeding 160 acres to each, upon simply making and acknowledging a declaration, which is duly recorded: Col. 2674-5,2678. The state board of land commissioners may at any time direct the sale of lands at auction, in separate lots of forty acres each; a minimum price is fixed by the board, and arid lands may also be so sold, at not less than the appraised value: Col. 2723-4. Thirty per cent of the purchase-money must be paid at sale (or, in the case of timbered lands, the whole) (Col. 2726), and bond given for the rest in seven annual instalments, with interest at seven per cent: Col. 2727. A certificate issues upon first payment, and bond given as above; a patent upon full payment: Col. 2728-9. School lands were formerly sold, upon petition of ten householders in the district, at auction, for not less than an appraised value (Col. 2746-7), but now only at the discretion of the state board, like other lands: Col. 2748.

(V) In the territories, the rights to public land are determined by United States laws. See U.S. R. S. 2257-2379; 2414-2490; U.S. L. 1878, C. 190; 1946-7. See also the Land Office Circular of Aug. 30, 1872, printed in Wy. Comp. L. p. lxxxii.

(W) In South Carolina, no grant of vacant land can now be issued except to actual purchasers for value; sales are made by the commissioners of the sinking fund: S.C. 61 and 63.

(X) In Georgia, lands subject to entry may be entered by application to the ordinary of the county for a warrant: Ga. 2364,2368. An applicant in possession has preference: Ga. 2369. Upon favorable report by the county surveyor, the plat is forwarded to the secretary of state, who issues a grant; the interest of the settler before grant may be assigned, but is not subject to levy. The grant must be applied for within two years of the order: Ga. 2375-7. (Y) In Alabama, school lands may be sold on vote of the township, at a minimum appraised price: Ala. 975,980. The sale is at auction, on varying credits, at eight per cent interest on balance unpaid: Ala. 983. A certificate is given the purchaser, which passes a conditional estate, to become absolute on payment of the purchase-money and interest (Ala. 987-8), whereupon a patent issues (992). For Mississippi, see Code, 1576,2552-3,2608 and Laws, 1884,13.



(Z) In Florida, any person aged twenty-one, or who is the head of a family, and a citizen of the United States, or who has filed a preliminary declaration to become such, may enter one quarter section of the lands of the state, or such quantity as will not make more than 160 acres with land previously held. A deed issues at the end of five years if the settler or his heirs have occupied, drained, and improved such land: Fla. 131,6-7. If during such period he change his residence or abandon the lands, they revert to the state: Fla. 131,9. No person can make more than one entry: Fla. 131,10. The person entering may pay the minimum price for the quantity of land so entered at any time before the expiration of five years, and obtain a deed thereof on proof of settlement and cultivation: Fla. 131,11. Payment may be made in three equal annual instalments; for failure to pay, the land reverts to the state: Fla. 131,16 and 19. See also, Fla. Laws, 1883,3451.

(AA) In Louisiana, government, swamp, and other lands, and seminary lands, may not be sold at less than \$1.25 per acre: La. D. 2929,1310,2937. Patents issue to purchasers on payment of the purchase-money: La. D. 2938. School lands are sold upon a majority vote of the township, at auction, for not less than an appraised value, in quantities from 40 to 160 acres to any one person, payable ten per cent in cash, balance in nine annual instalments, with interest at eight per cent secured by mortgage and personal security *in solido*: La. D. 2960. (There are also special provisions as to certain parishes.)

(AB) In New Mexico, any person may take possession of public land belonging to the United States, and make out a notice of claim to such land, not exceeding 320 acres, which is duly recorded, and thereupon such person has a right of possession as against all persons except the United States or persons holding under grant therefrom, and may maintain ejectment or forcible entry; but if such person fail to occupy the lands for six months, it is an abandonment. If such person make improvements, and is ejected, he is entitled to the value of the same, and such claim is a lien upon the land. The possession of land and improvements as herein provided may be conveyed like other real estate: 1878,6,1 and 3-5.

§ 1111. **Grants by the State.** The code of Georgia declares that a grantee of lands or a franchise takes nothing by implication, but is confined to the terms of the charter; but every presumption is in favor of a grant: Ga. 2362.

Grants by the state are made by patent, under seal of the state, signed by the governor and attested by the secretary: Ala. 2228. They are recorded by the secretary of state, but any person having a patent may record it like other deeds in the county where the land lies: Ala. 2231.

§ 1112. **Vacant Land.** In Maryland, any vacant land, cultivated or not, and any land which has escheated by reason of the last owner in fee-simple dying intestate thereof without heirs, may be taken up by any person not an alien, the first one applying being first entitled, on paying a fixed sum per acre and one third the value of the improvements: Md. 16,17 and 27-29.

§ 1113. **Land Certificates** (see § 1110) or settlers' rights before a patent issues are assignable, and the assignee may generally maintain any action relating to the land (except as against the state or its subsequent grantee): Me. 5,30 and 36; Mich. 5317; Wis. 215; Io. 88; Minn. 38,8 and 12 and 26; Va. 108,45; N.C. 2779; Tenn. (Thompson & Steeger) 954a; Mo.<sup>a</sup> 6148; Ark.<sup>b</sup> 3926,3934,3938,4205; Tex.<sup>a</sup> 3947; Cal.<sup>a</sup> 3515; Ore.<sup>a</sup> 29,11; Col. 2676; N.M. 2583. But not so, in one: Ky. 1884,1337.

The fee of the land remains in the State, however, until, upon full payment, a patent is issued: Me. 5,28; Mich. 5269-70; Wis. 219; Minn. 38,12 and 13; Kan. 100,4; 92,206; Neb. 1,80,15; Ark. 4305,4321.

The assignment must be indorsed on the warrant and attested by two witnesses: Va., Ark. The wife of the owner must consent to such sale: N.M.

NOTES. — <sup>a</sup> Such assignment must be by deed; so <sup>b</sup> only in the case of swamp lands.

§ 1114. **Rights of Settlers.** An actual settler, before deed granted, may cut timber for building or fencing: Me. 5,37; N.Y. 1,9,5,26; Wis. 220; Io. 3342; Kan. 92,205; Neb. 1,80,22; Col. 2737.

But he may not, except as above, cut timber unless such right is expressly granted : N.Y. ; Wis. ; Neb. 1,80,21 ; Col. So, in others, he may not commit any waste : Kan.

The certificate entitles him to possession of the land, and he may maintain trespass : Me. 5,36 ; Mich. 5279 ; Wis. 220 ; Minn. 38,18 ; Col. 2681.

The declaration of settlement does not include gold and silver lodes on the land ; but such mining claims must be acquired by special process : Col. 2680.

The claim must be marked out, but need not be enclosed, to enable the owner to maintain trespass, and must either be occupied, or improved to the value of \$100 : Col. 2682-3. A neglect to occupy, or to enclose five acres with a reasonable fence, or to plough at least five acres of the same for the period of six months, is considered such an abandonment as to preclude the owner's maintaining trespass : Col. 2634.

§ 1115. **Exemption.** (A) A settler purchasing wild land of the state under this article, and complying with the condition of purchase, may hold it with the improvements thereon free from attachment and execution while he remains in possession thereof (1) to the value of \$1,000 : Me. 5,38 ; (2) to any value as to debts previously contracted : Ga. 2376 ; Fla. 131,8 ; N.M. 2571.

And on his death it descends to his children, subject to dower, and is not liable for his debts unless his other property is insufficient therefor, and then not until the youngest surviving child attains the age of 18 : Me. 5,39.

§ 1116. **Squatters.** Any person who has enclosed or may enclose a portion of unclaimed government land, or has purchased such enclosure or erected any building or improvement thereon, is declared the lawful owner of the claim to the possession of such enclosed land and of the improvements, and is so to be held in all legal proceedings : Wash. 1883, p. 70 ; Wy. 1884,66,1 ; Uta. 612 ; N.M. 2579.

All persons making improvements on the public lands within the state, so long as they continue to possess or occupy the same, shall enjoy the free and undisturbed use of such improvements : Fla. 131,1 ; Ida. 1874-5, p. 752, § 4 ; Mon. G. L. 992 ; Ariz. 3446. If such lands are entered the person entering must pay the squatter the appraised value of such improvements before he can obtain possession : Fla. 131,2-3 ; La. R. S. 2943,2657 ; N.M. 2582.

Timber or other articles of value on lands of the United States reduced to possession by any person, shall be deemed the property of such person against all persons except the United States : N.M. 2572 ; Ariz.

Such rights may not extend to more than (1) 160 acres : Nev. 79 ; Wash. ; Ida. *ib.* § 2 ; Mon. ; Wy. p. 511,2 ; 1884,66,1 ; Ariz. ; (2) 320 acres : N.M.

In Arkansas, settlers who have made improvements have a preference right to purchase such land, not exceeding 160 acres, at the minimum price : Ark. 4214 ; 4227.

Any squatter on public lands on which settlement is not expressly prohibited by Act of Congress may maintain trespass and ejectment as if he had a fee-simple title : Mo. 2448 ; Nev. 78 ; Ida. 1874-5, p. 751, § 1 ; Wy. p. 511, § 1 ; 1884,66,3 ; N.M. 2581. Such claims must be clearly staked out : Nev. ; Wy. *ib.* 3. They must be recorded : Nev. 80 ; N.M. The settler must improve such land within ninety days to the value of \$200 : Nev. 81. Neglect to occupy or cultivate for six months (in Nevada, sixty days, or twelve months after \$15 fee paid to the county treasurer : Nev. 82) is an abandonment : Wash. ; Wy. *ib.* 4 ; N.M.

These rights are declared to be chattels real (see §§ 1300-1,1550) : Mon. This section is generally expressly declared not to apply as against the United States or United States laws ; and the same would follow from general principles.

§ 1117. **Transfer.** Such rights as are described in § 1116 may be duly transferred by deed : Kan. 21,10 ; Neb. 1,38,2 ; Wy. 1884,66,2 ; Mon. G. L. 994 ; Uta. 613-4 ; N.M. 2571,2583 ; Ariz. 3447.

§ 1118. **Commons.** All public lands proper for pasturing cattle, sheep, and horses are, in New Mexico, reserved for such purpose, and declared common pastures, and such lands may

not be used by any person as private property, but shall be held public and common to all : N.M. 2573-4.

No person can occupy any meadow in such public lands for the purpose of speculating with the hay thereon, but any person may so occupy 160 acres by enclosing them with a fence : N.M. 2575.

**Art. 112. Title by Prescription.** (For definitions and other provisions, see also in Part IV.)

§ 1120. **Title by Possession.** (A) In two states, the actual adverse possession of land (without written title) gives a good title by prescription against any one<sup>a</sup> if continued for twenty years : R.I. 175,2 ; Ga. 2682. So, ten years' possession : Miss. 2668.

But in processioning land, actual adverse possession under a claim of right for more than seven years shall be respected, and the lines marked so as not to interfere with such right : Ga. 2389.

(B) Seven years' quiet possession of lands which were first entered upon under an equitable right gives an absolute title except as against persons under disability : Pa. *Limitation*, etc. 1. So, in Tennessee, when the lands are held under a conveyance purporting to convey a fee : Tenn. 3459.

(C) Whenever in any case the action of a person for the recovery of real estate is barred by the provisions of the statute of limitations the person having such adverse and peaceable possession is held to have full title, precluding all claims : Tex. 3196 ; Cal. 6007 ; Dak. Civ. C. 582.

(D) Occupancy for any period, whether of real or personal property, confers a title sufficient against all except the state and those who have other actual title under § 1058 B : Cal. 6006 ; Dak. Civ. C. 581. (E) In Oregon, there is a conclusive presumption that an uninterrupted adverse possession of real property for twenty years has been held pursuant to a written conveyance : Ore. Civ. C. 765.

(F) In Colorado, every person in the peaceable and undisputed possession of lands or mining claims, or vacant lands, under claim and color of title made in good faith, including pre-emptions, who shall, or whose assigns may, for five successive years hereafter continue in such possession and pay all taxes during such time, shall be held the legal owner thereof : Col. 2186-7.

(G) In Louisiana, possession of immovables for ten years, if with title and in good faith (see Part IV.) or thirty years with no title and not in good faith, gives an absolute prescription : La. 3474-5 ; 3478-9 ; 3499.

(H) In New Mexico, every person, his heirs, etc., in peaceable possession of land for ten years under deed, devise, or grant from Spain, Mexico, or the United States, has an absolute<sup>a</sup> title to the same. And possession under Spanish or Mexican law or custom from the time of annexation to the United States always gives a good title as against any one : N.M. 1880. Any person holding real estate without evidence of title may file a statement of claim duly executed and acknowledged, setting forth how it was acquired and what he claims, in the registry of deeds ; and when recorded, such statement is notice to all the world of the claim, and the statute of limitations begins to run : N.M. 2747.

(I) In New Jersey, sixty years' actual possession uninterruptedly continued by occupancy, descent, conveyance, or otherwise, however it commenced, makes a good title and absolute bar against all the world : N.J. *Limitations*, etc. 23 ; or thirty years' such possession, if it commenced in a proprietary title or purchase in good faith (except as against persons under disability ; see Part IV.) : N.J. *ib.* 24.

NOTE. — <sup>a</sup> See, however, for persons under disability, etc., in Part IV.

§ 1121. **Against the State**, twenty years' possession of land, under a claim of right, when such land is subject to entry and grant (1) authorizes the courts to presume a grant : Ga. 2363 ; (2) such possession is a bar as against the state : Del. 2,2 ; S.C. Civ. C. 95. (3) So, ten years' possession and one year's tax paid (see § 1110) : Va. 103,41. (4) So, thirty years' adverse possession, or twenty-one years' possession with colorable title : N.C. 139.

§ 1122. **Ancient Possession.** In South Carolina, an actual, peaceable, and quiet possession of lands five years previous to July 4, 1776, shall be deemed a good and sufficient title ; and any grant obtained since that time, or which may be obtained, for the said land, is null and void : S.C. 1769.



§ 1123. **Tacking Prescriptions.** An inchoate prescriptive title may be transferred by a possessor to a successor, so that the successive possessions may be tacked to make out the prescription : Ga. 2689 ; Col. 2186-7. See also in Part IV.

## Art. 114. Eminent Domain.<sup>a</sup>

### § 1140. General Principles.

[In most of the states, this subject is treated only in connection with the several laws affecting the taking of land for public use : see in Part III.] In a few states, it is expressly enacted that this right remains in the state : Ky. 63,1,3 ; Cal. 44 and 6001 ; Ga. 2221. So, it seems, in several others, by implication : La.\* 497,2626 ; Ida. Civ. C. 851 ; Mon. Civ. C. 579 ; Uta. C. Civ. P. 1105.

It is defined to be the right of the people or government to take private property for public use : Cal. 11237 ; La.\* 2626 ; Mon.

The code of Georgia defines eminent domain to be the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good : Ga. 2222.

NOTE. — <sup>a</sup> See also Art. 9. For the process of condemning land in special cases or by special corporations, see in Part III.

§ 1141. **Purposes.** But no one can be deprived of his property (A) unless for some purpose of public utility : Cal. 11237 ; La. 497 ; Mon. Civ. C. 579.

And (B) in other states, the following public purposes are specified : (1) for public buildings and grounds (a) for the use of the state : Cal. 11238 ; Ida. Civ. C. 851 ; Mon. Civ. C. 580 ; Uta. C. Civ. P. 1105 ; (β) for all other public uses authorized by the legislature : Cal., Ida., Mon., Uta. ; (γ) for the use of any county, city, village, or school district : Cal., Ida., Mon., Uta. ; (δ) for the use of the United States : W.Va., Cal.

(2) For ways, roads, streets, and alleys, for the use of any county, city, village, or town : W.Va. 79,2 ; 1881,18 ; Cal. ; Ida. ; Mon. ; Uta.

(3) For waterworks, pipes, aqueducts, etc., for any county, city, village, or town : Cal., Ida., Mon., Uta.

(4) For drains and sewers for any county, city, village, or town : Cal., Ida., Mon., Uta.

(5) For raising the banks of streams, removing obstructions therefrom, widening, deepening, or straightening their channels : Cal., Ida., Mon., Uta.

(6) For incorporated companies of which the State is sole or part owner : W.Va. ; (7) for court-houses or public buildings : W.Va. ; (8) for public school-houses : W.Va.

(9) For all other public uses for the benefit of a county, city, village, or town : W.Va., Cal., Ida., Mon.

And (C) for the following non-public or corporate uses : (1) for railways, steam : W.Va. ; Tenn. 1549 ; Cal. ; Ida. ; Mon. ; Uta. ; and horse : Cal., Ida., Mon., Uta.

(2) For turnpike or toll roads : W.Va., Tenn., Cal., Ida., Mon., Uta.

(3) For canals : W.Va., Tenn., Cal., Ida., Mon., Uta.

(4) For ditches for draining : Cal., Ida., Mon., Uta.

(5) For aqueducts and pipes for water supply : Cal., Ida., Mon., Uta. Or irrigation : Cal., Ida., Mon., Uta.

(6) For wharves, docks, piers, etc. : W.Va., Cal., Ida., Mon., Uta.

(7) For bridges : W.Va., Tenn., Cal., Ida., Mon., Uta.

(8) For chutes or booms : Cal., Ida., Mon., Uta.

(9) For ferries : Cal., Ida., Mon., Uta.

(10) For telegraph (or telephone, in West Virginia) lines : W.Va., Cal., Ida., Mon., Uta. ; (11) for cemetery associations : W.Va. ; (12) for oil-pipe lines : W.Va.

So, it is enacted that in time of war or insurrection the proper authorities may possess and



hold any part of the territory of the state for the common safety: Ga.; that the legislature may authorize the appropriation of the same to public purposes, — such as the opening of roads, the construction of defences, or providing channels for trade or travel: Ga.

§ 1142. **Compensation.** And in many states, that a just or equitable indemnity or compensation must be paid: Ill. 47,1; W.Va. 79,1; Tenn. 1562; Cal. 11248; Ida. Civ. C. 861; Mon. Civ. C. 590; Uta. C. Civ. P. 1115; La.\* 497, 2678.

It must be paid (or, in Illinois, West Virginia, Tennessee, Idaho, secured to be paid) (1) before the taking: Ill. 47,10 and 13; W.Va.<sup>a</sup> 1881,18; Tenn. 1570; Ida. *ib.* 866; La.\* 497,2629; (2) within thirty days after final judgment: Cal. 11251; Ida. Civ. C. 864; Mon. Civ. C. 593; Uta. C. Civ. P. 1118; (3) within ninety days (*a*) after the taking: Md. 64,133; (*β*) after the final judgment: W.Va. 1881,18,18.

But final order of condemnation does not issue until damages paid: Uta. C. Civ. P. 1120.

Such indemnity must include both the value of the thing taken and damages for the taking to other land, etc.: W.Va. *ib.* 14; Cal. 11248; Ida.; Mon. Civ. C. 590; Uta.; La.

“Except in cases of extreme necessity and great urgency, the right of eminent domain cannot be exercised without first providing for just compensation to the owner for interference with his exclusive rights.” Ga. 2225.

All claims for damages are barred in two years from the occupation of the land: La. 2630.

The benefit to the remaining property of the owner is, in several states, to be deducted from such damages: W.Va., Tenn., Cal., Ida., Mon., Uta.

But, in others, it may *not* be so deducted: Ill. 47,9; La. 2633.

Except in the case of taking by the state (Illinois), such indemnity must be determined by a jury: Ill.; W.Va.; <sup>a, b</sup> La. 2632.

But it is first determined by commissioners appointed by the court, with appeal to such jury: W.Va. 1881,18,10 and 17.

NOTES. — <sup>a</sup> In the case of taking by companies incorporated for purposes of internal improvement.

<sup>b</sup> If a jury is required by either party.

§ 1143. **What May be Taken.** (A) Generally, (1) all real property belonging to private persons may be taken: Cal. 11240; Ida. Civ. C. 853; Mon. Civ. C. 582; Uta. C. Civ. P. 1107. So, all personal property: La.\* 2626.

(2) All lands belonging to the state, or any county, city, village, or town, and not appropriated to some public use: Cal., Ida., Uta.

(3) Property appropriated to one public use may be taken for another, if more necessary: Cal., Ida., Mon., Uta.

(4) Franchises may be taken for free ways, railroads, or more necessary public use: Cal., Ida., Mon., Uta.

(5) All other classes of private property may be taken, when authorized by law: Cal., Ida., Mon., Uta.

§ 1144. **Estate Taken.** (A) A fee is taken, (1) when for public buildings or grounds, reservoirs, and dams: Cal. 11239; Ida. 852; Mon. Civ. C. 581; Uta. C. Civ. P. 1106.

(2) In all cases except as in B specified: W.Va. 1881,18,18.

(B) An easement is taken (1) except as in A specified: Cal., Ida., Mon., Uta.

(2) In the case of roads and turnpikes: W.Va.

§ 1145. **The Process** must be (A) in a manner previously prescribed by law: W.Va. 79,1; 1881,18; La. 497. (B) Under due process of law: N.Y. 1,4,13; La.\*<sup>a</sup> 2627. (C) By petition to court: Ill. 47,2; W.Va. 1882,150; Tenn. 1550; Cal. 11243; La.\* 2630,2640; Ida. Civ. C. 856; Mon. Civ. C. 586; Uta. C. Civ. P. 1110.

NOTE. — <sup>a</sup> When the owner refuses to part with it, or demands an exorbitant price.

§ 1146. **The Reasons for Taking.** (A) The use must be one authorized by law : Cal. 11241 ; Ida. 854 ; Mon. Civ. C. 583 ; Uta. C. Civ. P. 1108.

(B) The taking must be necessary to such use : Cal., Ida., Mon., Uta.

And if already appropriated to a public use, the public use for which it is again taken must be the more necessary one : Cal., Ida., Mon., Uta.

§ 1147. **Jurisdiction of.** In Georgia, it is declared to be the province of the legislature to judge of the exigencies requiring the exercise of the right of eminent domain ; and if, under pretext of such necessity, the property of one is taken for the private use of another, the courts should declare the law inoperative : Ga. 2223.

The petition is generally brought in the superior court : Cal. 11243 ; La.\* 2630 ; Ida. Civ. C. 856 ; Mon. Civ. C. 585 ; Uta. C. Civ. P. 1110.

§ 1148. **The Judgment** of expropriation is valid as against all persons, including those under disability, whether they had actual notice or not : La. 2639. If thereafter any individual claim rights in the land, as owner or creditor, his remedy is against the person who received the damages : La. 2641.

§ 1148<sup>a</sup>. **Compensation.** In several states, it is enacted that in cases under this section, any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such city or other municipal corporation : Va. 55,16-17 ; Ga. 2226 ; La. 672.

§ 1149. **Destruction of Property.** It is, in Georgia, enacted that a right analogous to that of eminent domain is vested in the corporate authorities of cities, towns, and counties to interfere with, and sometimes to destroy, the private property of the citizen for the public good : Ga. 2226.

Thus, there is a right to effect the destruction of houses to prevent the extending of a conflagration : Ga. ; Va. 55,15 ; La. 672. So, the taking possession of buildings to prevent the spreading of contagious diseases : Ga.

## Art. 115. Escheat.

§ 1150. **General Principles.** All property, real and personal, within the limits of the state, which does not belong to any person, belongs to the people : Cal. 41 ; Nev. 805.

§ 1151. **Of Real Property in Cases of Intestacy.** In nearly all the states, when a person dies intestate, leaving real property, and no heir or person entitled to succeed under the laws of descent (Art. 310), it escheats, subject to the payment of all debts <sup>a</sup> (and charges of administration), (A) to the state : N.H. 203,7 ; Mass. 125,1 ; Me. 75,1 ; Ct. 18,2,1 ; 1885,110,53 ; N.Y. 2,1,1,1 ; N.J. *Escheats*, 1 ; Pa. *Escheats*, 1-3 ; O. 4161 ; Ind. 2478 ; Mich. 411 ; Wis. 2270 ; Io. 2460 ; Minn. 46,3 ; Neb. 1,80,2,3 ; 1,83,9,2 ; Md. 16,17 ; Del. 82,1 ; Va. 109,3 ; W.Va. 81,2 ; N.C. 2626 ; Ky. 36,1,1 ; Tenn. 2961 ; Mo. 5564 ; Ark. 2759 ; Tex. 1770 ; Cal. 41, 11269,6421 ; Ore. 16,1 ; Nev. 805 ; Dak. Civ. C. 795 ; Ida. Prob. C. 315 ; Mon. Prob. C. 535 ; Uta. 713 ; S.C. 2300 ; Ga. 2669 ; Ala. 2851 ; Miss. 881 ; La. 485 ; Fla. 99,2 ; N.M. 1437 ; Ariz. 3551.

(B) To the town where the estate lies : Vt. 2235,2237 ; R.I. 188,1.

(C) To the county where the estate, or the greater part of it, lies : Ill. 39,1 ; 49,1 ; Wash. 1883, p. 57.

(D) To the county where administration is had : Kan. 37,177.

So, in the case of bastards, real estate escheats when such deceased bastard left no heirs capable of taking under § 31: Ill. 39,2.

NOTE. — <sup>a</sup> Vt. ; R.I. ; Pa. ; Del. ; Va. 109,27 ; W.Va. 81,26 ; Ky. 36,5,5 ; Dak. But this is probably law in all the states ; see in Part IV.

§ 1152. **What Escheats.** Equitable titles escheat as well as legal ones: Pa. *ib.* 5; Va. 109,25; W.Va. 81,24; Ky. 36,5,4.

Estates held in trust or by mortgage do not escheat by reason of the trustee or mortgagee being an alien, or dying without heirs: Va., W.Va., Ky.

So, in other states, escheated estates, whether held by the state or its grantees, are subject to the same trusts and charges as if they had descended: N.Y. 2,1,1,2; Del. 82,17; Va. 109,26; W.Va. 81,25; Ky. 36,4,7; Cal. 6407; Dak. Civ. C. 796.

No land is liable to escheat which has been held for twenty years by a person claiming the same, or his assignors, and upon which taxes have been paid within such time: Va. 109,3; W.Va. 81,2.

§ 1153. **Disposition of Estate.** The estate escheated, or the proceeds thereof when sold, are applied, in several states, to the benefit (A) of the state common-school fund: Mich. 1883,169; Wis. 2270; Io. 2463; Neb. 1,80,2,3; Tenn. 2961; Ark. 1885,18,3; Cal. 6421; Dak. Civ. C. 778; Ida. Prob. C. 315; Uta. 713; Ariz. 3555.

(B) Of the school fund of the county (or, in Vermont, of the town) where the estate lies: Vt. 2237; Ind. 2478; Kan. 37,179; Ky. 1882,1307,1 (in Louisville only). To the county treasury simply: Ga. 2672.

(C) Of the state university: N.C. 1504.

(D) They are paid into the state treasury: N.H. 203,8; Ct. 1885,110,53; Pa. *ib.* 17 and 19; Del. 82,8; Va. 109,18; W.Va. 81,17; Mo. 5593; Ark. 2780; Tex. 1780; 1885,37; Cal. 11271; Ore. 16,7; Nev. 812; S.C. 2305; Ala. 2857; Miss. 889; Fla. 99,3; N.M. 1437.

(E) To the town treasury: R.I. 188,1.

(F) To the county agricultural society, or the house of refuge in cities of the first class: O. 4185-6.

(G) In Maryland, the lands escheated may be taken up by any occupant (see § 1112): Md. 16,17.

§ 1154. **Subsequent Claims by Heir.** The heir or other person entitled may, however, claim the estate escheated,<sup>a</sup> or the proceeds thereof,<sup>b</sup> without interest, if sold,<sup>c</sup> (1) at any time, without limitation: N.H. 203,8; R.I.<sup>b</sup> 188,1 and 9; Ct. 18,2,2; Ind.<sup>b</sup> 2414; Ky. 36,5,6; 1882,1307,2; Tex. 1783-4; Fla.<sup>b</sup> 99,4.

(2) At any time within thirty years of the judgment of escheat: R.I.<sup>a</sup> 188,8; (3) at any time within twenty-one years after sale: Kan. 27,179; (4) within twenty years after sale by an administrator: Ore.<sup>b,c</sup> 16,3 and 5; (5) within twenty years after the judgment: Cal. 11272; (6) within the ordinary period of limitation for actions to recover real estate after the judgment: Mass. 182,11; Me. 93,16; (7) within seventeen years of the judgment: Vt. 2238; (8) within ten years after payment under § 1153: Va. 109,33; N.C. 1504; Mo.<sup>b</sup> 5586,5594; (9) within ten years after the sale: Io.<sup>b</sup> 2464; (10) within ten years of the intestate's death: Mo.<sup>a,d</sup> 5586; (11) within seven years after the sale: Del.<sup>b</sup> 82,18; (12) within seven years of the judgment: Pa. *ib.* 21; Del.<sup>a</sup> 82,14-15; (13) within seven years after the death of the person last seized: Ark. 2783; (14) within six years after the judgment: Ga. 2674; (15) within five years: N.Y. Civ. C. 1980; Ind.<sup>a</sup> 2412; Ill. 49,7; W.Va. 81,32 (but compare § 75); Mo.<sup>a</sup> 5588; Nev. 809; Miss.<sup>b</sup> 892; Ariz. 3557; (16) within five years after the sale, and payment of the proceeds to the state or county treasurer: Wis. 3937; S.C.<sup>c</sup> 2306; (17) within two years after notice by the administrator: Ala.<sup>a</sup> 2855; (18) within two years after the sale: S.C.<sup>b</sup> 2311-2; (19) within two years after final settlement by a public administrator: Ida. 1880-1, p. 294,8; (20) within one year thereafter: N.M. 1866, Jan. 26,6; (21) within six months after notice by the administrator: Io.<sup>b,d</sup> 2463.

In other states, the heir would seem to have no method of recovering the property after a judgment of escheat: N.J. *ib.* 3; Ariz. 1885,80,4. And no such subsequent

claim is allowed to persons who were parties or privies to the judgment of escheat: Mass. 182,10; Me. 93,15; Mo.; Miss.

NOTES. — <sup>a</sup> In the states so noted, he may claim the *land* within such period. <sup>b</sup> In the states so noted, the *proceeds* thereof. <sup>c</sup> Such sale or payment may be made (1) after three years from the grant of administration: Kan.; (2) five years thereafter: Wash.; (3) one year after the inquisition, after a year's further notice by publication: Va. 109,13 and 15-16; W.Va. 81,11-15; S.C. 2303-4; (4) whenever the administration is completed: Ore.; (5) at any time after judgment of escheat: Ark. 2786. <sup>d</sup> *i. e.*, the land may then be sold, and the proceeds only can be recovered, if anything.

§ 1155. **Persons under Disability** at the time of escheat may, however, claim escheated estates or the proceeds (1) at any time within five years after disability removed: Ill. 49,7; Va. 109,33; Mo. 5590; Cal. 11272; Nev. 809; Ariz. 3557; (2) within three years thereafter: S.C. 2312; Ga. 2674; (3) within four years thereafter, or seven years if he remained out of the state: Pa. *ib.* 22; Del. 82,19; (4) minors have "the usual saving:" Ark. 2785.

§ 1156. **Other Cases of Escheat.** (A) Whenever there is real estate without an owner capable of holding it, the proper officer may bring process of escheat: Ct.<sup>a</sup> 182,1; Ill.<sup>a</sup> 49,1; Va. 109,30; Ky.<sup>a,b</sup> 1882,1307,1; Mo. 5564; Nev. 805; S.C. 2313; Ga. 2670; Ariz.<sup>a</sup> 3552. See also § 1150.

So, in other states, when a person has disappeared and not been heard of for seven years: Del. 82,6; Ky. 1884,1187; Tex. 1770. Compare also § 2510.

So, trust estates, where the beneficiary has been unknown for seven years: Pa. *Escheats*,<sup>a</sup> 6.

(B) Lands purchased by corporations without legal authority escheat in the same manner: Pa. *Escheats*, 33 and 37; *Charities*, 25.

(C) In Georgia, it is expressly enacted that there is no other case of escheat except as in §§ 1151,1157 (and above): Ga. 2669. See also § 1112.

NOTES. — <sup>a</sup> This applies also to personal estate. <sup>b</sup> It must be unclaimed for eight years.

§ 1157. **Escheat of Personal Estate.** In most of the states, when a person dies intestate, leaving personal estate not required for debts, and there is no person entitled under the statutes of distribution (Art. 310), the property "escheats" to the state, county, or town, or otherwise as in § 1151, respectively: N.H. 203,7; Mass. 135,3; Me. 75,8; Vt. 2235,2237; R.I. 138,1; Ct. 18,11,1 and 3; Pa. *Escheats*, 1; O. 4163; Ind. 2478; Ill. 49,1; Mich. 411; Wis. 3935; Io. 2460; Minn. 51,1; Kan. 37,176; Neb. 1,80,2,3; Md. 48,17; Del. 82,1; Va. 119,30; W.Va. 81,28; N.C. 2627; Ky. 36,1,3; Tenn. 3120,2961; Mo. 5567; Ark. 2759; Tex. 1770; Cal. 41; Ore. 16,1; Nev. 805; Wash.; Dak. Civ. C. 795; Ida. Prob. C. 315; Mon. Prob. C. 535; Wash.; Uta. 713; S.C. 2310; Ga. 2669; Ala. 2851; Miss. 881; Fla. 99,1; La. 485; N.M. 1437; Ariz. 3551.

So, in Vermont; except that if the decedent was resident in the state, it goes to the town where he was resident: Vt. 2237.

For escheat of legacies, etc., in administration process, see also in Part IV.

§ 1158. **The Disposition** of such escheated personal property is commonly the same as in the case of real estate escheated, respectively in the several states (§ 1153): N.H.; Vt.; R.I.; Ct.; Pa.; Ind.; Ill.; Io.; Neb.; Del.; Va.; N.C. 2627; Ky.; Tenn.; Ark.; Tex.; Ore.; Nev.; Dak.; Ida.; S.C. 2310; Ga.; Ala.; Fla.

But in a few states, it goes to the common schools of the county: O. 4163; Md. 48,17.

§ 1159. **Subsequent Claim.** Any next of kin or other persons entitled may generally claim such property or the proceeds thereof without interest (1) within the same respective times of limitation as in the case of real estate when the proceeds have been paid over after a sale (§ 1154): N.H. 203,8; Vt.; R.I. 188,1;



Ind. 2415; Io. 2464; Va. 109,33; W.Va. 81,32; Ky. 36,5,6; Mo. 5586; Ark. 2781; Tex. 1783-4; Ore. 16,3; Ga.; Fla.

But (2) in others, it may be claimed at any time, without limitation: N.H.; Wis.; Md. 48,18; Tenn. 3120; Mo.<sup>a</sup> 261-5.

(3) At any time within thirty years: Ct. 18,2,3; (4) within ten years after payment to the state, county, etc., treasurer, university, etc.: Ill. 49,7; N.C. 2627; (5) within ten years after the intestate's death: Nev. 809; Ariz. 3557; (6) within five years of the sale: Pa. *ib.* 21; Del. 82,18; (7) within three years after judgment of escheat: Miss. 891; (8) within two years after payment over to the state: S.C. 2311; (9) within eighteen months of grant of administration: Ala. 2852,2854.

But no such subsequent claim is allowed to persons who were parties or privies to the judgment of escheat: Miss.; and no collateral more remote than nephews and nieces can claim personal property once escheated: Md.

NOTE. — <sup>a</sup> As to unclaimed assets paid over by an administrator, see Probate Code in Part IV.

§ 1160. **Persons under Disability** may generally make claim at certain periods after disability removed, (1) as in § 1155: Ill. 49,7; Va. 109,33; Mo. 5588; Ark. 2786; S.C. 2312; Ga.

(2) At any time within two years thereafter, or seven years (in Pennsylvania, five years), if such person has continued to reside out of the state: Pa. *ib.* 22; Del. 82,19.

§ 1161. **Other Cases of Escheat of Personal Property** are (A) when any such is held by a bailee or trustee without a rightful owner: Pa. *Escheats*, 7; Ky.<sup>a</sup> 1832,1307,1.

(B) Dividends unclaimed for five years (subject to subsequent claim, etc., as in § 1159): N.C. 2628.

(C) Personal property of every kind, choses in action, or sums of money unclaimed (1) for five years: N.C. 2629; or (2) for eight years: Ky.

(D) Derelict property generally: Fla. 99,5. For legacies, etc., see Probate Code, Part IV. See also § 1156.

NOTE. — <sup>a</sup> See § 1156, note <sup>b</sup>.

§ 1162. **Attainder** <sup>a</sup> (A) by bill or by corruption of blood for felony is, in several states, abolished: N.J. *Crim. Proc.* 114; Md. 73,24; Va. 1878,311,10,5; W.Va. 48,4; Ore. *Crim. C.* 763; Uta. 2228; S.C. 2314; Ga. 2675; La. D. 978.

So, attainder by bill (see § 143): Tex. 1649. But in a few states, escheat of realty, or forfeiture of personalty, by corruption of blood is specially preserved: Pa. *Escheats*, 32; Dak. P. C. 766.

So, as to escheat or forfeiture for treason only: N.Y. *Civ. C.* 1977 and 1982; Dak. So, in other states, there is (except as above) no forfeiture of personal estate for felony: N.Y. 4,1,7,22; N.J.; Md.; Va.; W.Va.; Tex.; Cal. 13677; Ore.; Dak.; Uta.; S.C.; Ga.; La.

(B) And the estate, real and personal, of suicides descends as in cases of natural death: N.Y., Md., Va., W.Va., Tex.

(C) All deodands are abolished: R.I. 248,31; N.Y.; Md.; Tex.; Cal.; Uta.

NOTE. — <sup>a</sup> See also § 143.

§ 1163. **Administration Process.** See also the Probate Code, Part IV., for other provisions relating to payment over of escheated estates by the administrator to the state.

## Art. 117. Rights of Land Ownership.

§ 1170. **Usque ad Cœlum, etc.** The owner of land owns downwards and upwards indefinitely: Cal. 5829; Dak. *Civ. C.* 265; Ga. 2218; 3020; La. 505. If he builds above or below adjoining his neighbor's property, it must be in a perpendicular line: La. 673.

Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land; subject to the right of the owner of such adjoining land to make proper and usual excavations on the same for purposes of construction, in using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving the other reasonable previous notice of his intention to make such excavations: Cal. 5832; Dak. Civ. C. 268.

*Trees* whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another; if they stand partly on the land of several owners, they belong to them in common: Cal. 5833-4; Dak. Civ. C. 260-70.

All constructions, plantations, works, made upon or within the soil, are supposed to be done by the owner and at his expense, and to belong to him, unless the contrary be proved (without prejudice to subterranean rights of others acquired by prescription): La. 506.

If the owner make such constructions, etc., with materials which did not belong to him, he has a right to keep the same, whether he used them in good or bad faith, on condition of reimbursing the owner and paying actual damages: La. 507.

When they are made by a third person, and with such person's own materials, the owner of the soil has a right to keep them,<sup>a</sup> or to compel such person to take away or demolish the same: Cal. 6013; La. 508.

If the owner requires them to be demolished, it is at the expense of the person who erected them, and without compensation; and such person may even be sentenced to pay damages if the case require it, for the prejudice which the owner of the soil may have sustained: La. 508.

If the owner keeps the works, he owes to the owner of the material nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value the soil may have acquired thereby: La.

Nevertheless, if the plantations, edifices, or works have been made by a third person evicted, but not sentenced to make restitution of the fruits because such person possessed *bona fide*, the owner has not a right to demand demolition, but has his choice either to reimburse the value of the materials and labor, or to reimburse a sum equal to the enhanced value of the soil: La. See, for other states, in Part IV.

NOTE. — <sup>a</sup> In the absence of special agreement.

§ 1171. **Water Rights: General Principles.** (A) In Wisconsin, the boundaries of lands adjoining waters, and the rights of the State and of individuals in respect to all such lands and waters, are to be determined in conformity with the common law, so far as applicable: Wis. 1597. So, of course, in other states. Compare § 1001.

(B) But in Virginia, the beds of all the bays, rivers, and creeks, and the shores of the sea, belong to the State, and may be used in common by all the people; and the rights of owners extend only to low-water mark, except that they have the exclusive right to plant oysters in streams, etc., bounded on both sides by their land: Va. 62,1-2; 101,1-3.

(C) In Dakota, the owner of land owns the water standing thereon or flowing over or under its surface, but not forming a definite stream. Such water may be used as long as it remains there; but he may not prevent its natural flow, nor pursue nor pollute the same: Dak. Civ. C. 255.

(D) Any person diverting any stream from its natural channel is liable to any party aggrieved for the damages sustained (in Montana, liable to a *penalty*): Tenn. 1308; Mon. 1883, p. 113.

**Running Water.** In Georgia, running water, while on land, belongs to the owner of the land: Ga. 2227.

He whose estate borders on running water may use it as it runs for watering his estate or other purposes: Ga. 3018; Dak. Civ. C. 527; La. 661.

The right to the use of running water flowing in a river or stream or down a cañon may be acquired by appropriation: Cal. 6410; Ida. 1880-1, p. 267, § 1; Uta. 1880,20,6. But it must be for some useful or beneficial purpose; and when the appropriator ceases to use it for such purpose, the right ceases: Cal. 6411; Ida. *ib.* 2; Uta. 1880,20,6 and 9.

But in several states, such owner has no power to divert it from the usual channel: Tenn. 1523; Ga.; Ala. 1727; La. 661. And he must return it to its ordinary channel when it leaves his estate: Uta. 1880,20,11; La.

The person entitled to such use may change the place of diversion, if others are not injured by such change, and extend the ditch, flume, pipe, or aqueduct to places beyond where the first use was made : Cal. 6412 ; *Ida. ib.* 3 ; *Uta.* 1880,20,8.

Nor can the land-owner so use or adulterate it as to interfere with the enjoyment of it by the next owner : *Ga.*

The right to use water as above may also be acquired by a prescription of seven years : *Uta.* 1880,20,6. And the Utah law also recognizes "secondary rights" to water (in case of surplus, extraordinary flow, etc.) : *Uta. ib.* 7.

And the proprietor below must receive the waters which run naturally from the estate above ; nor can he erect any dam or other work to prevent such running : *S.C.* 1169 ; *Ga.* 1607 ; *La.* 660. But the proprietor above can do nothing whereby this servitude is rendered more burdensome : *La.*

The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed ; but in reclaiming it, the water already appropriated by another must not be diminished : *Cal.* 6413.

As between appropriators, the one first in time is first in right : *Cal.* 6414 ; *Ida. ib.* 1 ; *Uta.*

There are provisions requiring notice of appropriation, diligence in appropriating, etc. : *Cal.* 6415-6420 : *Dak. Civ. C.* 527*h* ; *Ida. ib.* 4-7.

The above provisions do not affect the rights of riparian proprietors : *Cal.* 6422.

Neglect to use water for seven years is held an abandonment : *Uta.* 1880,20,9.

Rights of irrigation pass with a grant of the land irrigated : *Uta.*

If the waters are not sufficient for the service of all having "primary" rights to use the same, they are distributed to each owner of such right in proportion to its extent ; but those using the water for domestic purposes have the preference over those claiming for any other purpose, and those using it for irrigation rank next : *Uta.* 1880,20,14.

There is no legal right in underground streams : *Ga.* 3019.

See also § 1179.

§ 1172. **The Sea-shore** is defined to be that space of land over which the waters of the sea spread in the highest water during the winter season : *La.* 451.

The use of the sea-shore is public : *Va.* 101,1 ; *La.* 451. Consequently every one has a right to land there, either to fish or shelter himself, to moor ships, build cabins, dry nets, etc., doing no damage to the buildings and erections made by owners of adjoining property : *La.* 452.

A proprietor of land on the sea-shore owns (A) to ordinary high-water mark : *Cal.* 5830. (B) To low-water mark : *N.J. Wharves*, 2, 8 ; *Va.* 101,5 ; *Ore. Civ. C.* 845. See § 1177.

§ 1173. **River Banks.** The use of the banks of navigable streams is public, though the ownership of them belongs to those who possess the adjacent lands : *La.* 455. Accordingly, every one may land upon them, moor his ships, unload his vessels, dry nets, etc. : *La.*

The *banks* are defined to be that which contains the stream at ordinary high water (but not at *floods*) or the levees, if levees are established : *La.* 457.

§ 1174. **Accretions** of land on navigable waters, as well as on waters not navigable, belong to the owner of the land : *Md.* 16,38 ; *Cal.* 6014 ; *Dak. Civ. C.* 584 : *La.* 509.

So, accretions on either side of a stream belong to the owner on that side : *Ga.* 2228.

Such accretions are termed alluvion : *La.*

*So, conversely*, the same rule applies to derelictions formed by running water retiring imperceptibly from one of its shores and encroaching on the other ; the owner of the land adjoining the shore which is left dry has a right to the dereliction, nor can the opposite owner claim the land which he has lost : *La.* 510. It makes no difference whether such new land is formed by accession of soil or by the recession of the stream : *Cal.*

But the right does not take place in case of derelictions of the sea : *La.*

If the stream take a new channel so as to surround the field of any shore-owner and make it an island, such owner retains his property therein : *Cal.* 6018 ; *Dak. Civ. C.* 588 ; *La.* 517.

If it take a new channel and leave the former one, the owners of the soil newly occupied take



by way of indemnification the former bed of the river, every one in proportion to the land he has lost : Dak. Civ. C. 589 ; La. 518. If the stream returns to its former channel, they take again their former property : La.

In Vermont, when the channel of a stream not navigable is changed by a freshet, the person owning land through or adjoining which it originally flowed may restore it, and enter for this purpose on the land now adjoining the stream at any time within three years : Vt. 3246.

If, however, the stream carries away by sudden irruption a considerable tract of land from an adjoining field, which tract is susceptible of being identified, by carrying the same on a field lower down, or on the opposite shore, the owner of such tract may claim it, provided he does so within a year, or even afterwards at any time (within a year after : Cal., Dak.), if the person to whose land the soil thus carried away has been united does not take possession : Cal. 6015 ; Dak. Civ. C. 585 ; La. 511.

Islands and bars formed in navigable streams, not attached to the bank, belong to the state : Cal. 6016 ; Dak. Civ. C. 586 ; La. 512.

In unnavigable streams they belong to the riparian proprietors in proportion to their frontage, and divided as between those on opposite shores by a line drawn through the middle of the stream : Cal. 6017 ; Dak. Civ. C. 587 ; La. 513-6.

§ 1175. **Marine Deposits.** In Connecticut, no right in any marine vegetable deposit thrown up by the sea or by a navigable river is acquired by any person by gathering it together on a public beach, unless removed within twenty-four hours thereafter : Ct. 18,2,4.

§ 1176. **Streams [and Lakes], if not Navigable,** belong to the owner of the land ; if the stream is the boundary-line, he owns to the middle thread of the current ; if the current changes, the boundary follows accordingly : Cal. 5830 ; Ore. Civ. C. 845 ; Ga. 2228.

But in Dakota, the stream and bed are in such case common to both : Dak. Civ. C. 266. But if it takes a wholly new channel, the original line remains the boundary : Ga. The owner is entitled to the same exclusive possession of such stream that he has of any other part of his land : Ga. 2231. The legislature has no power to interfere with him in its lawful use, except to restrain nuisances : Ga.

§ 1177. **On Navigable Streams or Lakes** the rights of land-owners extend to low-water mark : Va. 101,5 ; Ark. 1875, March 6, § 7 ; Cal. 5830 ; Dak. Civ. C. 266 ; Ga. 2230.

The proprietor has the sole right of making improvements (wharves, etc.) into waters in front of his land : Vt. 1919 ; N.J.<sup>a</sup> *Wharves*, 1 ; Io. 1874,35,1 ; Md. 16,39 ; 45,4 ; W.Va. 171,46 ; 1881,14,40 ; N.C. 2751 ; Ore. 63,1 ; Wash. 3271 ; Fla. 134,1. But he must not interfere with navigation : Vt., Md., W.Va., N.C.

All navigable waters are, in several states, declared public highways : Tenn. 1513 ; Cal. 2348 ; Ala. 1723. And in many states, specified streams are declared navigable by the laws.

So, in two others, all rivers large enough to float logs, etc. : Minn. 32,1 ; S.C. 1062. But in Georgia, a navigable river is one capable of bearing freight-boats in regular course of trade ; rafting, or transporting wood in small boats, is not sufficient to make the stream navigable : Ga. 2229.

No owner or occupier of a dam or water-power can acquire by prescription any rights to impede navigation, the passage of fish, or other public easement : N.H. 135,19.

NOTE. — <sup>a</sup> Of *tide* waters.

§ 1178. **Levees and Ditches.** In Georgia, it is enacted that all persons owning land or watercourses may ditch and embank their lands so as to protect them from freshet ; provided such ditching and embanking does not divert the watercourse from its ordinary channel : Ga. 2232.

Any person owning or occupying lands upon the banks of any stream where the lands lying back of such stream are lower than the bank thereof is responsible for all damages which may be sustained by the owners or occupants of lower lands by reason of any cut made in the bank by such owner : Cal. 3486.



But they may divert unnavigable watercourses running through their own land in their own land: Ga.

There are laws providing for public levees in a few states: O. 4585; Io. 1882,44; Mo. 6197-6200; Ark. 4364-4396. See also in Part III.

§ 1179. **Irrigation.** The persons owning lands on the banks or in the vicinity of any stream may use the water thereof for irrigation purposes: Col. 1711; Dak. Civ. C. 527*a*; Ida. 1880-1, p. 269,10; Mon. G. L. 731; Wy. 65,1; Uta. 1884,49,1; Ariz. 3240. See also § 1171.

There are general laws providing systems of irrigation in many western states: Tex. 2982-3001; Cal. April 1,1872; Nev. 3852-5; Col. 1712-1813; Dak. Civ. C. 527*b-i*; Ida. 1874-5, p. 829; 1880-1, pp. 269,273; Mon. G. L. 732-741; Wy. Chap. 65; 1882,57; Uta. 505-528; 1878,22; 1880,20; 1882,46; 1884,49,2-24; N.M. T. 1, Chap. 1; Ariz. 3241-3270; 1883,41. See also § 2253.

§ 1180. **Fruits** of the earth, whether spontaneous or cultivated, belong to the owner by right of accession: La. 499. So, even when produced by the labor or expense of a third person, upon the owner's reimbursing him: La. 501.

## CHAPTER II. — OF ESTATES IN LAND.

**Art. 130. Division and Definitions.** (For notes to Article, see note to Title.)

§ 1300. **Real Estate**<sup>a</sup> is defined (A) to include lands, tenements, and hereditaments, and (in all these states except Indiana, Illinois, Nebraska, Delaware, North Carolina, Missouri, Arkansas, California, Dakota, South Carolina, Alabama, New Mexico, Arizona) all rights thereto and interests therein:<sup>b</sup> N.H. 1,20; Mass. 3,3; Me. 1,6; Vt. 9; R.I. 24,9; N.Y. 2,1,5,10; Civ. C. 3343; Ind. 1285; Ill. 30,38; Mich. 2; Wis. 4971; Io. 45; Minn. 4,1; Kan. 104,1; Neb. 1,73,44; Del. 5,1; Va. 15,9; W.Va. 1882,143,17; N.C. 3765; Ky. 21,13; Tenn. 49; Mo. 700,3126; Ark. 645,6347; Cal. 5014; Col. 225,3141; Dak. Civ. C. 2126; Ida.<sup>b</sup> Civ. C. 13; Mon. G. L. 145; Uta. C. Civ. P. 13; C. L. 651; S.C. Civ. C. 444; Ala. 2; N.M. C. L. 1880,44,2; Ariz. 2279.

*Except* chattel interests, in Virginia, West Virginia, Kentucky. But chattels real (estates for years) are included as real estate,<sup>c</sup> except, in New York, leases not exceeding three years: N.Y.; Ill.; Neb.; Mo. 700; Ark.; Col. 225; Ga. 2273.

Equitable interests are real estate, as well as legal: Io., Kan., Tenn.; estates for the life of another: Wash. (see § 1336); pews and rights in churches: Me. 73,29; Vt.; mining rights: Nev. 307; Col.; Wy. Civ. C. 634; Uta. 651; N. M. 2218; water rights: Uta.; possessory rights and claims: Uta., Mon. (B) In Georgia, real estate is defined to include all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of, or dependent thereon: Ga. 2218. See also § 2101.

Land warrants are personal estate until they are located, when they become real: Va. 108,47.

(C) In California and Dakota, real or immovable property is also defined to consist of land, that which is affixed to land, that which is incidental or appurtenant to land, and that which is immovable by law: Cal. 5658; Dak. Civ. C. 163.

(D) In Louisiana, immovable things are, in general, such as cannot either move themselves or be removed from one place to another. But there are also things immovable by destination, *i. e.*, fixtures (see Art. 105): La. Civ. C. 462-3. Thus, land and buildings or other constructions, whether they have their foundations in the soil or not, standing crops and trees or their fruits, are immovables: La. Civ. C. 464-5. (E) So, in Maine, down trees lying on land are real

estate and pass with the conveyance; but if peeled or cut, they are personal property: Me. 73,1. So, in New Mexico, "all real movable property."

NOTES. — <sup>a</sup> See also §§ 1550, 1551, 4471. For *fixtures*, see Art. 210. <sup>b</sup> Or, in the noted states, "possessory rights and claims." <sup>c</sup> And compare §§ 1310, 1471.

§ 1301. **Land** includes (A) all real estate, as defined in § 1300, A: N.H. 1,20; Mass. 3,3; Me. 1,6; Vt. 9; R.I. 24,9; N.Y. 2,1,5,10; Ind. 1285; Mich. 2; Wis. 4971; Io. 45; Minn. 4,1; Kan. 104,1; Va. 15,9; W.Va. 13,17; Ky. 21,13; Tenn. 49; Mo. 3126; Col. 3141; Mon. G. L. 145; Uta. C. Civ. P. 13; except equitable interests: Io.

(B) So, in other states, land includes (1) all corporeal hereditaments: Miss. 15; including chattel interests: Col. 225; Miss.; (2) "lands, tenements, and hereditaments:" Ore. 6,56; Nev. 302; Col. 225; including mining or other possessory rights: Nev.; Col.; Wy. Civ. C. 654. (C) In other states, land is defined to be the solid material of the earth, whatever the ingredients of which it is composed: Cal. 5659; Dak. Civ. C. 164.

§ 1302. **Division by Duration.** Estates in land are divided (A) into estates of inheritance, estates for life, estates for years, estates at will (and by sufferance except in California and Dakota): N.Y. 2,1,2,1; Mich. 5517; Wis. 2025; Minn. 45,1; Cal. 5761; Dak. Civ. C. 218.

(B) In other states, there is also a division into *perpetual* and *limited* interests: Cal.\* 5638; Dak.\* Civ. C. 180.

*Perpetual* interests have a duration equal to, *limited* interests less than, the duration of the property itself: Cal.\* 5691-2; Dak.\* Civ. C. 183-4.

§ 1303. **Division by Time.** Estates are also divided (A) into estates in *possession* and estates in *expectancy*: N.Y. 2,1,2,7; Mich. 5523; Wis. 2031; Minn. 45,7.

An estate in *possession* is where the owner has an immediate right to possess the land; in *expectancy*, where the right to possess is postponed to a future period: N.Y. 2,1,2,8; Mich. 5524; Wis. 2032; Minn. 45,8. (B) In others, the division is made into *present* and *future* interests; but the meaning is the same: Cal.\* 5688-90; Nev. 302; Dak.\* Civ. C. 180-2.

(C) There is also the division into *vested* and *contingent*: Nev. See § 1350.

§ 1304. **Division by Ownership.** Estates are further divided (A) into estates in severalty, in joint-tenancy, and in common: N.Y. 2,1,2,43; Mich. 5559; Wis. 2067; Minn. 45,43; Cal.\* 5681-2; Dak.\* Civ. C. 174-8.

(B) And partnership: Cal.\* Dak.\*

(C) And the community interest of a husband and wife: Cal. In many states, where there is no such express division, estates in coparcenary, partnership, and community are also recognized, and joint-tenancy abolished. See Art. 137.

**Estates in severalty** (or *sole ownership*, in Dakota) are those owned by a single person: Cal.\* 5681; Dak.\* Civ. C. 174.

## Art. 131. Freeholds and Fees.

§ 1310. **Freeholds.** By the laws of several states, freeholds include estates of inheritance and estates for life: N.Y. 2,1,2,5; Mich. 5521; Wis. 2029; Minn. 45,5; Cal. 5765; Dak. Civ. C. 222.

Estates for the life of another are, in some states, deemed estates of (inheritance: N.C.) freehold: <sup>a</sup> N.Y. 2,1,2,6; Mich. 5522; Wis. 2030; Minn. 45,6; 1281; Cal.<sup>b</sup> 5766; Dak.<sup>b</sup> Civ. C. 223; Ala.<sup>b</sup> 2279.

But in others, they become chattels real after the death of the first grantee: N.Y. 2,1,2,6; Mich. 5522; Wis.<sup>b</sup> 2030; Minn.; Ala.

In Massachusetts, whoever holds lands under a demise for a term of one hundred years or more, of which fifty remain unexpired, is regarded as a freeholder for all purposes: Mass. 121,1. And the estate is regarded as a fee-simple, for all purposes of descent, demise, the rights of the dower, the widow's share, the sale thereof by administrators, guardians, etc., the levying executions thereon, and the redemption thereof when mortgaged or taken under execution: Mass. So, in Delaware, of permanent leasehold estates, renewable forever, provided the grantor, etc., has released his right to rent: Del. V. 15,163.

NOTES. — <sup>a</sup> See also § 3010. <sup>b</sup> Whether limited to heirs or not.

§ 1311. **Fees.** Every estate of inheritance shall continue to be termed a fee-simple or a fee; and, when not defeasible or conditional, it is an absolute fee: N.Y. 2,1,2,2; Mich. 5018; Wis. 2026; Minn. 45,2; Cal. 5762; Dak. Civ. C. 219. See § 1310.

§ 1312. **Fees-simple** generally remain as at common law, except that, in many states, land is allodial. See §§ 1100,1101.

§ 1313. **Estates Tail** are, (A) in many states, absolutely abolished and turned into fees-simple: <sup>a</sup> N.Y. 2,1,2; Ind. 2958; Mich. 5519; Wis. <sup>a</sup> 2027; Minn. <sup>a</sup> 45,3; Va. 112,9; W.Va. 82,9; N.C. 1325; Ky. 63,1,8; Tenn. 2813; Cal. 5763; Dak. Civ. C. 220; Ga. 2250; Ala. 2179; Miss. 1190; Fla. 92,11.

In all these and two others, a grant or devise now made in tail creates a fee-simple: N.Y.; Pa. *Ests. Tail*, 8; Ind.; Mich.; Wis. 2028; Minn.; Va.; W.Va.; N.C.; Ky.; Tenn.; Mo. 3940; Cal.; Dak.; Ga.; Ala.; Miss.; Fla.

And a grant by the donee creates a fee-simple (see also C): Minn. 45,4.

But in a few of these, any remainder on what would (but for this abolition) be an estate tail, is valid as a contingent limitation upon a fee, and takes effect on the death of the first taker if he leave no issue at death: N.Y. *ib.* 4; Ind.; Mich. 5520; Cal. 5764; Dak. Civ. C. 221.

So, in Georgia, where an estate tail would be *implied* by common-law rules of construction, a life estate is created in the first taker, with remainder over in fee to his children and their descendants; if none, the remainder over takes effect according to its terms. So, in Mississippi, any person may convey or devise lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainder-man, and in default thereof to the right heirs of the donor, in fee-simple: Miss. 1190.

In three, such remainder over after an estate tail is only valid if it would be valid if limited upon a fee-simple: Va. 112,9; W.Va.; Ky. 63,1,8.

(B) In a few other states, estates tail are made a life estate (or, in Ohio, an "estate tail") in the first donee with remainder <sup>b</sup> in fee-simple absolute (1) to the person <sup>c</sup> to whom the estate would pass at common law at death of the first <sup>a</sup> donee: Vt. 1916; Ill. 30,6; Mo. 3941; Ark. 643; Col. 203; (2) to the children of the first donee as tenant in common, or children of those deceased by representation: <sup>b, d</sup> Ct. 18,6,3; N.J. *Descent*, 11; O. 4200; N.M. 1423.

But in New Jersey, the widow of the donee has dower, and the husband curtesy.

(C) In several other states, the tail seems to be good if the estate be not conveyed; <sup>e</sup> but the grantee may convey it in fee-simple (1) by an ordinary deed: Mass. 120,15; Me. 73,4; R.I.; <sup>e</sup> Pa. <sup>f</sup> *ib.* 3,4; Md. 44,7; Del. 83,27; (2) by a deed acknowledged (<sup>a</sup>) before a special commissioner: R.I. <sup>g</sup> 172,4; or (<sup>β</sup>) before a supreme or superior court: R.I. 172,3. And so, in two, where lands are held by one person for life with vested remainder in tail to another, the tenant for life and remainder-man may convey such lands in fee-simple by simple deed: Mass. 120,16; Me.; (3) by will: R.I. 182,1. See § 2621.

And in two, lands (but not remainders upon tail) held in tail are liable for the debts of the tenant during life and after his decease like estates in fee-simple: Mass. 126,3;



Me. 76,6. And when taken in execution or sold by administrators or guardians the creditor or purchaser takes a fee-simple : Mass.; Me.; Pa. *ib.* 6.

"Implied entailments" are barred by twenty-one years' actual possession of the premises and treatment of the estate as a fee-simple by the donee and those claiming under him : Pa. Ann. Dig. 1874, *Ests. Tail*, 1. Or by a declaration of the persons holding under such donee, his alienee, or the survivors of any such as so held in common, executed and recorded like a deed : Pa. *ib.* 2, 1883, 117.

(D) In twelve states and territories, the laws are silent, and estates tail would logically seem to be preserved as at common law : N.H., Io., Kan., Neb., Tex., Ore., Nev., Wash., Ida., Mon., Wy., S.C. But presumably they would in many states not be recognized by the courts.

NOTES. — <sup>a</sup> "As an allodium : " Wis., Minn. <sup>b</sup> This remainder is undoubtedly contingent ; although by the ordinary definition (§ 1350) it would seem to be vested. <sup>c</sup> *i. e.*, the eldest son, strictly ; but it may be doubted whether the common law of the state is not intended, particularly in the older states, which acquired their law historically, and not by adoption. Compare (2). <sup>d</sup> And it seems a remainder would be valid, as in A. <sup>e</sup> But no person can *devise* an estate in tail for a longer time than to the children of the first devisee : R.I. 182, 2. <sup>f</sup> The deed must express an intent to bar the entail. <sup>g</sup> This is only necessary in the case of non-residents.

§ 1314. **Equitable Estates Tail** in possession or remainder, and all remainders or reversions thereon, may be barred like legal estates ; and the person to whom an equitable estate tail is so conveyed is entitled to have the fee-simple so created conveyed to him by the person having the legal estate : Mass. 120, 17-18 ; Del. 83, 27.

### Art. 133. Life Estates.

§ 1330. **What are.** Estates may be for the life either of the tenant or some other person or persons : Ga. 2252. [So, of course, in all states.] But not in such property as would be destroyed in the use : Ga. 2253.

In some states, an estate for life may be created in a term for years ; see § 1427.

In Georgia, an estate which must terminate at death, and may extend during life (such as an estate during widowhood), is deemed a life estate : Ga. 2254.

§ 1331. **Incidents.** In several states, it is enacted that the life tenant is entitled to the full use and enjoyment of the property, (1) except that in such use he must exercise ordinary care : Ga. 2255. (2) He must do no injury to the inheritance : Pa. *Waste*, 5 ; Cal. 5818 ; Dak. Civ. C. 256 ; Ga.

Any natural increase of property belongs to the tenant for life : Ga. 2256.

§ 1332. **Waste.** (A) The tenant for life, or for the life of another, is liable in damages, (1) in many states, for actual and permissive waste : Mass. 179, 1 ; Me. 95, 1 ; R.I. 231, 1 ; Ct. 19, 17, 17, 9 ; 18, 11, 4, 3 ; N.Y. 2, 1, 4, 8 ; N.J. *Waste*, 2 and 3 ; Mich. 7940 ; Wis. 3171 ; Io. 3332 and 3334 ; Neb. 2, 633 and 635 ; Va. 133, 1 and 4 ; W.Va. 199, 1 ; Mo. 3108 and 3114 ; Ore. Civ. C. 334. (2) Only for actual waste : N.Y. Civ. C. 1651 ; Ind. 286 ; Minn. 76, 45 ; Del. 88, 1 ; N.C. 625 ; Ky. 66, 3, 1 ; Cal. 10732 ; Nev. 1313 ; Col. 2467 ; Civ. C. 233 ; Wash. 601 ; Dak. C. Civ. P. 652 ; Ida. Civ. C. 472 ; Mon. Civ. C. 350 ; Uta. C. Civ. P. 613 ; Ariz. 2688.

(B) And in many, he forfeits the estate to the remainder-man or reversioner in any case of waste : Mass. ; Me. ; R.I. ; N.J. ; Io.<sup>a</sup> 3333-4 ; Neb.<sup>a</sup> 2, 634 ; Mo. ; Ore. ; <sup>a</sup> Ga. 2255.

But in others, so only in the case of actual waste : N.Y.<sup>a</sup> Civ. C. 1655 ; Ind. ; <sup>a</sup> Minn.<sup>a</sup> 76, 45-6 ; Del. 88, 9 ; N.C.<sup>b</sup> 629 ; Ky. 66, 3, 1 ; Mo. 3107 ; Wash. ; <sup>a</sup> Dak.<sup>a</sup>

In many, he is liable for treble damages in the case of actual [wanton] waste : N.Y. ; N.J. ; Minn. ; Va. 133, 4 ; W.Va. 199, 4 ; N.C. ; Ky. 66, 3, 7 ; Mo. 3113-4 ;



Cal.; Nev.; Col.; Wash.; Dak.; Ida.; Mon.; Uta.; Ariz.\* So, in any case of waste, in Nebraska and Oregon.

He is, in other states, liable for double damages in any case of waste: R.I.; Mich. 7945; Wis. 3176. So, in actual waste only: Del.

In Pennsylvania, the remainder-man or reversioner may have a writ of estrepement against him: Pa. *Waste*, 5. See Art. 135.

The person committing waste is liable for actual damages (except cases of wanton waste, as above): Minn.; Va. 133,4; W.Va.; N.C. 624; Mo.

NOTES. — <sup>a</sup> But only in favor of a tenant in reversion against a tenant in possession, when the injury to the reversion is adjudged equal to the tenant's interest (or two thirds of the tenant's interest: Io., Neb.), or to have been done in malice: N.Y.; Ind.; Minn.; Ore.; Wash.; Dak. C. Civ. P. 653.

<sup>b</sup> Only if the damages be not paid.

§ 1333. **Repairs.** As a consequence of § 1332 (A1), it would seem that a tenant for life is bound to make necessary repairs or he will be liable for waste. And this is specially enacted in two states: Cal. 5840; Dak. Civ. C. 271.

He must pay the taxes: O. 2852; Cal.; Dak. See also in Part III.

§ 1334. **Emblements.** The tenant for life may bequeath the emblements or crops, and also rents, so far as they have accrued at his death (§ 2027): Pa. *Wills*, 5.

§ 1335. **Succession.** In several states, estates for the life of another are devisable. See § 2630.

If not devised they go as personal assets: N.Y. 2,6,3,6; N.J. *Wills*, 2; Md. 50,145; Del. 89,16; Va. 126,18; S.C.<sup>a</sup> 1855.

[This would also seem to follow, from § 1310, in other states.]

But not, if granted to the decedent *and his heirs* (compare also note <sup>a</sup>): Md.

NOTE. — <sup>a</sup> If there be a *special occupant*, they go to him; and if such special occupant be heir, they are chargeable as *assets per descent*: S.C.

## Art. 134. Chattel Interests.

§ 1340. **Estates for Years** are, in several states, declared to be chattels real: N.Y. 2,1,2,5; Mich. 5521; Wis. 2029; Minn. 45,5; Cal. 5765; Dak. Civ. C. 222.

So, they go to the administrator as assets: Md. 50,145. See also §§ 1300,1310,1550-1,3010. But, in Georgia, an estate for years "passes as realty:" Ga. 2273. See also § 3010. An estate for years is, in Georgia, defined to be one which is limited in its duration to a period fixed, or which may be made fixed and certain: Ga.

§ 1341. **Creation.** An estate for years may, generally, be created (1) for any number of years. Compare § 1310. (2) So, in Georgia; but not so as to violate the rule against perpetuities: Ga. 2273.

But in a few, no leasehold estate can be created for a longer term (1) than twenty years: Ala. 2190; (2) than fifteen years: Md. 1884,485. (3) So, twenty years in town lots or buildings; in other cases, as in agricultural land, ten years: Cal. 5717-8; Nev. 306; Dak. Civ. C. 203.

A lease or ground-rent created for a longer term than fifteen years can be redeemed by the tenant by paying a sum of money equal to the capitalization of the rent at six per cent, unless some other sum be specified in the lease: Md.

All the provisions relative to future estates (Art. 135) apply as well to limitations of chattels real as to freehold estates, so that the absolute ownership of a term shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee: N.Y. 2,1,2,23; Mich. 5539; Wis. 2047; Minn. 45,23; Cal. 5770; Dak. Civ. C. 227.

§ 1342. **Incidents.** (A) In Georgia, an estate for years carries with it the right to use in as absolute a manner as a greater estate, but not to the injury of the property or person entitled in remainder or reversion: Ga. 2275.

It does not pass the mining interest unless such intention appears or is implied from the circumstances: Ga. 2278.

(B) A tenant for years or at will may occupy the buildings, take the annual products of the soil, and work mines and quarries open at the commencement of his tenancy, but has no other rights except such as are expressly granted: Cal. 5819-20; Dak. Civ. C. 257-8.

§ 1343. **Waste and Repairs.** Tenants for years are liable to damages or forfeiture for waste, or to writ of estrepement, precisely and in all respects like tenants for life, in most of the states (see § 1332) respectively: Mass.; Me.; R.I.; Ct.; N.Y.; N.J.; Pa. *Waste*, 3; Ind.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Del.; Va.; W.Va.; N.C.; Ky.; Mo. 3107; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Ida.; Mon.; Uta.; Ga. 2275; Ariz.

So, in one, tenants at will: Pa.; and so, in another, "all" tenants: Va.; so, tenants under a contract to purchase: Tenn. 4141.

In Georgia, a tenant for years is bound for all repairs and other expenses necessary for the protection and preservation of the property: Ga. 2277.

He may use a reasonable amount of timber for such repairs: Neb. 2,641-2.

§ 1344. **Estates at Will and Sufferance** are chattel interests; but not, in many states, liable as such to sales under execution; N.Y. 2,1,2,5; Mich. 5521; Wis. 2029; Minn. 45,5; Cal. 5765; Dak. Civ. C. 222.

## Art. 135. Future Estates.

§ 1350. **Division and Definition.** See § 1304.

**Expectant Estates** are divided (A) into (1) estates commencing at a future day, or *future estates*, and (2) reversions: N.Y. 2,1,2,9; Mich. 5525; Wis. 2033; Minn. 45,9.

A **Future Estate** is one limited to commence in possession at a future day, either without the intervention of a precedent estate (see § 1423) or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time: N.Y. 2,1,2,10; Mich. 5526; Wis. 2034; Minn. 45,10; Cal. 5767; Dak. Civ. C. 224. When a future estate is dependent upon a precedent estate, it may be termed a remainder and may be created and transferred by that name: N.Y. 2,1,2,11; Mich. 5527; Wis. 2035; Minn. 45,11; Cal. 5769; Dak. Civ. C. 225.

"An estate in remainder is one limited to be enjoyed after another estate is determined, or at a time specified in the future:" Ga. 2263.

A **Reversion** is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised: N.Y. 2,1,2,12; Mich. 5528; Wis. 2036; Minn. 45,12; Cal. 5763; Dak. Civ. C. 225; Ga. 2263.

Future estates are *vested*, when there is a person in being who would have an immediate right to the possession of the land, upon the ceasing of the immediate or precedent estate;<sup>a</sup> *contingent*, when the person to whom, or the event upon which, they are limited to take effect, remains uncertain: N.Y. 2,1,2,13; Mich. 5529; Wis. 2037; Minn. 45,13; Cal. 5693,5694-5; Dak. Civ. C. 185-7; Ga. 2265.

Except as herein specified, all expectant or future estates are, in the same states, abolished: N.Y. 2,1,2,42; Mich. 5558; Wis. 2066; Minn. 45,42; Cal. 5703; Dak. Civ. C. 195.

A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind: Cal. 5700; Dak. Civ. C. 192. Compare §§ 1420,1426.

NOTE.—<sup>a</sup> This definition is faulty, in that it does not provide for contingency of the person. Compare § 1313, note <sup>b</sup>.

§ 1351. **Rights of Remainder-men, etc.** The rights of a reversioner are, generally, the same as those of a vested remainder-man in fee : Ga. 2263.

**Rights of Remainder-men and Reversioners.** In two states, it is generally stated that every person having an estate determinable upon life or lives who, after the determination of the particular estate, without the express consent of the person entitled, holds over, shall be liable to the person entitled for the profits during such possession as trespasser : N.Y. Civ. C. 1664 ; S.C. 2230-1. Particularly, a husband seized in right of his wife who holds over after her death, is so liable. See in Division II.

So, the guardian or trustee of an infant : N.Y., S.C.

§ 1352. **Grants of Remainders and Reversions.** In many states, grantees, devisees, or assignees of lands, or of remainders and reversions, are declared to have the same rights and remedies against lessees<sup>a</sup> and their representatives, by entry for non-payment of rent, or for waste or other forfeitures, as the original lessors : N.H. 250,22 ; N.Y. 2,1,4,23 ; N.J. *Conveyances*, 79 ; Pa. *Landlord, etc.* 21 ; Ind. 5218 ; Ill. 80,14 ; Wis. 2194 ; Md. 45,6 ; Del. 120,16 ; Va. 134,1 ; W.Va. 113,1 ; N.C. 1331 ; 1765 ; Ky. 63,1,25 ; Cal. 5821 ; Dak. Civ. C. 259 ; Miss. 1324.

So also as against the assignees of the lessee, except where it is a mere assignment for security, not accompanied by possession : Cal. 5822 ; Dak. Civ. C. 260.

So, upon covenants or agreements made with the original lessor : N.H., N.Y., N.J., Ill., Wis., Md., Del., Va., W.Va., N.C., Ky., Cal., Dak., Miss.

So, in others, "alienees of lessors and lessees of land have the same legal remedies in relation to such lands as their principal : " Ind. 5218 ; Kan. 55,16.

So, the lessor's alienee may recover rent ; and the rent may be recovered from the lessee's assignee or sub-tenant : Mo. 3094-5.

And, *vice versa*, the lessees and their representatives have the same rights and remedies on covenants or agreements against the grantees of the land or reversion as against their original lessors : N.Y. 2,1,4,24 ; N.J. *Conveyances*, 80 ; Ind. ; Ill. 80,15 ; Wis. 2195 ; Del. 120,17 ; Va. 134,2 ; W.Va. 113,2 ; N.C. 1332,1765 ; Ky. ; Mo. 3094-5 ; Cal. 5823 ; Dak. Civ. C. 260 ; Miss. 1325.

So, sub-lessees have the same remedy upon the original contract against the chief landlord as they might have had against their immediate lessor : Ind. 5217 ; Kan. 55,15.

Except on covenants for title or against incumbrances, or warranty : N.Y., N.J., Ill., Del., Va., W.Va., Cal., Dak., Miss.

But rent in arrear, or damages for a breach of covenant, is not assignable under the foregoing provisions : Del. 120,18.

For suits against particular tenants, etc., see Part IV.

This law applies also to the case of grants or leases in fee reserving rents : N.Y. 2,1,4,25 ; Wis.

The grantee of a reversion upon a conditional estate may enter for breach of condition as the grantor might have done : Ct. 19,17,5,1. And in one other state, this law applies only to remainders, etc., dependent on tenancies at will or by sufferance : N.H. 250,22.

NOTE. —<sup>a</sup> In the noted states, this provision applies where the tenant is at will or sufferance.

§ 1353. **Waste.** Where the particular tenant for life, years, dower, etc., is liable for waste (Arts. 133,134) (and also, in Minnesota, Kansas, California, Oregon, when any person has committed an injury upon the inheritance), the action is given (1) to the owner of the next estate of inheritance : N.H. 202,6 ; Mass. 179,1 ; Me. 95,1 ; N.Y. Civ. C. 1665 ; Pa. *Waste*, 5 ; Mich. 5777 ; Wis. 2198 ; Minn. 75,42 ; Kan. 55,23 ; Neb. 2,638 ; Ky. 66,3,2 ; Mo. 3108 ; Cal. 5826 ; Ore. 17,37 ; Dak. Civ. C. 264.

In other states, (2) one who has a remainder or reversion for life or years only has such action also : Mass.<sup>a</sup> 179,4 ; Me. 95,3 ; R.I. 231,1 ; Pa. ; Mich. 7944 ; Wis. 3175 ;



Ky.; Mo. In others, "any person injured" has the action: Va. 133,4; Wash. 601; Mon. Civ. C. 350; Uta. C. Civ. P. 613.

The remainder-man of the next estate of inheritance has the action, whether an intermediate particular estate for life or years intervene or not:<sup>a</sup> Mass.; Me.; N.Y.; Ind. 287; Mich.; Wis.; Io. 3337; Minn.; Kan.; Neb.; Ky.; Mo.; Cal.; Ore.; Dak.

When both the remainder-men of the fee and of the next particular estate have the action, each will recover the actual damages he has suffered by the waste or injury complained of: Mass., Me., Mich., Wis., Ky., Mo.

An heir may bring an action for waste done in the time of his ancestor as well as in his own time: Mass.; Me. 95,1; N.Y. Civ. C. 1652; N.J. *Waste*, 6; Mich. 7943; Wis. 3174; Io. 3338; Neb. 2,639; Del. 88,5; N.C. 628; Ky. 66,3,3; Mo. 3109.

NOTE. — <sup>a</sup> He has frequently the action of *tort* in the nature of waste, but not waste.

**Art. 136. Conditional Estates.** (See § 1054, B. For conditions in wills, see §§ 2828–9.)

§ 1360. **Conditions** are (A) either precedent [*suspensive*, in Louisiana] or subsequent [or *resolutive*, in Louisiana]: Cal. 5708; Dak. Civ. C. 197; Ga. 2295; La.\* 2013,2043,2045.

The former fix the beginning, the latter the end, of the estate: Cal., Dak. The former require performance before the estate vests; the latter may cause a forfeiture of a vested estate: Ga., La.\*

"An estate may be granted upon a condition, either express or implied, upon performance or breach of which the estate shall either commence, be enlarged, or be defeated:" Ga. 2294.

The law inclines to construe conditions as subsequent rather than precedent, and remediable by damages rather than forfeiture: Ga. 2295.

Suspensive conditions may be determined either by a future and uncertain event or on an event actually past but as yet unknown to the parties. In the former case, the obligation cannot be executed till after the event; in the latter, it has effect from the day it was made, but cannot be enforced till the event be known: La.\* 2043.

The dissolving or resolutive condition is that which, when accomplished, operates as a revocation of the obligation, placing matters in the same state as though it had not existed. It does not suspend the execution of the obligation, but obliges the creditor to restore what he has received if the condition be fulfilled: La.\* 2045.

(B) Conditions are, further, either *casual*, depending on chance, and not in the power of either party; *potestative*, in the power of either or both parties to bring about or hinder; *mixed*, depending both on the will of one of the parties and on a casual event or the will of a third person: La.\* 2022–5.

(C) Conditions are also either express or implied: Ga.; La.\* 2026. They are express when they appear in the contract; *implied* when they result from operation of law, the nature of the contract, or the presumed intent of the parties: La.\*

§ 1361. **Nominal Conditions.** When any conditions annexed to a grant or conveyance of land are merely nominal, and evince no intention of actual and substantial benefit to the person to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform them shall in no case operate as a forfeiture of the lands conveyed subject thereto: Mich. 5562; Wis. 2070; Minn. 45,46.

In Louisiana, whether the parties intended to create a condition or only to modify the obligation without making its existence depend on the event, must be determined by the ordinary rules of interpretation (see Art. 102, and in Title VI.): La.\* 2027.

§ 1362. **Repugnant and Impossible.** Conditions repugnant to the estate granted are void: Ga. 2296. Compare § 1365.



So, a condition to do an impossible act is void : Ga.

But in Louisiana, it renders the estate or obligation void : La.\* 2031.

A condition *not* to do an impossible thing does not render void the estate or obligation : La.\* 2032.

Only physical or moral impossibilities are intended above, not a condition relatively impossible to the obligor by his want of strength, skill, means, etc. Such a condition is not impossible : La.\* 2033.

§ 1363. **Illegal and Immoral.** (A) A condition *precedent* to do an act wrong in itself renders the instrument invalid (but if subsequent, the condition is probably void) : Cal.\* 5709 ; Dak.\* Civ. C. 198 ; La.\* 2031.

But in Georgia, all conditions to do an act contrary to public policy, whether precedent or subsequent, are void : Ga. 2296. See also §§ 1364-6.

(B) So, a condition to an act, not wrong, but merely unlawful, whether precedent or not, is void, and the instrument is valid : Cal.\* Dak.\* So, as to all unlawful acts, whether wrong or not : Ga.

§ 1364. **In Restraint of Marriage.** (A) Conditions imposing restraints upon marriage are, in two codes, void : Cal.\* 5710 ; Dak.\* Civ. C. 199. *Except* (1) conditions against marriage during minority are valid : Cal.\* Dak.\* ; (2) and so are conditions against marriage of the widow of the person by whom the condition is imposed : Dak.\* ; (3) and this section does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage : Cal.\* Dak.\*

(B) But in Georgia, an estate may be created during widowhood, and is subject to the same rules as life estates ; and limitations over upon the marriage of a widow are valid, unless manifestly intended as a restraint upon her, and not as a prudential provision for the children ; in which case they are void : Ga. 2272.

§ 1365. **Against Alienation.** Conditions against alienation, when repugnant to the interest created, are void : Cal.\* 5711 ; Dak.\* Civ. C. 200.

§ 1366. **Conditions Dependent.** The dependence or independence of covenants or conditions must be collected from the intention of parties viewing the entire instrument ; in dependent conditions, the failure of the person first required to act is an excuse to the other party for failing to comply. If the conditions be independent, no such excuse avails : Ga. 2298.

The law inclines to construe conditions to be independent : Ga.

§ 1367. **Performance.** No legal disability except insanity excuses a person from failing to comply with a condition annexed to his estate : Ga. 2297.

No notice of such condition need be given by the person claiming under the limitation over : Ga.

Upon breach of condition subsequent working a forfeiture, the person to whom the estate is limited (1) may enter immediately : Ga. 2269 ; (2) the original grantee must reconvey to the grantor or his heirs, or convey to the remainder-man : Cal. 6109 ; Dak. Civ. C. 633.

An instrument granting estate upon a condition precedent passes the estate upon performance of the condition : Cal. 6110 ; Dak.

Every condition must be performed in the manner that it is probable that the parties wished and intended that it should be : La.\* 2037. When an obligation has been contracted upon condition that an event shall happen within a *limited* time, the condition is broken at the expiration thereof without such happening ; if there be no time fixed, the condition may always be performed, and is not broken until it has become certain the event will not happen : La.\* 2038. When the condition is that a particular event shall not happen within a limited time, it is fulfilled when the time has elapsed without such happening, or whenever, before or after such period fixed, it becomes certain that the event will not happen ; and if there be no time fixed, the condition is never fulfilled until it so becomes certain that the event will not happen : La.\* 2039. A condition is also considered fulfilled when the fulfilment has been prevented by the obligor : La.\* 2040.

§ 1368 **Potestative.** Every obligation is null depending on a potestative condition on the part of the obligor : La.\* 2031 ; but if the obligation do not depend solely on the exer-

cise of the obligor's will, but be that the obligor shall do or not do a certain act, although such act depend on the obligor's will, yet the obligation is not void : La.\* 2035 ; so, if the condition be subsequent, an obligation may be made to depend on the will of the obligee for its duration : La.\* 2036.

§ 1369. **Inheritance.** The right of the obligee or grantee under the condition is heritable if the obligation of the condition be not a personal one : La.\* 2029.

The condition being complied with, has a retrospective effect to the day the engagement was contracted; and if the creditor dies before the accomplishment of the condition, his rights devolve on his heirs : La.\* 2041.

## Art. 137. Joint Interests.

§ 1370. **Definitions.** See § 1305. The code of two states defines a *joint interest* to be one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the transfer to be a joint-tenancy, etc. (see § 1371) : Cal.\* 5683 ; Dak.\* Civ. C. 176.

**A Tenancy in Common** is one held by several persons not in joint-tenancy nor in partnership : Cal.\* 5685 ; Dak.\* Civ. C. 178.

**A Partnership Interest** is one owned by several persons in partnership and for partnership purposes : Cal.\* 5684 ; Dak.\* Civ. C. 177. See Division II.

§ 1371. **Joint-Tenancy.** (A) In many states, all joint-tenancies previously existing are done away with and turned into tenancies in common, except as below : N.Y. 2,1,2,44 ; N.J. *Conveyances*, 78 ; Ill. 30,5 ; Del. 86,1 ; Ore. 17,38 ; Nev. 269 ; Ga. 2300.

(B) So, in most states, of all future conveyances ; *i. e.*, all grants and devises of land made to two or more persons, whoever they be, shall be construed to create estates and common and not joint tenancy (1) without exception : Ga. 2301. (2) Unless expressly stated in the creating instrument to be in joint tenancy : N.H. 135,14 ; Mass. 126,5 ; Me. 73,7 ; Vt. 1916 ; R.I. 172,1 ; N.Y. ; N.J. ; Ind. 2922 ; Ill.\* ; Mich. 5560 ; Wis. 2068 ; Io. 1939 ; Minn. 45,44 ; Md. 45,3 ; Del. ; Va. 113,19 ; W.Va. ; Mo. 3949 ; Ark. 647 ; Cal.\* 5686 ; Ore. 6,9 ; Nev. 269 ; Col. 200 ; Dak.\* Civ. C. 179 ; Ida. 1874-5, p. 603,43 ; Mon. G. L. 219 ; N.M. 2764 ; or unless it manifestly appear from the tenor of the instrument that the intent was to create a joint-tenancy : Mass. 126,6 ; Vt. ; R.I. ; Ind. ; Va. ; W.Va. 82,19 ; Ky. 63,1,14 ; Miss. 1197 ; as if it be "to them and the survivor of them," or in like words : N.H., Mass., Vt., R.I., N.Y., Ind.

(3) Except, in many states, the case of conveyances to trustees, who continue to hold the legal estate in joint-tenancy : Mass. 126,6 ; Me. 73,13 (see § 1774) ; Vt. ; N.Y. ; N.J. *Trustees*, 1 ; Pa. *Jnt. Ten.* 1 ; Ind. 2923 ; Ill. ; Mich. 5561 ; Wis. 2069 ; Minn. 45,45 ; Del. ; Va. ; W.Va. ; N.C. 1885,327 ; Ky. ; Mo. ; Ark.\* ; Cal. 5683 ; Ore. ; Nev. ; Col. ; Ida. ; Mon. ; Miss. ; N.M.

(4) And so, except the case of executors : N.Y. ; Ind. ; Ill. ; Mich. ; Wis. ; Minn. ; Del. ; Va. ; W.Va. ; N.C. 1502 ; Ky. ; Mo. ; Ark. ; Cal.\* ; Ore. ; Nev. ; Col. ; Ida. ; Mon. ; N.M.

(5) And of mortgagees, or conveyances in mortgage : Mass., Me., Ind., Mich., Wis., Minn., Miss.

(6) And except conveyances to husband and wife (§ 1373) : Mass., Vt., Ind., Mich., Wis., Mo.

(7) And except property held in partnership, for the purpose of enabling the surviving partner to settle his accounts : N.C. ; Tenn. 2818 ; Cal.\* ; Dak.\*

(8) And except property acquired as *community property* (Art. 340) : Cal.\*

(C) And in other states, joint-tenancy is declared severed by the death of one

of the tenants, and it descends or is to be partitioned as if held in common<sup>a</sup> (for exceptions, see B): Pa.; Ind.† 6060; Ill. 76,1; Va.\* 113,18; W.Va. 82,18; N.C.\* 1326; Ky. 63,1,13; Tenn.\* 2817; Ark.\* 3590; Tex.\* 1655; Col.\* 1832; Mon.\* G.L. 770; S.C. 1852; Ala. 2191; Fla.\* 92,11.

So, estates in joint-tenancy may, in some states, be devised: see § 3010.

(D) In Connecticut, Ohio, Kansas, Nebraska, and a few territories, where the laws are silent, joint-tenancy would, it seems, be created as by common law.

NOTES. — <sup>a</sup> The law in these states seems practically identical with those under A.

§ 1372. **Incidents.** Where joint-tenancies exist, and except as provided in §§ 1371, 1378, 3010, the law of joint-tenancy would seem to remain as at common law.

§ 1373. **Tenancies in Common.** Generally all conveyances or devises to two or more persons create estates in common. See § 1371. And specially, in a few states, conveyances or devises to husband and wife create estates in common (and in Virginia, West Virginia, Kentucky, their respective moieties are subject to dower, curtesy, etc.): Mass. 1885,237; R.I. 172,1; Va. 113,18; W.Va. 82,18; Ky. 52,4,13; Miss. 1197.

§ 1374. **Incidents.** The shares of tenants in common are presumed to be equal, unless the contrary appear: Ga. 2301.

One tenant in common or joint-tenant or coparcener cannot cut timber without the written consent of all his cotenants: Pa. *Waste*, 15.

The fact of inequality does not give the person holding the greater interest any privileges as to possession superior to the person owning a lesser interest so long as the tenancy continues: Ga. 2301.

Every tenant in common has the right to possess the joint property, and so long as he occupies no greater portion of it than his own share would be on division, and does not withdraw from it any of its essential value, such as mineral deposits, he is not liable to account for rent to his cotenant: Ga. 2302.

There can be no adverse possession against a cotenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession: Ga. 2303.

§ 1375. **Coparcenary.** In a few states, (A) this tenure is abolished; and in all cases where two or more persons are entitled to an inheritance by descent, they take as tenants in common: N.H. 135,15; R.I. 172,2; N.Y. 2,2,17; N.J. *Descent*, 1; Ind.<sup>a</sup> 2469-70; Ore. 17,38; Ga. 2301; Ala. 2273.

(B) But, in others, such persons always take in coparcenary: O. 4158; Del. 85,1; Ky. 31,1; Mo. 2161; Ark. 2162; Col. 1039; Fla. 92,1. See also § 3130.

(C) In states where no provision is made by statute, they would seem to take by coparcenary if of the female sex, and possibly also if of both sexes.

NOTE. — <sup>a</sup> Except the case of father and mother, grandfather and grandmother, etc., who take in *joint-tenancy*.

§ 1376. **Incidents.** No parcener has any privilege over another in any election, division, or other matter concerning lands which have descended to them: O. 5774; Ky. 31,10; Fla. 92,10.

§ 1377. **Waste.** One tenant in common (and often one joint-tenant<sup>a</sup> or coparcener<sup>b</sup> has, in most states, an action against another for waste: Mass.<sup>a,b</sup> 179,6-7; Me.<sup>a,b</sup> 95,5; R.I.<sup>a,b</sup> 231,2; N.Y.<sup>a</sup> Civ. C. 1656; N.J.<sup>a,b</sup> *Waste*, 5; O.<sup>b</sup> 5774; Mich.<sup>a</sup> 7942; Wis.<sup>a</sup> 3173; Io.<sup>a</sup> 3332; Minn.<sup>a</sup> 75,45; Neb.<sup>a</sup> 2,633; Del.<sup>a,b</sup> 88,4; Va.<sup>a,b</sup> 133,2; W.Va.<sup>a,b</sup> 199,2; N.C.<sup>a</sup> 627; Ky.<sup>a,b</sup> 66,3,5; Mo.<sup>a,b</sup> 3111; Cal.<sup>a</sup> 10732; Ore. Civ. C. 334; Col.<sup>a</sup> 2467; Wash. 601; Dak.<sup>a</sup> C. Civ. P. 652; Ida.<sup>a</sup> Civ. C. 472; Mon.<sup>a</sup> Civ. C. 350; Uta.<sup>a</sup> C. Civ. P. 613; Ga. 2302; Fla.<sup>b</sup> 92,10; Ariz.<sup>a</sup> 2688.



In some, he recovers treble damages: Mass.;<sup>a, b</sup> Me.;<sup>a, b</sup> N.Y.;<sup>a</sup> Io.;<sup>a</sup> Minn.;<sup>a</sup> Neb.;<sup>a</sup> Va.<sup>a, b, d</sup> 133,4; Ky.;<sup>d</sup> Mo.;<sup>a, b, d</sup> Cal.;<sup>a</sup> Ore.; Nev.;<sup>a</sup> Col.;<sup>a</sup> Wash.; Dak.;<sup>a</sup> Mon.; Uta.;<sup>a</sup> Ariz.;<sup>a</sup> in others, double damages: R.I.;<sup>a, b</sup> Mich.;<sup>a</sup> 7945; in others, the actual damages: N.J.,<sup>a, b</sup> Va.,<sup>a, b</sup> Mo.<sup>a, b</sup> See, for other states, § 1332.

Or he may, in lieu thereof, have also judgment for partition: N.Y. Civ. C. 1657; N.J.

NOTES. — <sup>a</sup> So, in the noted states, of joint-tenants. <sup>b</sup> Of coparceners. <sup>c</sup> Of copartners. <sup>d</sup> In cases of wanton waste.

§ 1378. **Occupation and Account.** In many states, one tenant in common (joint-tenant, etc., see note) has an action against the other (A) for receiving or occupying more than his just share of the estate: N.H.<sup>c</sup> 220,2; Vt.<sup>a, b</sup> 1202; R.I.<sup>a, b</sup> 236,1; Ct.<sup>a, b</sup> 19,17,1,4; N.Y.<sup>a</sup> Civ. C. 1666; N.J.<sup>a</sup> *Account*, 3; Ind.<sup>a, b</sup> 280; Ill.<sup>a, b</sup> 2,1; Wis.† 4257; Del.<sup>a</sup> 86,2; Va.<sup>a</sup> 142,14; W.Va.<sup>a</sup> 145,14; Col.<sup>a</sup> 1833; Mon.<sup>a</sup> G. L. 771; Ga.<sup>a</sup> 2302.

(B) So, in several others, for recovering more than his just share of the rents and profits: N.H. 220,4; Me.<sup>a</sup> 95,20; Ct.;<sup>a, b</sup> O.<sup>b</sup> 5774; Ill.<sup>a, b</sup> 2,1; Mich.<sup>a</sup> 5778; Wis.<sup>a</sup> 2199; Minn.<sup>a</sup> 75,43; Kan.<sup>a, b</sup> 55,22; Ore. 17,38.

(C) So, in some, he has an action of trespass, trover, etc., for injuring or removing the property: N.H. 220,3; Mass.<sup>a, b</sup> 179,6; Me.<sup>a, b</sup> 95,5; Ill.<sup>a</sup> 76,2; Col.<sup>a</sup> 1833; Mon.<sup>a</sup>

(D) He may, in nearly all states, enforce partition against his cotenants: N.H. 247,1; Mass.<sup>a, b</sup> 178,1; Me.<sup>a, c</sup> 88,1; Vt.<sup>a, b</sup> 1275; R.I.<sup>a, b</sup> 230,2-4; Ct.<sup>a, b</sup> 19,17,12,1; N.Y.<sup>a</sup> Civ. C. 1532; N.J.<sup>a, b</sup> *Partition*, 1; Pa.<sup>a, b</sup> *Partition*, 1; O.<sup>b</sup> 5754; Ind.<sup>a</sup> 1186; Ill.<sup>a, b</sup> 106,1; Mich.<sup>a</sup> 7850; Wis.<sup>a</sup> 3101; Minn.<sup>a</sup> 74,1; Neb.<sup>a</sup> 2,802; Md.<sup>a, b</sup> 66,13; Del.<sup>a</sup> 86,3 and 8; Va.<sup>a, b</sup> 120,1; W.Va.<sup>a, b</sup> 144,1; N.C. 1892; Ky. 63,1,13; Tenn. 3993; Mo.<sup>a, b</sup> 3339; Ark.<sup>a, b</sup> 4789; Tex. 3465; Cal.<sup>a, b</sup> 10752; Ore. Civ. C. 419; Nev.<sup>a</sup> 1327; Wash. 552; Dak.<sup>a, b</sup> C. Civ. P. 548; Mon.<sup>a, b</sup> Civ. C. 364; Wy. Civ. C. 564; Uta.<sup>a, b</sup> C. Civ. P. 635; S.C.<sup>a</sup> 1829; Ga. 2304,3996; Ala.<sup>a</sup> 3497; Fla.<sup>a, b</sup> 160,2; La. 1307; Ida.<sup>a, b</sup> Civ. C. 487; N.M.<sup>a, b</sup> 2274; Ariz.<sup>a</sup> 2702; D.C.;<sup>b</sup> U.S. 1876,297, § 1.

(E) In several, he has ejectment against such cotenant: O. 5783; Ind. 1063; Neb.<sup>a</sup> 2,628; Ga. 2303; N.M.<sup>a</sup> 33,7. See also in Part IV.

(F) He has a general equitable action against cotenants: Mass.<sup>a, b, c</sup> 151,2; (G) he has the action of account, general, as in the case of copartners: Vt.<sup>b</sup> 1217. So, in other states; see in Part IV.

NOTE. — See § 1377 for notes.

§ 1379. **Contribution.** In Kansas, one tenant in common, etc., having by consent the management of the estate, who makes repairs and improvements thereon with knowledge of the others, is entitled to contribution therefor: Kan.<sup>a, b</sup> 55,21.

So, one tenant in common has a lien upon the interest of the other (1) in the crop for any balance due for labor or supplies furnished about such crop: Ala. 3479; (2) upon the estate, for the proportion of any taxes paid by him due from the other tenants: Mass.<sup>a</sup> 12,63. See in Part. III.

NOTE. — See § 1377, notes.

## CHAPTER III. — CONVEYANCING.

**Note to Chapter.** — The sign \* throughout the chapter means that the provision applies both to realty and personalty; the sign † that it applies to personalty only. By the French law prevailing in Louisiana, the law of donations applies equally to real and personal property, and it is impracticable to separate the provisions as in the laws of other states. For Louisiana, therefore, see Titles 5 and 6.



**Art. 140. General Principles.**

§ 1400. **Seisin.** "All persons owning lands not held by an adverse possession shall be deemed to be seized and possessed of the same : " Io. 1928 ; Kan. 22,1.

§ 1401. **By Person Disseized.** (A) In many states, any person claiming a right or title to real estate, although out of possession, and there be an adverse possession, may sell and transfer his interest as fully as if in actual possession : Me. 73,1 ; Vt. 1884,146 ; Ill. 30,4 ; Mich. 5657 ; Wis. 2205 ; Io. 1932 ; Minn. 40,6 ; Kan. 22,6 ; Neb. 1,73,31 ; Mo. 673 ; Ark. 644 ; Cal.\* 6047 ; Ore. 6,8 ; Nev. 262 ; Col. 202 ; Ida. 1874-5, p. 602,34 ; Mon. G. L. 210 ; Wy. 1882,1,7 ; Uta. 628 ; Ga. 2695 ; Miss. 1187 ; Ariz. 2278.

(B) But in others, the common law is followed ; and a grant, devise, or conveyance of real estate, made and delivered when the estate is in the actual possession of a person claiming title adversely to the grantor, is (except as below) absolutely void : R.I. 173,2 ; Ct. 18,6,15 ; N.Y. 2,1,2,147 ; N.C.<sup>a</sup> 1333 ; Ky. 11,2 ; 24,1 ; Tenn.<sup>a</sup> 2446 ; Dak. Civ. C. 681.

And the seller must have been in possession one year before the sale : Tenn.

And so also a sale under execution of such land is void : Ky. But not so in Tennessee : Tenn. 2448.

*Except* that a valid grant, etc., may (as at common law) be made to the person in possession of the land : Vt. 1954 ; Ct. ; N.C. ; Ky. 11,6.

And in other states, a devise of such lands may be made, and is valid, although they were possessed adversely to the testator : N.H. 193,3 ; Mass. 127,26 ; Me. 74,4 ; Ky. 11,2. And in Tennessee, this law does not prohibit *bona-fide* sales. See also in Part V., Champerty. And in several, a valid mortgage may be made of such estate : N.Y. *ib.* 148 ; Ky. 11,7 ; Tenn. ; Cal. 7921 ; Dak. P. C. 190. See Art. 185, § 2630.

The covenants in such void deed or other conveyance are valid, and the grantor is bound by them : Vt. 1954.

The rule does not apply as between mortgagor and mortgagee, lessor and lessee, vendor and vendee, trustee and *cestui* : Ky. 11,7.

(C) In other states, the laws are silent ; and the common-law rule would seem to prevail ; but it is usually much modified by the decisions of courts.

NOTE. — <sup>a</sup> In North Carolina and Tennessee, the old statute of champerty (32 H. VIII. C. 9) is re-enacted.

§ 1402. **Tortious Conveyances.** (A) In several states, there is a general provision that no greater estate shall pass by any conveyance than the grantor possessed at the time of delivery of the deed or could then lawfully convey : N.H. 135,18 ; N.Y. 1,2,1,143 ; Va. 112,7 ; W.Va. 82,7 ; Ky. 63,1,17 ; Tex. 550 ; Miss. 1199. (B) And, in many others, it is specially provided that no conveyance by a tenant for life or years shall work a forfeiture, but passes to the grantee all the interest which the tenant could lawfully convey : N.H. 135,18 ; Mass. 126,7 ; Me. 73,5 ; Vt. 1918 ; N.Y. *ib.* 145 ; Ind. 2961 ; Mich. 5654 ; Wis. 2202 ; Minn. 40,5 ; Va. 112,7 ; Ky. 66,1,1 ; Tex. 550 ; Cal. 6108 ; Ore. 6,5 ; Dak. Civ. C. 630 ; Wy. 1882,1,4 ; Ga.<sup>a</sup> 2260 ; Ala. 2196 ; Miss. See § 1454.

NOTE. — <sup>a</sup> As to tenants for life only.

§ 1403. **Forfeitures.** And in many states, that no expectant estate can be defeated or barred (A) by any alienation or other act of the owner of the precedent estate (except where so specially provided by statute, or, in Massachusetts and Maine, in cases of barring tail, see § 1313) : Mass. 126,8-9 ; Me. 73,5 ; N.Y. 2,1,

2,32; Mich. 5548; Wis. 2056; Minn. 45,32-3; Va. 112,13; W.Va. 82,13; Ky. 63,1,12; Tex. 550; Cal. 5741; Dak. Civ. C. 213; S.C. 1883,280; Ala. 2184; Miss. 1199.

(B) Nor, in several, by the destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise: Mass.; Me.; N.Y.; Mich.; Wis.; Minn.; Cal.; Dak.; Ga. 2264; Miss. See also under E.

So, in two others, not by the surrender or default of a life tenant (see also Art. 133, and in Part IV.): Va. 129,3; W.Va. 80,3.

(C) Nor, in many, by the determination of such precedent interest before the happening of the contingency on which the future estate is limited to take effect. See, § 1426.

*Except* that such expectant estate may be defeated in any manner or by any means which the party creating the estate shall in the creation thereof have provided or authorized; and is not on that account to be adjudged void in its creation: Mass.; N.Y. 2,1,2,33; Mich. 5549; Wis. 2057; Minn.; Cal. 5740; Dak. Civ. C. 212.

(D) So, no discontinuance tolls the entry: Mass. 126,16. See § 1404.

(E) So, a mortgage by a lessee to the lessor of the land leased creates no merger: Md. 45,7.

In Georgia, there is a general provision that if two estates in the same property unite in the same person in his individual capacity, the less estate is secured in the greater: Ga. 2271.

No union of the particular estate with the inheritance by purchase or by descent shall so operate, by merger or otherwise, as to defeat, impair, or in any way affect such remainder: Va. 112,13; W.Va. 82,13; Ky. 63,1,12; Tex. 550; Miss. 1199.

When the reversion of any land expectant on a lease is merged in any other estate, the person entitled to this estate has the same remedy against the lessee or his assigns for rent or forfeiture or breach of covenant, etc., as the person entitled to the original reversion would have had: Md. 45,6.

§ 1404. **Descent Cast.** And in many states also, the right of a person to the possession of real estate or the right of entry is not tolled, impaired, or affected (A) by descent cast in consequence of the death of the disseizor or person in possession: Mass. 126,16; Me. 104,5; Vt. 953; N.Y. Civ. C. 374; N.J. *Addenda*, 3; Wis. 4217; Va. 129,4; W.Va. 80,4; Ky. 63,1,5; Mo. 3221; Ark. 4473; Cal. 10327; Nev. 1028; Dak. Civ. C. 50; Ida. C. Civ. P. 152; Uta. C. Civ. P. 187; S.C. 2282; Civ. C. 107; Miss. 1200; Mon. C. Civ. P. 38; Ala. 3233; Ariz. 2092.

*Unless*, in a few, the disseizor had peaceable possession for ten years (in Kentucky, fifteen years; and in New Jersey, five years) after the disseisin: N.J., Ky., S.C.; and in New Jersey and South Carolina, without entry or continual claim.

(B) Nor, in several, is such right lost by *discontinuance*: Mass.; Me.; N.J. *Addenda*, 7 and 10; S.C. 2293; as (1) by a conveyance by tenant in dower or curtesy: N.J.; (2) by a conveyance or act of the husband of the owner: Va. 129,2. See also in Division II.

§ 1405. **Time of Creation.** The delivery of the deed, or the death of the testator, is deemed the time of creation of an estate, present or future, by deed or devise respectively: N.Y. 2,1,2,41; Mich. 5557; Wis. 2065; Minn. 45,41; Cal. 5749; Dak. Civ. C. 216. See also § 1562.

All deeds duly executed and delivered carry the right to immediate possession, unless they specify a future day: Col. 206.

So, if a vendor or tenant commit waste after he has sold his interest, but while still in possession, he is liable for damages: Va. 133,1; Ky. 66,3,4.

§ 1406. **Shelley's Case.** In many states, this rule is abolished; and where an estate is limited, either by deed or by will, to a person and remainder to his heirs or the heirs of his body, as well as to his issue, he takes a life estate, and the person or persons who shall at his death be such heir or heirs <sup>a</sup> takes a contingent

remainder by purchase : Mass. 126,4 ; Me. 73,6 ; Ct. 18,6,4 ; N.Y. 2,1,2,28 ; Mich. 5544 ; Wis. 2052 ; Minn. 45,28 ; Va. 112,11 ; W.Va. 82,11 ; Ky. 63,1,10 ; Tenn. 2814 ; Mo. 3943 and 4003 ; Cal. 5779 ; Dak. Civ. C. 236 ; Ala. 2183 ; Miss. 1201 ; N.M. 1425.

So, in other states, in the case of *wills* only : N.H. 193,5 ; R.I.<sup>b</sup> 182,2 ; N.J. *Descent*, 10 ; O. 5968 ; Kan. 117,52 ; Ore. 64,28.

NOTES. — <sup>a</sup> The word *heirs* must be construed according to the laws of descent in these several states. Thus the issue of the deceased child of the life tenant would take as heirs in such child's place ; for example, see N.J. *Descent*, 10. <sup>b</sup> And as to devises to the *issue* or *heirs of the body* only.

## Art. 141. Of the Parties.

§ 1410. **Who may Convey.** (See §§ 1104–5.) (A) Any person, association, body politic or corporate who may hold real estate may convey the same by deed : Col. 198 ; N.M. 2748. (B) In others, all persons not under legal incapacity and aged twenty-one may alien their lands : Mich. 5652 ; Ala. 2144.

### § 1411. Persons under Disability. See Division II.

§ 1412. **Persons not in Being.** (A) In two states, no estate can be given or granted to any person but such as are in being at the time of the creation of the estate, or their immediate issue and descendants : Ct. 18,6,2 ; O. 4200. (B) But in others, a deed or devise to an infant unborn, but *in esse*, is good :<sup>a</sup> N.C. 1328 ; La.\* 1482. See also §§ 1440,2621. And in case of a will, it is sufficient if the child be conceived at the time of the testator's decease : La.\* In both cases, however, the estate does not pass unless the person be born alive : La.\* For future estates, see also Arts. 142 and 144.

(C) When a patent issues or a deed is made to a person dead at time of execution, the heirs take the title as if such deed, etc., had been made to them by name : Wis. 2258 ; Ky. 50,1,1.

So, in many states, a patent of land issues to the heirs when the person entitled dies after the order : N.Y. 1,9,5,40 ; O. 8468 ; 4120 ; Mich. 5346 ; Wis. 2376 ; N.C. 2780 ; Tex. 3931,3946 ; Cal. 3523.

NOTE. — <sup>a</sup> The same would seem to result from the general provision declaring a child conceived to be an existing person, in California and other states. See § 6005.

§ 1413. **Posthumous Children.** In most states, when a future estate or a remainder is limited by deed or will to the heirs, issue, or children of any person, after the death of such person his posthumous children take as if living at the death, although no estate be conveyed to support contingent remainders :<sup>a</sup> N.Y. 2,1,2,1,30 ; Ill. 30,14 ; Mich. 5546–7 ; Wis. 2054–5 ; Minn. 45,30 ; Va. 112,10 ; W.Va. 82,10 ; N.C. 1327 ; Ky. 63,1,15 ; Mo. 3945 ; Cal. 5698 ; Nev. 273 ; Col. 205 ; Dak. Civ. C. 190 ; Ida. 1874–5, p. 604,47 ; Mon. G. L. 223 ; S.C. 1846 ; Ala. 2182 ; Miss. 1202 ; N.M. 1427.

And consequently a future estate depending on the death of any person without heirs, issue, etc., is defeated by the birth of a posthumous child capable of inheriting from such person :<sup>b</sup> N.Y. 2,1,2,31 ; Ill. ; Mich. ; Wis. ; Minn. 45,31 ; Va. ; W.Va. ; N.C. ; Tenn. 2009 ; Mo. 3946 ; Cal. 5739 ; Nev. 272 ; Dak. Civ. C. 211 ; Ida. *ib.* 46 ; Mon. G. L. 222 ; Ala. ; N.M. 1428.

Such posthumous children must, in a few states, be born within ten months after the father's death, in order to succeed under §§ 1413 or 1415 : Va. ; W.Va. ; N.C. 1327 ; Ky. 63,1,9 ; Tenn. 2815 ; Miss. 1203.

NOTES. — <sup>a</sup> In some states, the principle applies in the case of a will, but not in that of a deed. See § 2621. <sup>b</sup> This would also seem to follow from the principal provision in the other states.



§ 1414. "**Heirs.**" In North Carolina, any limitation by deed or will to the heirs of a living person is construed to be to the children of such person, unless a contrary intention appear: N.C. 1329.

In Georgia, limitations over to the "heirs," "heirs of the body," "lineal heirs," "lawful heirs," "issue," or words of similar import, are held to mean *children*, whether the parents be alive or dead: Ga. 2249. And in such case the children and the descendants of children deceased at the time of the vesting of the estate take by representation: Ga. See also § 2300.

§ 1415. "**Dying without Issue.**" In a deed or will, "dying without issue" (or heirs, or heirs of the body, in all these states except Mississippi) is construed to mean dying without issue, etc., living (or *in esse*; see § 1412) *at the time of death*: N.Y. 2,1,2,1,22; Mich. 5538; Wis. 2046; Minn. 45,22; Va. 112,10; W.Va. 82,10; N.C. 1327; Ky. 63,1,9; Tenn. 2815; Mo. 3942; Cal.\* 6071; Nev. 271; Dak.\* Civ. C. 617; Ida. 1874-5, p. 604,45; Mon. G. L. 221; S.C. 1862; Ga. 2251; Ala.\* 2181; Miss. 1203; N.M. 1424.

But in a few states, so only in *wills*: N.J. *Wills*, 25; Md. 49,9.

Unless a contrary intention appear: N.J., Md., Va., W.Va., N.C., Tenn. See also § 2800.

§ 1416. **Volunteers.** In several states, the provisions of the 8 & 9 Vict. C. 106, § 5, are adopted, and an immediate estate or interest in, or the benefit of a condition respecting, any estate, may be taken by a person under an instrument although he be not a party thereto: Va. 112,2; W.Va. 82,2; Cal. 6085; Dak.\* Civ. C. 621.

And if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action therein which he might maintain in case it had been made with him only, and the consideration had moved from him to the person making such covenant or promise: Va., W.Va.

§ 1417. **The Disponible Part.** See §§ 2632-3, and in Title VI.

## Art. 142. Of the Estate Conveyed.

§ 1420. **What may be Conveyed.** (A) Generally, except as provided in § 1401 and below, every estate or interest in lands, absolute or limited, present or future, certain or contingent, legal or equitable, may be conveyed: Va. 112,5; W.Va. 82,5; Ky. 24,1; 63,1,6; Ala. 2144; Miss. 1187; N.M. 2748.

And the same would be implied in many other states from the definition of the real estate that may be conveyed by deed: Ore. 6,58. See § 1550.

A right of re-entry, or of repossession for breach of condition subsequent, can be transferred: Cal.\* 6046; but only to the owner of the property: Dak.\* Civ. C. 603. See § 1401.

No contract, for a valid consideration, to sell any interest, real or supposed, in land belonging to the United States, or for the occupancy thereof, or any improvement made thereon, shall for that cause be avoided or impeached, if the nature of such interest was known to the party and his consent thereto obtained without fraud or misrepresentation: Ind. 3000; Neb. 1,38,1. See also Art. 111.

So, in other states, (B) expectant estates of every variety, including rights of entry, contingent or conditional interests, are descendible, devisable, and alienable, in the same manner as estates in possession: N.Y. 2,1,2,35; N.J. *Conveyances*, 82; Mich. 5551; Wis. 2059; Minn. 45,35; Cal. 5699; Dak. Civ. C. 191.

(But this does not render contingent estates liable to be sold under executions: N.J.)

So in two, only when the expectant estate, executory devise, or contingent remainder is so limited that in case of the person's death before the happening of the contingency, it will pass to his heirs: Mass. 126,2; Me. 73,3. And so, in two others, the expectancy of an heir (or other estates where the contingency is as to the *person*: N.J.) cannot be conveyed: N.J.; Ia.\* 2454.



The same would result, from § 1350, in California and Dakota. So, a mere possibility, not coupled with an interest, cannot be transferred: Cal.\* 6045; Dak.\* Civ. C. 602.

§ 1421. **Estates in Futuro.** In many states, any estate, freehold or chattel, may be made to commence *in futuro* by deed or will,<sup>a</sup> whether with or without the intervention of a precedent estate: N.Y. 2,1,2,24; Ind. 2959; Mich. 5540; Wis. 2048; Io 1933; Minn. 45,24; Neb. 1,73,52; Va. 112,5; W.Va. 82,5; Ky. 63,1,6; Mo. 3945; Tex. 556; Cal. 5767 and 5773; Dak. Civ. C. 224 and 230; Ga. 2691 and 2247; Miss. 1187.

So, in several, any estate which would be good by executory devise is equally good if created by deed: Va.; W.Va.; Ky.; Ala. 2180.

So, in Georgia, a future estate or interest may be conveyed by deed: Ga. 2691.

But such deed must, in Georgia, operate to transfer the title immediately, or the instrument will be testamentary and revocable.

NOTE. — <sup>a</sup> See, however, Art. 135 and the subsequent sections of Art. 142.

§ 1422. **Life Estates.** In several states, successive estates for life can only be limited to persons in being at the creation thereof: N.Y. 2,2,2,17; Mich. 5533; Wis. 2041; Minn. 45,17; Cal. 5774; Dak. Civ. C. 231.

So, in two, of a life estate limited as a remainder upon a term for years: Cal. 5777; Dak. Civ. C. 234.

And, further, where a remainder is limited on more than two successive estates for life, all the life estates subsequent to these two are void, and the remainder takes effect at once upon their termination: N.Y. 2,1,2,17; Mich.; Wis. 2041; Minn.

So, in two, when the remainder is limited upon estates for the life of persons not in being, they are void, and it takes effect at once: Cal.; Dak. Civ. C. 231.

**Estates pur Auter Vie.** In four states, when a remainder is created on an estate for the life of more than two persons, other than the grantee, it takes effect immediately upon the death of the two persons first named, as if no other *cestuis que vivent* had been introduced: N.Y. 2,1,2,19; Mich.; Wis. 2043; Minn. 45,19.

§ 1423. **Future Estates.** In a few, it is declared that no future estate shall be invalid on account of the improbability of the contingency on which it is to take effect: N.Y. 2,1,2,26; Mich. 5542; Wis. 2050; Minn. 45,26; Cal. 5697; Dak. Civ. C. 189.

And two or more future estates may be created to take effect in the alternative, so that if one fails the other may be substituted: N.Y. 2,1,2,25; Mich. 5541; Wis. 2049; Minn. 45,25; Cal. 5696; Dak. Civ. C. 188.

A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed: Cal. 5781; Dak. Civ. C. 238.

§ 1424. **Remainders.** (A) A remainder, vested or contingent, may be created upon the determination of a term of years: N.Y. 2,1,2,24; Ind. 2959; Mich. 5536; Wis. 2044; Tenn. 2816; Cal. 5773; Dak. Civ. C. 230. But not, in several, unless the contingency must occur within the rule against perpetuities (§ 1440), or upon the termination of the term for years: N.Y. 2,1,2,20; Mich. 5336; Wis.; Minn. 45,20; Cal.; Dak.

(B) No estate for life can be limited as a remainder on a term for years, except to a person in being at the creation of the estate: N.Y. 2,1,2,21; Mich. 5537; Wis. 2045; Minn. 45,21.

(C) No remainder can be created upon an estate for the life of any other person or persons than the first grantee or devisee of such estate, unless it be in fee, or, if the estate granted be in a term of years, for the residue of the term: N.Y. 2,1,2,18; Mich. 5534; Wis. 2042; Minn. 45,18; Cal. 5775; Dak. Civ. C. 232.

(D) A fee may be limited upon a fee, upon a contingency which must occur within the

time limited by the rule against perpetuities (§ 1440): N.Y. 2,1,2,1,24; Cal. 5773; Dak. Civ. C. 230; Ga. 2247.

(E) A remainder can be created for a person not in being: Ga. 2268.

§ 1425. **Vested Remainders.** In Georgia, it is enacted that if a remainder-man die before the time the estate vests in possession, his heirs take a vested remainder interest. And when the contingency is not as to the person but as to the event, they take a contingent remainder. But if the contingency be as to the person, and that person be not *in esse* at the time when the contingency happens, his heirs are not entitled: Ga. 2266.

It is declared that the law favors the vesting of remainders in all cases of doubt: Ga. 2269.

And a vested remainder opens to take in all persons within the description coming into being up to the time of enjoyment commencing: Ga. 2268.

§ 1426. **Contingent Remainders** are, in Alabama, abolished; but any estate may be created by deed or will to have an effect like an executory devise (cf. § 1420): Ala. 2180.

(A) In several states, when a remainder in an estate for life or years is not limited on a contingency defeating or avoiding such precedent estate, it will only come into effect on the death of the first taker or the expiration of the term: N.Y. 2,1,2,29; Mich. 5545; Wis. 2053; Minn. 45,29; Cal. 5780; Dak. Civ. C. 237. See also § 1403.

(B) So, in several, no contingent remainder is defeated by the termination of the precedent estate before the happening of the contingency; but it will take effect at any time after such termination: N.Y. 2,1,2,34; Mich. 5550; Wis. 2058; Minn. 45,34; Cal. 5742; Dak. Civ. C. 214.

So, in three, a contingent remainder shall in no case fail for want of a particular estate to support it: Va. 112,12; W.Va. 82,12; Ky. 63,1,11.

And in Georgia, the fee may be in abeyance without detriment to subsequent remainders: Ga. 2247.

(C) In several, any contingent remainder may be valid if it would be valid as a conditional limitation; such as a remainder limited on a contingency which might operate to abridge the precedent estate: N.Y. 2,1,2,27; Ind. 2960; Mich. 5543; Wis. 2051; Minn. 45,27; Cal. 5778; Dak. Civ. C. 235.

(D) In two, a contingent remainder cannot be created on a term for years unless the contingency must happen during the period of perpetuity (§ 1440): Cal. 5776; Dak. Civ. C. 233.

But for other states, see § 1424, A.

§ 1427. **Estates in Terms, etc.** In several, an estate for life may be created in a term of years and a remainder limited thereon: N.Y. 2,1,2,24; Ind. 2959; Mich. 5540; Wis. 2043; Minn. 45,24; Cal. 5773; Dak. Civ. C. 230.

And a disposition of the rents and profits of lands to accrue are governed by the rules regulating future estates in land: N.Y. 2,1,2,36; Mich. 5552; Wis. 2060; Minn. 45,36. See also § 1441.

## **Art. 144. Perpetuities.** [For notes, see note to this Title.]

§ 1440. **General Rule.** (A) In several states, the law is declared that the absolute power of alienation of real estate shall not be suspended by any condition or limitation (in deed or will) for a longer period than during the continuance of two lives in being at the creation of the estate: N.Y. 2,1,2,15; Mich. 5531; Wis. 2039; Minn. 45,15.

(B) So, in others, not longer than during the existence of any number of such lives in being at creation of estate: Ind. 2962; 6057\*; Cal. 5715; Dak. Civ. C. 201.

(C) In one state, for no longer period than during the continuance of three lives, as above, and ten years after: Ala. 2188.

(D) In several, no limitation is valid beyond lives in being and twenty-one years (plus, in Kentucky and Georgia, the period of gestation) thereafter: Io.\* 1920; Ky. 63,1,27; Ga. 2267. Compare § 1413.

(E) But in several, a contingent remainder in fee may be created on a prior remainder in fee, to take effect if the first remainder-man die under twenty-one, or otherwise lose his estate before arriving at full age: N.Y. 2,1,2,16; Ind. 2962; Mich. 5532; Wis. 2040; Minn. 45,16; Cal. 5772; Dak. Civ. C. 229.

And in Arizona, any person may by deed convey real estate to his legitimate child or children, and natural child or children, or his child or children by adoption, and their issue during their natural lives, whether born or begotten before or after the conveyance; and in such conveyance may inhibit the alienation of such estate during the natural lives of such children and issue: Ariz. 2287.

And in Alabama, land may be conveyed to the wife and children, or children only, severally, successively, and jointly, and to the heirs of the body of the survivor, if they come of age, and in default thereof over: Ala. 2188.

§ 1441. **The Effect** of limitations, any or all of which are void because perpetuities, (A) is to make those limitations valid which are not so void; and the last taker under a limitation not too remote will have the absolute fee: Ga. 2667.

(B) In one other, however, the remainder in fee will take effect upon the termination of the last particular estate not too remote; and those life estates, etc., which are too remote are dropped out: Ind. 2963.

(C) In several states, "every future estate is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is here prescribed; and such power is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed:" N.Y. 2,1,2,14; Mich. 5530; Wis. 2038; Minn. 45,14; Cal. 5716; Dak. Civ. C. 202.

Subject to these rules, lands may be conveyed for such terms as the owner thinks proper; and courts are enjoined to give effect in such cases to the intention and meaning of the parties: Ala. 2187.

This section applies also to terms for years: Cal. 5770; Dak. Civ. C. 227. See also §§ 1341,1412,1427. And to trusts: Cal. 5771; Dak. Civ. C. 228; and to dispositions of the income of property to accrue: Cal. 5722; Dak. Civ. C. 204.

§ 1442. **Of Personal Property.** The absolute ownership of personal property shall not be suspended by any condition or limitation whatever for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument or death of the testator: N.Y. 2,4,4,1.

In all other respects, and in other states, limitations of future or contingent interests in personal property shall be subject to the rules presented in the first chapter of this act in relation to future estates in lands: N.Y. *ib.* 2; Ind. 6057. And so, apparently, in all the other states there is no distinction made. See §§ 1440,1441.

§ 1443. **Accumulations.** In a few states, there are statutory restrictions on accumulations of rents and profits of real estate, whether directed by deed or will (and — in N.Y. 2,4,4,3 and 4; Pa.; Ind.†; Cal.; Dak.; Ala. — the same apply to personal estate also); thus, (A) in most states, (1) if the accumulation is to commence on the creation of the estate [*i. e.*, the death of the settler or the execution of the conveyance] out of which the profits are to arise, it must be made for minors then in being at the creation of such estate, and must terminate on their majority: N.Y. 2,1,2,37; Ind.† 6058; Mich. 5553; Wis. 2061; Minn. 45,37; Cal. 5724; Dak. Civ. C. 206; Ala. 2189.

(2) If it is to commence at any period subsequent to the creation of the estate, it must be within the time allowed by the rule against perpetuities (§ 1440) and must commence at some time during the minority of the beneficiary and terminate at his or their majority: N.Y.; Ind.†; Mich.; Wis.; Minn.; Cal. 5722 and 5724; Dak.

(B) In Pennsylvania, the accumulation may not be for a longer term than during the life or lives of the settler or testator and twenty-one years plus the period of gestation thereafter; that is to say, during the minority of the person entitled: Pa. *Real Estate*, 9.

(C) But in Alabama, there may be an accumulation for ten years without regard to the minority of the beneficiary: Ala. 2189.



(D) And in Wisconsin, there may be accumulation for twenty-one years for the benefit of a literary or charitable corporation: Wis. 2061. In New York, there may be accumulation until the sum is sufficient for the purpose to which it is destined, of funds held in a lawful trust by a college or literary incorporation: N.Y. 1846,74.

Except as herein provided, all directions for accumulations of the profits and of real [or personal; see above] estate are void: N.Y. 2,1,2,38; Pa.; Ind.†; Mich. 5554; Wis. 2062; Minn. 45,38; Cal. 5723; Dak. Civ. C. 205.

§ 1444. **Effect.** If a direction for accumulation be for a longer time than as prescribed in § 1442, it is void only as to such additional time: N.Y. 2,1,2,38; 2,4,4,4; Ind.† 6058; Mich. 5554; Wis. 2062; Minn. 45,38; Cal. 5725; Dak. Civ. C. 207.

If a minor for whose benefit such accumulation is directed is destitute of means of support or education, the proper court may cause a reasonable sum for such purpose to be taken from the fund: N.Y. 2,1,2,39; 2,4,4,5; Pa. *ib.*; Ind.† 6059; Mich. 5555; Wis. 2063; Minn. 45,39; Cal. 5726; Dak. Civ. C. 208.

§ 1445. **Estates in Abeyance.** In several states, it is provided that when the ownership of an estate is in abeyance (as when there is a valid future limitation not vested), if there is no valid direction in the creating instrument for the disposal of the rents and profits, they shall belong to the person presumptively entitled to the next estate: N.Y. 2,1,2,40; Mich. 5556; Wis. 2064; Minn. 45,40; Cal. 5733; Dak. Civ. C. 210.

§ 1446. **Religious Corporations.** In Kentucky, no church or society of Christians can hold the title, legal or equitable, to land exceeding fifty acres of ground, but may hold that amount for the purpose of erecting thereon a house of public worship, public instruction, church, or graveyard: Ky. 13,3.

And in Wisconsin, land may be given, granted, or devised to literary or charitable corporations which shall have been organized under the laws of the State, for their sole use and benefit: Wis. 2039.

In Kentucky, the statute of Elizabeth is re-enacted, and all grants, devises, etc., for charitable and educational purposes are made valid: Ky. 13,1. See also Part III., *Religious Corporations*.

## **Art. 145. Warranties.** [For notes to article, see note to Title.]

§ 1450. **Collateral Warranties** are, (A) in many states, abolished altogether: N.Y. 2,1,2,141; Ind. 2925; N.C. 1334; Mo. 3944; Cal. 6115; Nev. 276; Dak. Civ. C. 633; Ida. 1874-5, p. 604,50; Mon. G. L. 226; N.M. 1426.

(B) In several others, they are void as against the warrantor's heirs: Ct. 18,6,4; N.J. *Conveyances*, 76; Del. 83,28; S.C. 1809.

§ 1451. **Lineal Warranties** are (A) abolished: N.Y., Ind., Mo., Cal., Nev., Dak., Ida., Mon., N.M. For citations, see § 1450.

(B) But the heirs and devisees of a person creating any covenant in a deed are answerable, to the extent of the lands devised or descended to them, in the manner prescribed by law: N.Y., Ind., Mo., Cal., Nev., Dak., Ida., Mon., N.M.

(C) And in several, the heirs are liable on a warranty by the ancestor to the value of their real estate from him devised or descended: Va. 112,7; W.Va. 82,7; Ky. 63,1,18.

(D) So, in Louisiana, heritable <sup>a</sup> obligations and stipulations give to and impose upon heirs, assigns, and other representatives, the same duties and rights that the original parties had and were liable to, except that beneficiary heirs can only be liable to the amount of the succession: La.\* 2008.



In several, a warranty made by a tenant for life of real estate which shall descend or come to any person in reversion or remainder, is void as against such person: N.J. *Conveyances*, 75; Del. 83,28; N.C. 1334; Ky. 63,1,17; S.C.; Ala. 2192.

So, in New Jersey, specially of a warranty (1) by tenant by curtesy: N.J. *Addenda*, 10; (2) by a husband of his wife's land: N.J.; (3) by a tenant in dower: N.J. *ib.* 7.

In one, however, they bind the warrantor personally, as a covenant: N.C. So, it seems to be implied, in the other states.

NOTE. — <sup>a</sup> These may be either as to real or personal property, or contracts concerning either; see Title 6.

§ 1452. **Breach.** No covenant of warranty (or seisin) is considered as broken by reason (1) of the existence of a highway upon the land conveyed, unless otherwise specified in the deed: Vt. 3042; Ill. 30,39.

(2) Nor by eviction by a person whose right did not exist in perfection before the sale, as when it only became perfected through negligence of the buyer: La.\* 2502.

§ 1453. **Action.** In two states, no right of action exists on a covenant of warranty when possession has been delivered to the warrantee until the party menacing the possession of the grantee has commenced legal proceedings, and the mortgagor or grantor has, after notice, refused to defend: Col. 208; La.\* 2517-8.

Such notice is unnecessary, however, unless the warrantor shall show that he possessed a good defence as against the party menacing, had he been given notice in time: La.\* 2518.

And if the vendee commence suit against a person disturbing his possession, he should notify his warrantor, who will then be obliged to indemnify him fully in case of condemnation, whether the warrantor conduct the suit or not: La.\* 2519.

§ 1454. **Estoppel.** But in several states, every deed with general warranty (or, in Nebraska and Mississippi, with special warranty or quitclaim; or in New York, Illinois, Kansas, Missouri, Arkansas, California, Nevada, Colorado, Dakota, Idaho, Utah, Georgia and Arizona, any deed purporting to convey the fee-simple; or a greater interest than the grantor had, in Iowa and Nebraska) (A) is conclusive as against the grantor, his heirs and assigns: N.Y. 2,1,2,143-4; Ky. 63,1,18; Cal. 6107; Dak. Civ. C. 629; Ga. 2699; Miss. 1195; "to the extent of any estate which shall thereafter come to him:" Ky., Cal., Ga., Miss.

(B) When the grantor was not possessed of the estate purported to be conveyed at the time, any estate afterwards acquired by such grantor in the land inures to the benefit of, or is held by him in trust for, the grantee, to the extent of the estate so purported to be conveyed: Ill. 30,7; Io. 1931; Kan. 22,5; Neb. 1,73,51; Mo. 3940; Ark. 642; Cal. 6106; Nev. 261; Col. 201; Wash. App. p. 25, § 1; Dak. Civ. C. 633; Ida. 1874-5, *Conveyances*, 33; Mon. G. L. 209; Uta. 627; Ariz. 2277.

Such original grantor is not, however, estopped from acquiring the estate at a judicial or tax sale against the grantee or his assigns, or for subsequent taxes: Neb.

§ 1455. **Louisiana Law.** The parties may by particular agreement add to the implied obligation of warranty (see § 1501), or diminish its effect, or may even agree that the seller shall not be subject to warranty. But he is always accountable for what results from his personal act, and any contrary agreement is void; and even in case of stipulation of no warranty, the seller must restore the price unless the buyer was aware at the time of sale of the danger of eviction, and bought at his peril and risk: La.\* 2503-5.

§ 1456. **Eviction.** In case of warranty, the buyer, if evicted, may claim (1) the restitution of the price; (2) the fruits or revenues he has been obliged to return to the owner evicting; (3) all costs in both suits; (4) actual damages: La.\* 2506. Such full price must be restored though the thing sold has lost in value by any cause, even by the buyer's neglect; but if the buyer has reaped some benefits from the thing, and in so doing impaired it, the seller may retain such damages on the price to the amount at which they may be estimated in favor of the evicting owner: La.\* 2507-8. See also §§ 4570-1.

The seller is also bound to reimburse all useful improvements made by the buyer on the premises : La.\* 2509; and if the seller knowingly sold the property of a third person, he is bound to reimburse to the buyer all expenses, even of embellishments and luxury, that the buyer has been at in improving the premises : La.\* 2510. See Title VI. Rescission.

## **Art. 146. Other Covenants.** [For notes, see note to Title.]

### **§ 1460. General Principles.**

When obligations are attached to immovable property, they are called real obligations, in Louisiana : La.\* 2010.

They may be created in three ways: (1) by the alienation of immovable property subject to a real condition, either expressed or implied, in law (*e. g.*, a sale subject to rent charge); (2) by alienating to one person the immovable property, and to another some real right to be exercised upon it (*e. g.*, servitudes); (3) by the creation of a right of mortgage upon immovable property. All these contracts give rise to obligations purely real on the part of those who acquire the land under any kind of title. They are not personally liable, but the real property is, and by abandoning it to the obligee they relieve themselves of all liability : La.\* 2012. The real obligation created by condition annexed to the alienation of real property is susceptible of all the modifications that the will of the parties suggest, except such as are forbidden by law (see also Art. 136) : La.\* 2013. There are also conditions implied by law which create a real obligation, such as the obligation to pay the price to the seller and to furnish roads to the public : La. 2014.

Not only servitudes, but leases and all other rights, which the owner had imposed on his land before the alienation of the soil, form real obligations which accompany it in the hands of the person who acquires it, although he have made no stipulation on the subject, or they be not mentioned in the act of transfer. The purchaser may, if the circumstances permit it, have relief against the seller for concealment of such charges; but the law establishes the rule that no one can transfer a greater right than he himself has, except where the neglect of some formality required by law has subjected the owner of the real incumbrance to a loss of his right, in favor of a creditor or *bona-fide* purchaser : La. 2015.

Considered with respect to those who have contracted them, some real obligations are also personal; such are those created by mortgage for the payment of a debt. Others are strictly real, both as to the contracting party and his heirs or other successors. A mortgage given to secure the debt of another, without any obligation of personal responsibility, is an example of this latter kind. But no real obligation is personal, as to a subsequent possessor of the property on which it is created, unless he has made it such by his own act : La. 2019.

**§ 1461. Covenants running with the Land** are those contained in grants of real estates which are appurtenant to the estates and pass with them so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them : Cal. 6460; Dak. Civ. C. 819.

All real obligations and rights thereto (*i. e.*, both the benefit and burden) pass with the property : La. 2011.

Every covenant which is made for the direct benefit of the estate granted, or some part of it then in existence, runs with the land : Cal. 6462; Dak. Civ. C. 821.

So, the following are specially enacted to run with the land: (1) warranty : Cal. 6463; Col. 207; Dak. Civ. C. 822; (2) "quiet enjoyment : " Cal., Col., Dak.; (3) for further assurances : Cal., Dak.; (4) seisin : Me. 82,18; Col.; (5) against incumbrances : Me., Col.; (6) covenants for the payment of rent or taxes, by the grantee : Cal., Dak.

The code of Georgia enacts that the purchaser of lands obtains with the title, however conveyed to him, at public or private sale, all the rights which any former owner of the land under whom he claims may have had by virtue of any covenants of warranty of title, of quiet enjoyment, or of freedom from incumbrances, contained in the conveyance from any former grantor, unless the transmission of such covenants with the land is expressly negatived in the covenant itself : Ga. 2702.

So, in Maine, the assignee of a grantee or his executors, etc., after eviction by an older and better title, may maintain an action on a covenant of seisin or against incumbrances as the first grantee might have done; and the prior grantee cannot in such case release the covenants of the first grantor to the prejudice of his such grantee or assignee : Me. 82,18.

The following run with the land when made by the covenantor expressly for his assigns, or to the assigns of the covenantee, so far as the assigns thus mentioned are concerned: a covenant for the addition of some new thing to the property, or for the direct benefit of some part of the property not then in existence or annexed thereto: Cal. 6461; Dak. Civ. C. 823; La. 2011. All servitudes pass with the land: La. See Art. 213. Compare also § 1352.

No covenant runs with the land except those above specified: Cal. 6461; Dak. Civ. C. 820.

**§ 1462. Effect.** A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property: Cal. 6465; Dak. Civ. C. 824.

No one merely by reason of having acquired an estate subject to such a covenant is liable for a breach of it before he acquired the estate or after he has parted with it or ceased to enjoy its benefits: Cal. 6466; Dak. Civ. C. 825.

**§ 1463. Apportionment.** Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of such covenant, it must be apportioned among them according to the value of their respective shares in the servient estate, if ascertainable; if not, according to the quantity of such shares: Cal. 6467; Dak. Civ. C. 826.

**§ 1464. Concealing Incumbrances.** In two states, in all conveyances of real estate by deed or mortgage upon which any incumbrance exists, the grantor shall, before consideration paid, by exceptions in the deed or otherwise, make known to the grantee the existence and nature of such prior incumbrance, so far as he has knowledge of it: Mass. 126,17; Minn. 40,34.

For the meaning of the term *incumbrances*, see § 1502.

Whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances, when an incumbrance appears of record to exist thereon, whether known or unknown to him, is liable to the grantee and his assigns for all damages sustained in removing the same: Mass. 126,18; Minn. 40,35. See also in Part V.

**§ 1465. Actions on Covenants.** In Georgia, an offer to rescind is not necessary to recovery upon a covenant of warranty; but an offer to rescind, and a refusal by the warrantee, should be considered in estimating damages: Ga. 2704.

**§ 1466. Assignment by Covenantee.** In Louisiana, all rights acquired by a heritable obligation (§§ 1451,3010) may be assigned, either expressly by contract granting such right, or impliedly by the conveyance of the property to which they are attached: La.\* 2009.

## **Art. 147. Of the Deed.** [For notes, see notes to Title.]

**§ 1470. Feoffment Unnecessary.** In New York, (A) feoffment with livery of seisin is expressly abolished: N.Y. 2,1,2,136.

(B) In many states, it is expressly declared unnecessary: Pa. *Deeds, etc.* 74; Ill. 30,1; Minn. 40,1; Md. 44,6; Va. 112,4; Ore. 6,1; Nev. 228; Col. 199; Ida. 1874-5, p. 596,1; Ala. 2195; Miss. 1187; Fla. 32,4.

(C) So, in two others, all real estate, as regards the conveyance of the immediate freehold, "lies in grant as well as livery:" Va. 112,4; W.Va. 82,4.

(D) And real estate may be conveyed by simple deed, according to the provisions of this chapter, executed according to Chapter IV., (1) without livery of seisin: Vt. 1922; R.I. 173,2; Pa.; Ill. 30,1-2; Md.; Del. 83,1; Va.; Tenn. 2811; Ark. 639; Nev.; Col.; Ida.; Wy. 1882,1,1; Ala.; Miss.; Fla. (2) "Without any other act or ceremony:" N.H. 135,1; Mass. 120,1; Me. 73,1; R.I.; Mich. 5652; Wis. 2203; Minn. 40,1; Kan. 22,3; N.C. 1885,147,3; Tenn.; Mo. 668; Ore. 6,1; Ida. 1874-5, *Conveyances*, 1; Mon. G. L. 178; Wy. [The same would be implied in all other states.]



In several states, a deed of bargain and sale, lease and release, covenant to stand seized, or deed operating by way of covenant to stand seized, transfers the possession of the bargainor, releasor, or covenantor to the bargainee, etc., for the estate or interest which the bargainor, etc., has in the use, as perfectly as if the bargainee, etc., had been enfeoffed at common law with livery of seisin : Va. 112,14 ; W.Va. 82,14 ; N.C. 1330 ; Ky. 24,3 ; Fla. 32,4.

But "when any deeds or conveyances shall be acknowledged or proved, as aforesaid, in order to their being recorded, the memorandum of livery and seisin thereupon made in deeds of feoffment shall, in like manner, be acknowledged or proved, and shall be recorded with the deeds ; and such memorandum, proved and acknowledged as aforesaid, shall be taken and deemed a sufficient livery and seisin of the land or other real estate conveyed : " S.C. 1780.

**§ 1471. Deed Necessary.** And in nearly all states, no interest in real estate (cf. §§ 1300,1550,1551) can be conveyed or assigned or created without a deed : " N.H. 135,12 ; Mass. 120,3 ; Me. 73,10 ; Vt. 1932 ; R.I. 173,3 ; Ct. 18,6,1,14 ; N.Y. 2,7,1,6-7 ; N.J. *Frauds*, 2 ; Pa. *Frauds*, etc. 2 ; O. 4198 ; Ind. 2919 ; Mich. 6179-6181 ; Wis. 2302 ; Minn. 41,10-11 ; Neb. 1,32,3 ; Del. 120,3 ; Va. 112,1 ; W.Va. 82,1 ; Ky. 24,2 ; Tenn. 2808 ; Mo. 2510 ; Ark. 3381 ; Tex. 548 ; Cal. 6091 ; Ore. Civ. C. 771 ; Nev. 283 ; Col. 1515 ; Wash. 2311 ; Dak. Civ. C. 672 ; Ida. Civ.C. 935-6 ; Mon. G.L. 160 ; Uta. 1010,1 ; C. Civ. P. 1206 ; S.C. 2018 ; Miss. 1188 ; Fla. 32,1 ; La. 2275 ; Ariz. 2119. Nor trust or power. See §§ 1653,1710, and the Statute of Frauds in Title VI. Compare also §§ 1470,1624.

*Except*, leases for a term not exceeding (1) one year : Vt. 1934 ; R.I. ; Ct. ; N.Y. ; Mich. ; Wis. ; Minn. ; Neb. ; Del. ; Ky. ; Ark. ; Tex. ; Cal. ; Ore. ; Nev. ; Col. ; Dak. ; Ida. ; Mon. ; Uta. ; Ga. ; 2280 ; Miss. ; Ariz. ; (2) two years : Fla. ; (3) three years : N.J. ; Pa. ; Ind. ; N.C. 1743 ; Tenn. ; (4) five years : Va., W.Va. Compare § 1624.

All sales of immovable property must be by "authentic act" (§ 1560), or under private signature : La. 2440.

But an assignment of a lease for a longer term than one year, made without deed, is good as against the assignor, his heirs, and devisees : Vt. 1934.

This section does not prevent, after a fine has been levied, the execution of a deed to declare the uses of such fine : N.Y. 2,7,1,7.

NOTE. — "Except, of course, under successions or by operation of law ; and compare §§ 1551,1560. Commonly, the effect of such conveyance without a deed is only to create an estate at will. See Statute of Frauds, Title VI., § 4143.

**§ 1472. Release.** In many states, a deed of quitclaim and release will pass all the estate that could lawfully be conveyed by a deed of bargain and sale : Mass. 120,2 ; Me. 73,14 ; Ind. 2924 ; Mich. 5653 ; Wis. 2207 ; Minn. 40,4 ; Ore. 6,3 ; Wy. 1882,1,3 ; 1884,5,2 ; Miss. 1195 ; Fla. 32,4.

Deeds of bargain and sale are continued in use, and are deemed grants : N.Y. 2,1,2,142.

A deed of release is effectual without first executing the lease : Va. 112,15 ; W.Va. 82,15 ; Ky. 24,4.

The word *release* is unnecessary in such deed, and a simple quitclaim is effectual : Wy. 1884,5,2.

Deeds of bargain and sale or other conveyances "heretofore" made and executed according to former laws and usages remain valid and effectual : Vt. 1923. Deeds of bargain and sale, lease and release, and covenant to stand seized, are expressly recognized as valid : R.I. 173,2.

**§ 1473. Fines and Recoveries.** There would seem to be no use for fines and recoveries when estates tail can be barred by an ordinary deed. So, in two states, they are expressly done away with : N.J. *Conveyances*, 81 ; Fla. 150,10.

But in Delaware, fines and recoveries levied according to the law as it stood in England are still good conveyances : Del. 83,26.



§ 1474. **Special Words.** In most states, the term *heirs* or other words of inheritance is not necessary to create or convey an estate in fee, and every grant or devise of real estate passes the whole interest of the grantor or testator unless the intent to convey less appears in express terms or is necessarily implied: N.Y. 2,1,5,1; Ind. 2929; Ill. 30,13; Mich. 5730; Wis. 2206; Io. 1929,1930; Minn. 40,4; Kan. 22,2; Neb. 1,73,49-50; Md. 44,4; Va. 112,8; W.Va. 82,8; N.C. 1280; Ky. 63,1,7; Tenn. 2812; Mo. 3939; Ark. 641; Tex. 551; Cal. 6105, 6329,6072; Ore. 6,4; 64,29; Nev. 270; Col. 204; Dak. Civ. C. 618,633 and 732; Ida. 1874-5, p. 603,44; Mon. G. L. 220; Prob. C. 486; Ga. 2248; Ala. 2178; Miss. 1189, Wy 1884,5,1. See also § 2808.

So, in wills only: N.J. *Descent*, 13; Wy. 1884,5,1; Uta. 1884,44,1,2,13; S.C. 1861.

In Maryland, the words *grant* and *bargain and sell* or any other words purporting, in a deed, to convey the whole estate of the grantor, are sufficient: Md. 44,5. And there is a general provision that all deeds concerning real estate which shall contain the names of the grantor and grantee or bargainor and bargainee, a consideration in cases where a consideration is necessary to the validity of a deed, and a sufficient description of the real estate conveyed, and the estate or interest therein intended to be conveyed, shall be sufficient: Md. 44,2.

It is necessary that a deed should be made on good or valuable consideration; and the consideration may always be inquired into when justice requires it: Ga. 2690. But no prescribed form is necessary to the validity of a deed, and no want of form will invalidate it, if sufficient in itself to make known the transaction between the parties: Ga. 2692.

So, any instrument in writing signed by grantor or his agent having written authority is effectual to transfer the legal title to the grantee, if such was the intention of the grantor, to be collected from the entire instrument: Ala. 2948.

§ 1475. **Construction.** (A) Every instrument of conveyance is to be construed so as to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument and is consistent with the rules of law: N.Y. 2,1,5,2; Neb. 1,73,53; Ga. 2697.

(B) If an instrument intended as a conveyance of real estate fails in whole or in part to take effect as a conveyance, it is nevertheless valid as a contract upon which a conveyance may be enforced so far as the rules of law permit: Tex. 561; Mich. 5727.

(C) All conveyances of real property or interests therein duly executed and delivered carry with them the right of immediate possession, unless a future day be specified therein: Col. 206.

(D) Every deed conveying land is construed (1) to include all buildings, privileges, and appurtenances, of every kind, belonging to the lands therein embraced, unless an exception be made in the deed: Va. 113,7; W.Va. 64,10; Ky. 63,1,23; (2) to pass all easements attached to the property: Cal. 6104; Dak. Civ. C. 627; (3) and to create in favor of the grantee an easement to use other real property of the grantor for the benefit of the granted estate in the same manner as he obviously and permanently used it at the time: Cal., Dak.; (4) to pass the estate of the grantor in highways bounding the land: Cal. 6112; Ore. Civ. C. 845; Dak. Civ. C. 631; (5) to pass the party-wall, and rights of compensation relating thereto: Pa. *Party-walls, etc.* 28.

(E) If two clauses in a deed are utterly inconsistent, the former must prevail: Cal.\* 6070; Dak.\* Civ. C. 616; Ga.

(F) Grants are to be interpreted in like manner with contracts in general, except as herein excepted: Cal.\* 6066; Dak.\* Civ. C. 612. See Title VI.

(G) A clear and distinct limitation in a grant is not controlled by other words less clear and distinct: Cal.\* 6067; Dak.\* Civ. C. 613; Ore.

(H) A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor: Cal.\* 6069; Dak.\* Civ. C. 615.

§ 1476. **Recitals.** (A) In Georgia, it is enacted that the recital in a deed of the receipt of purchase-money, does not estop the maker from proving the contrary: Ga. 2698.

(B) In deeds made by masters in chancery, sheriffs, guardians, administrators, executors, trustees, commissioners, or other persons, under and by virtue of any order, proceeding, or decree, of any court, it is unnecessary to copy any such joint order, proceeding, or decree; but it is sufficient to refer to the same by title of case and name of court and the date or term of court at which such proceeding or judgment, etc., was obtained: Ill. 30,12.

(C) If the operative words of a grant are doubtful, recourse may be had to its recital, to assist the constructions: Cal.\* 6068; Dak.\* Civ. C. 614.

## Art. 148. Statutory Forms.

§ 1480. **Prescribed Forms.** In many states, there are special abbreviate forms or technical phrases provided by statute which have the same effect as the more elaborate verbiage of common-law conveyancing: Ind., Ill., Mich., Wis., Io., Md., Va., Tenn., Ark., Tex., Cal., Dak., S.C., Miss.

These forms are not, however, exclusive of the forms previously in use, which remain as valid as before: Wis. 2214; Md. 44,77; Va. 113,8; W.Va. 64,11; Tex. 553; S.C. 1775.

Nor do they prevent the insertion of any other clause or clauses which are deemed proper and advisable by the seller and purchaser: Tex., S.C.

No conveyance of land, or instrument intended to operate as such conveyance, made in good faith and upon a valuable consideration, whether heretofore or hereafter made, shall be wholly void by reason of any defect in any statutory requirement in the signing, sealing, attestation, acknowledgment, or certificate of acknowledgment thereof; but it may operate as a contract to convey, and may be enforced in equity, subject to the rights of subsequent purchasers in good faith for value; and when any such instrument has been, or shall hereafter be, recorded in the office of the register of deeds of the proper county, it has effect as notice: Mich. 5727.

In Virginia, etc., all these forms are copied from the Eng. Stat. 8 and 9 Viet. Chaps. 119 and 124.

§ 1481. **General Principles.** In Wisconsin, it is declared the duty of all parties executing a conveyance of real estate to state therein, as near as practicable, the actual and true consideration: Wis. 2214.

§ 1482. **Forms to Convey the Whole Estate.** Thus, the following forms are (A) declared sufficient to pass all the estate, right, title, and interest, legal and equitable, of the grantor in the land thereby conveyed (Va., W.Va., Mo., Miss.), or (B) declared equivalent to a deed of fee-simple (Ind., Ill., Mich., Wis., Io., Md., Tenn., Ark., Tex., Cal., Dak., S.C.):—

(1) In consideration of—I convey [*and warrant*]<sup>a</sup> to—the land described as—. Witness my signature the—day of—18—. Miss. 1231.

(2) This deed, made the—day of—, in the year—, between [J. S. and W. V.], witnesseth: that in consideration of [one dollar], the said [J. S.] doth grant unto the said [W. V.] all [description of property]. Witness the following signature and seal. Md. 44,55; Va. 113,1 and 2; W.Va. 64,1-2; Dak. Civ. C. 624.

(3) For the consideration of—dollars, I hereby convey to A. B. the following tract of land [description] [and I warrant the title against all persons whomsoever].<sup>a</sup> Io. 1970.

(4) J. S., of D., for and in consideration of \$— in hand paid, conveys [and warrants]<sup>a</sup> to J. W., of V., the following described real estate [description] situated in the county of—, in the state of Illinois. Dated this—day of—A.D., 18—. J. S. [I. S.] Ill. 30,9.

(5) J. S. conveys [and warrants]<sup>a</sup> to J. V. [description] for the sum of [consideration]. Ind. 2927; Mich. 5728.

(6) State of—, county of—. Know all men by these presents that I,—, of the—, in the state aforesaid, for and in consideration of—dollars to me in hand paid

by —, have granted, sold, and conveyed, and by these presents do grant, sell, and convey unto the said — of — all that certain [description]. To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said —, his heirs and assigns forever. [And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said —, his heirs and assigns, against any person whomsoever lawfully claiming or to claim the same or any part thereof.] <sup>a</sup> Witness my hand this — day of —, A.D., 18 —. Signed and delivered in the presence of —. [Signature.]

Tex. 552; Ark. *Forms*, No. 143; Mo. *Forms*, No. 98.

(7) A. B., grantor, of — county, Wisconsin, hereby quitclaims [conveys and warrants] <sup>a</sup> to C. D., grantee of — county, Wisconsin, for the sum of — dollars, the following tract of land in — county [description]. Witness the hand and seal of said grantor this — day of —, 18 —.

In the presence of { —

— [SEAL.]  
— [SEAL.]

Wis. 2208.

(8) I hereby convey to A. B. the following tract of land [description] [and I warrant the title against all persons whomsoever]. <sup>a</sup>

Tenn. 2820.

(9) The state of South Carolina: Know all men by these presents that I, A. B., of —, in the state aforesaid, have granted, sold, bargained, and released, and by these presents do grant, bargain, sell, and release unto the said C. D., all that [description] together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in any wise incident or appertaining; to have and to hold all and singular the premises before mentioned unto the said C. D., his heirs and assigns forever. [And I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said C. D., his heirs and assigns, against myself and my heirs, and against every person whomsoever lawfully claiming or to claim the same, or any part thereof]. <sup>a</sup> Witness my hand and seal this — day of —, in the year of our Lord —, and in the — year of the independence of the United States of America.

S.C. 1775.

(10) I, A. B., grant to C. D. all that real property situated in — county, state of —, bounded [or described] as follows [description]. Witness my hand and seal this — day of — 18 —.

A. B.

Cal. 6092.

*Form where a married woman is a party:* This deed, made this — day of —, in the year —, by us, — and —, his wife, witnesseth, that in consideration of —, we, the said — and his wife, do grant unto —. Witness our hands and seals.

Test: A. B.

Md. 44,56.

See also in Division II.

NOTE. — <sup>a</sup> If a warranty deed is desired.

§ 1483. **Quitclaim Deed.** In many states, the form of a warranty deed will be found in § 1482, at the bracketed parts (see § 1482, note <sup>a</sup>), and of a quitclaim or special warranty by leaving out such parts. <sup>a</sup>

And the following forms are, in the respective states, deemed equivalent (A) to a valid quitclaim deed in fee: Ind., Ill.,<sup>b</sup> Mich., Io., Tenn., Mo. (B) To a conveyance in fee of all the right, title, and interest of the grantor, either in possession or expectancy, in and to the premises and all its privileges and appurtenances thereunto belonging: Wis.

(C) To the expression that the grantor (or releaser) hath remised, released, and forever quitclaimed, and by these presents doth remise, release, and forever quitclaim unto the grantee (or releasee), his heirs and assigns, all right, title, and interest whatsoever, both at law and in equity, in or to the lands and premises granted or released or intended so to be, so that neither he nor his personal representative, his heirs or assigns, shall, at any time hereafter, have, claim, challenge, or demand the lands and premises aforesaid or any part thereof, in any manner whatever: Va., W.Va.

(I) A. B. quitclaims to C. D. [description], for the sum of [consideration].

Ind. 2928; Mich. 5729.



(2) J. S., of D., for the consideration of \$1,000, conveys and quitclaims to J. V., of V., all interest in the following described real estate [description], situated in the county of ———, in state of ———.

Dated this ——— day of ———, 18 .

J. S. [L. S.]  
Ill. 30,10.

(3) I hereby quitclaim to A. B. all my interest in [description].

Tenn. 2820.

(4) For the consideration of ——— dollars, I hereby quitclaim to A. B. all my interest in the following tract of land [description].

Io. 1970.

(5) Take the general form (§ 1482, respectively) and substitute *quitclaims* for *conveys and warrants*: Wis. 2203. So, *remise, release, and forever quitclaim*: Mo. Forms, No. 101.

(6) The said [grantor] releases to the said [grantee] all his claims upon the said lands:

Va. 113,3; W.Va. 64,3.

**Homestead.** The words, “hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the state” amounts in either deed or mortgage to a release and waiver of all homestead rights: Ill. 30,11.

NOTES. — <sup>a</sup> This is specially enacted in Miss. 1235. <sup>b</sup> This form does not, in the noted states, pass after acquired title unless so expressed; and see § 1454.

§ 1484. **Mortgages.** The following forms are equivalent (A) to a valid mortgage to the grantee, his heirs and assigns, executors and administrators (with warranty of perfect title),<sup>a</sup> and warranty against all previous incumbrances and covenant of quiet possession: Ind., Ill., Mich. (B) To a mortgage of real estate simply: Io., Md., Tenn., Mo., Cal., Dak.

(C) To a conveyance of the land therein described, together with all the rights, privileges, and appurtenances thereunto belonging, in pledge to the mortgagee, his heirs, assigns, and legal representatives for the payment of the indebtedness therein set forth, with covenant from the mortgagor that all taxes and assessments levied and assessed upon the land described, during the continuance of the mortgage, shall be paid previous to the day appointed by law for the sale of lands for taxes, as fully as the forms of mortgage now and heretofore in common use in this state; and it may be foreclosed the same manner and with the same effect, upon any default being made in any of the conditions thereof as to payment of either principal, interest, or taxes: Wis.

(1) A B. mortgages [and warrants] <sup>a</sup> to C. D. [description], to secure the repayment of [sum, notes, and time due].

Ind. 2930; Ill. 30,11; Mich. 5731.

(2) For consideration of ——— dollars, I hereby convey [etc.], to be void upon condition that I pay [etc.].

Io. 1970.

(3) I hereby convey to A. B. the following land [description], to be void [etc., as in (2)].

Tenn. 2820.

(4) This mortgage, made this ——— day of ———, by me, ———, witnesseth that, in consideration of the sum of ——— dollars, now due from me, the said ———, to ———, I, the said ———, do grant unto the said ——— [description], *provided* that if I, the said ———, shall pay, on or before the ——— day of ———, to the said ——— the sum of ——— dollars, with the interest thereon, from ———, then this mortgage shall be void. Witness my hand and seal.

Md. 44,63.

(5) A. B., mortgagor, of ——— County, Wisconsin, hereby mortgages to C. D., mortgagee, of ——— County, Wisconsin, for the sum of ———, the following tract of land in ——— County [description]. This mortgage is given to secure the following indebtedness [*here state amount or amounts, and form of indebtedness, whether on note, bond, or otherwise; time or times when due, rate of interest, by and to whom payable, etc.*]. The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of ——— dollars attorney's fees in case of foreclosure thereof. Witness the hand and seal of said mortgagor, this ——— day of ———, 18 .

In presence of { ———, ———, [SEAL.]  
———, ———, [SEAL.]

Wis. 2209.

(6) This mortgage, made the ——— day of ———, in the year ———, by A. B., of ———, mortgagor, to C. D., of ———, mortgagee, witnesseth:



That the mortgagor mortgages to the mortgagee [property description], as security for the payment to him of — dollars on [or before] the — day of —, in the year —, with interest thereon [or, as security for the payment of an obligation, describing it etc.]. A. B.

Cal. 7948 ; Dak. Civ. C. 1736. See *Mo. Forms*, Nos. 104-105

NOTE. — <sup>a</sup> If a warranty is desired, as in § 1482.

**§ 1485. Assignment of Mortgage.** In a few states, the following forms (A) are sufficient to vest in the assignee for all purposes all the rights of the mortgagee under the mortgage described, and the amount of indebtedness due thereon at the date of the assignment: Wis. ; Md. 44,38.

(1) For value received, I, A. B., of —, Wisconsin, hereby assign to C. D., of —, Wisconsin, the within mortgage [or, a certain mortgage, executed to — by C. F. and wife, of — county, Wisconsin, the — day of —, 18 —, and recorded in the office of the register of deeds of — county, Wisconsin, in vol. —, of mortgages, on page —], together with the — and indebtedness therein mentioned.

Witness my hand and seal this — day of —, 18 —.

In presence of { —,  
—,

A. B. [SEAL.]

Wis. 2210.

(2) I hereby assign the within mortgage to [the assignee]. Witness my hand and seal this — day of —.

J. S. [SEAL.]

In Maryland, (B) the following form is declared effectual as any assignment that could be made: —

(3) I hereby assign the within mortgage to J. S.: Md. 44,37. An assignment in this form, indorsed upon the original mortgage, conveys to the assignee every right which the assignor possessed as fully and amply as any instrument could do: Md. 44,38.

(C) The following statutory forms are prescribed for a release of mortgage, and declared to be as full and effectual as any release could make it: —

(1) I hereby release the *above* [or, *within*, if entered on the deed itself] mortgage.

Md. 44,39.

(2) I hereby release a mortgage made by C. D. to me, dated the — day of —, and recorded in the clerk's office of — county, in deed-book —, page —.

A. B.

Acknowledged before —

J. H.

Va. 1884,527,2 ; W. Va. 1882,49,2.

**§ 1486. Deed of Trust.** And the following forms are sufficient for a deed of trust to secure debts or indemnify sureties: Va., W. Va., Tenn.

(1) This deed, made the — day of —, in the year —, between [the grantor], of the one part, and [the trustee], of the other part, witnesseth: that the said [the grantor] doth grant unto the said [the trustee] the following property: [description], in trust to secure [*description of debts or sureties to be indemnified, covenants, or other agreements*]. Witness the following signature and seal.

Va. 113,5 ; W. Va. 64,5 ; Wy. 1877, p. 94, § 1.

(2) In consideration of —, I convey [and warrant]<sup>a</sup> to — the land described as —, in trust, to secure —. Witness my signature, the — day of —, 188 .

Miss. 1236.

(3) This deed, made this — day of —, in the year —, by me, —, witnesseth, that whereas [consideration] I, the said —, do grant unto —, as trustee, the following property [description], in trust for the following purposes [—].

Test: A. B. Witness my hand and seal.

Md. 44,58.

(4) For the purpose of securing to A. B. a note of this date due at [twelve months], with interest from date [or, as the case may be], I hereby convey to C. D. in trust, the following property [description]. And if the note is not paid at maturity, I hereby authorize C. D. to sell the property herein conveyed [stating the manner, place of sale, notice, etc.], to execute a deed to the purchaser to pay off the amount herein secured, with interest and costs, and to hold the remainder subject to my order.

Tenn. 2820. See also *Mo. Forms*, No. 102.

NOTE. — <sup>a</sup> See § 1484, note <sup>a</sup>.

§ 1487. **Lease, etc.** And the following forms are sufficient for a lease : —

(1) This deed, made the — day of —, in the year —, between [J. S. and J. V.], witnesseth : that the said [J. S.] doth demise unto the said [J. V.], his personal representatives and assigns, all [description of property], from the — day of —, for the term of — thence ensuing, yielding therefor during the said term the rent of [\$1, payable monthly]. Witness the following signature and seal.

Md. 44,66; Va. 113,4; W.Va. 64,4.

(2) I have leased to — and his representatives and assigns, —, from the — day of — until the — day of —, yielding therefor, during the said term, the rent of —. Witness my signature, the — day of —, 188—.

Miss. 1238.

In Texas, no bond for title or contract of sale can be recorded unless it sets forth whether the parties be married or single, and the land separate or community property : Tex. 1879,115.

§ 1488. **Conveyances by Administrators, Executors, Guardians, and Commissioners** may be in the following form, and are sufficient to pass all that could or would be conveyed in such case by any form of conveyance, viz. : (1) By virtue of the authority conferred on me, administrator of the estate of —, deceased, by the decree of the Chancery Court of — County, Miss., on the — day of —, confirming a sale made on the — day of —, in pursuance of a decree of said court on the — day of —, I, as administrator of said estate, in consideration of —, hereby convey to —, the purchaser thereof, the following land, to wit : —. Witness my signature the — day of —.

Miss. 1242.

The description of the character of the maker of the conveyance will vary the foregoing form according to the fact ; and if a conveyance be made in pursuance of a power conferred by a will, and not by virtue of a decree, the will should be referred to as the source of power : Miss. 1243.

§ 1489. **Sheriff's Deed.** (A) Deeds of sheriffs upon sale on execution may be substantially in the following forms : —

(1) Whereas, a judgment in favor of A. B. and against C. D. was docketed in the Circuit Court of — County, Wis., on the — day of —, 18—, and E. F., sheriff [or G. H., then sheriff] of said county, in pursuance of an execution upon said judgment against the property of said C. D., said execution being dated the — day of —, 18—, levied upon the lands hereinafter described, and proceeded according to law to advertise and sell the same to satisfy the demands and costs mentioned in the execution, and did, on the — day of —, 18—, sell the said lands to L. M. for — dollars, said L. M. being the best bidder therefor, and thereupon made out duplicate certificates of said sale in the form required by law, and filed one of said certificates in the office of the register of deeds of the county of — within ten days after said sale, and delivered the other to the purchaser : And whereas — months have expired since said sale, and said premises remain unredeemed, and no creditor of the said C. D. has acquired the right of said purchaser [or, and J. K., a creditor of said C. D., has acquired the rights of the purchaser by redemption, as the case may be] : Now, therefore, the said E. F., sheriff aforesaid, in consideration of the premises and of said sum of — dollars to him [or to his predecessor], paid by the said L. M., hereby conveys to the said L. M. [or if a creditor shall have acquired the right of the said L. M., then to said creditor by name] the following tract of land in — County, Wisconsin [description], with all the interest which said C. D. had therein on the — day of —, 18—, or has since acquired. Witness the hand and seal of said sheriff this — day of —, 18—.

In presence of { —,  
—,

— . [Seal.]  
Sheriff — County, Wis.

Wis. 2211.

(2) This deed, made this — day of —, in the year —, by me —, sheriff of — County, Maryland, witnesseth, that by virtue of an execution issued out of —, and dated — day of —, in the year —, in the case of — against —, I, the said —, as sheriff of said county, have sold to — the following property [description]. Now, therefore, I, the said —, do grant unto the said — all the right and title of — in and to the said hereinbefore described property. Witness my hand and seal.

Test. : A.B.

Md. 44,59.

(3) By virtue of an execution issued by the clerk of the Circuit Court of — County, Mississippi, on the — day of —, 188—, returnable before said court on the — Monday of —, 188—, to enforce a judgment of said court, rendered on the — day of —, 188—, in favor of — against — for \$— and costs, I, as sheriff of — County, Mississippi, have this day, according to law, sold the following lands, to wit [description], when — became the best bidder therefor, for the sum of —, and having paid said sum of money, I now convey said land to him. Witness my hand the — day of —.

Miss. 1242.

(4) This deed, made this — day of —, between A. B., sheriff of the county of — [or special commissioner, as the case may be], of the first part, and C. D. of the second part; whereas the said sheriff [etc.], in pursuance of the authority vested in him by a decree [judgment or order] of the — Court of the county of —, made on the — day of —, in a suit in chancery [or an action at law], therein pending, in which E. F. was plaintiff and G. H. was defendant, did sell the real estate hereinafter mentioned, and conveyed according to the terms and conditions required by said decree [judgment, etc.], at which sale the said C. D. became the purchaser for a sum of — dollars. And whereas the said court, by a subsequent decree made in the case, on the — day of —, confirmed the said sale, and directed a deed for the said real estate to be made to the said C. D., by the said sheriff. Now, therefore, this deed witnesseth: that the said A. B., sheriff [etc.], as aforesaid, doth grant unto the said C. D. a certain parcel [description]. Witness the following signature and seal:

A. B., Sheriff [etc.].

[L. S.]

W. Va. 64,9.

(B) *Effect.* Such deed, in Wisconsin, shall convey to the purchaser therein named all the interest of the judgment debtor in the property described, as fully as in the form of deed for that purpose heretofore in common use in this state: Wis. 2211. See Col. 1857.

See also Wis. §§ 2212-2213, for deeds on foreclosure of mortgages and by guardians. See Md. 44,60-2, for trustee's deed under a decree, commissioners' deed in partition, and executor's deed. For a deed by trustee of sale under a trust-deed, see W. Va. 64,8; 1882,140; Mo. Forms, Nos. 103,106,107; Wy. 1877, p. 96,4.

## Art. 150. Forms of Covenants.

§ 1500. *Implied Covenants.* In many states (A) no covenant is implied in any conveyance of real estate, whether it contain special covenants or not, except as below (§§ 1501,1502) specified: N.Y. 2,1,2,140; Mich. 5655; Wis. 2204; Minn. 40,6; Tex. 557; Cal. 6113; Ore. 6,6; Wy. 1882,1,5.

(B) The seller (of either real or personal property in Louisiana) is always bound, whether stipulations to that effect have been inserted or not, to warrant the buyer (1) against eviction from the whole or the part of the thing sold; (2) against the charges claimed on such thing which were not declared at the time of sale: La. 2501.

§ 1501. *Special Phrases.* (A) In several states, when a deed uses the words, *And the said (grantor) covenants* (or, in Kentucky, *warrants*), the effect is as if it were expressed by the covenantor to be for himself, his heirs, personal representatives, and assigns, and it shall be deemed to be with the covenantee, his heirs, personal representatives, and assigns: Md. 44,67; Va. 113,9; W. Va. 64,12; Ky. 24,5.

(B) In many states, the words *grant* (Pa., Ill., Del., Mo., Ark., Tex., Cal., Nev., Dak., Ida., Mon., Ala., Miss.), *bargain* (Pa., Ill., Del., Mo., Ark., Nev., Ida., Mon., Ala., Miss., N.M.), *sell* (Pa., Ill., Del., Mo., Ark., Nev., Ida., Mon., Ala., Miss., N.M.), *convey* (Tex.), or the general form of warranty deed, as in § 1482 (Ind., Ill., Mich., Wis.), in deeds of fee-simple, effect an express covenant to the grantee, his heirs, or assigns (1) of seisin: Pa. Deeds, 75; Ind. 2927; Ill.<sup>a</sup> 30,8 and 9; Mich. 5728; Wis. 2208; Mo. 675; Ark.<sup>a</sup> 639; Ala. 2193; Miss. 1196; N.M.<sup>a</sup> 2750.

(2) Of special warranty, or against incumbrances by the grantor: Pa.; Ind.; Ill.; Mich.; Wis.; Del. 83,2; Mo.; Ark.;<sup>a</sup> Tex. 557; Cal. 6113; Nev. 277; Dak. Civ. C. 628; Ida. 1874-5, p. 605, 51; Mon. G.L. 227; Ala.; Miss.; N.M.<sup>a</sup>



(3) For quiet enjoyment : Pa.,<sup>a</sup> Ind., Ill., Mich., Wis., Ark.,<sup>a</sup> Ala., Miss.

(4) For further assurances of such real estate to be made by the grantor and his heirs to the grantee and his heirs : Mo. 675.

(5) Of right to convey : Ind., Mich., Wis., Cal., Ida., Mon.

(6) Of general warranty, or against all incumbrances : Ind., Mich., Wis., Ark.,<sup>a</sup> Tex.

(C) In Georgia, a general warranty of title against the claims of all persons includes in itself covenants of a right to sell, of quiet enjoyment, and of freedom from incumbrances : Ga. 2703.

(D) In other states, the term *warrants* amounts to covenants of seisin, right to convey, quiet enjoyment, against incumbrances, and of warranty : Ind. 2927 ; Ill. 30,9 ; Mich. 5728 ; Wis. 2208.

For other cases, see § 1460. For covenants in mortgages, see § 1867.

NOTE. — <sup>a</sup> Unless limited by express words.

§ 1502. **Incumbrances.** The term *incumbrances* includes taxes, assessments, and all liens upon real property : Tex. 558 ; Cal. 6114 ; Dak. Civ. C. 633.

§ 1503. **General Warranty.** (For many states, see the general form of warranty deed : Ind., Ill., Mich., Wis., Io., Tenn., Mo., Ark., Tex., S.C.)

In a few states, the following words are equivalent to a covenant, that the grantor, his heirs, and personal representatives will forever warrant the said property unto the grantee, his heirs [devisees], and assigns, against the claims and demands of all persons whomsoever (Mich., Wis., Md., Va., W.Va., Ky., Miss.) ; and in Michigan and Maryland, a warranty binds also the grantor's devisees : —

(1) The word *warrants* or *with warranty* without restriction has such effect : Ill. 30, 9 ; Mich. 5728 ; Wis. 2208 ; Ky. 24,5 and 7 ; Miss. 1233.

(2) The words *generally warrants*, or *with general warranty* : Md. 44,68 ; Va. 113,10 and 12 ; W.Va. 64,13 and 15.

§ 1504. **Special Warranty.** And the following words or forms take effect as a covenant by the grantor (A) that he, his heirs, devisees, and personal representatives will forever warrant and defend the grantee, his heirs, personal representatives, and assigns against the claims of the grantor and all persons claiming through him : Md., Va., W.Va., Ky., Miss. ; and in Maryland, such warranty binds also the grantor's devisees.

(1) The words *warrant specially*, or *with special warranty* : Md. 44,69 ; Va. 113,11 and 12 ; W.Va. 64,14-15 ; Ky. 24,6-7 ; Miss. 1232 and 1234.

(2) The words *warrant the title against all persons claiming under me* : Tenn. 2820 ; Mo. *Forms*, No. 99.

§ 1505. **Seisin.** In all conveyances the following words take effect as a covenant by the grantor, his heirs, devisees, and personal representatives "that said grantor, at the time of the execution and delivery of the deed, was lawfully seized of the property conveyed : " (1) "that he is seized of the land hereby conveyed : " Md. 44,70 ; (2) "that I am seized and possessed of the said land : " Tenn. 2820 ; (3) "that I am lawfully seized in fee of the aforegranted premises : " Ark. *Forms*, No. 127.

See also § 1501.

§ 1506. **Right to Convey.** And the following words take effect as if the grantor covenanted "that he has good right, full power, and absolute authority, to convey the said land, with all the buildings thereon, and the privileges and appurtenances thereto belonging, unto the grantee, in the manner in which the same is conveyed by such deed according to its true intent."

(1) "That [the grantor] has the right to convey the said land to the grantee : " Md. 44, 71 ; Va. 113,13 ; W.Va. 64,16.

(2) "That I have a right to convey it : " Tenn. 2820 ; Ark. *Forms*, No. 127.

§ 1507. **Further Conveyances.** And the following words take effect as if the grantor were to covenant that "he, his heirs or personal representatives will, at any time, upon any



reasonable request, at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds, and things, for the better, more perfectly and absolutely conveying and assuring the said lands and premises, hereby conveyed or intended so to be, unto the grantee, his heirs and assigns, in manner aforesaid, as by the grantee, his heirs or assigns, his or their counsel in the law, shall be reasonably devised, advised, or required." (1) That he "will execute such further assurances of the said lands as may be requisite:" Md. 44,74; Va. 113,15; W.Va. 64,18.

§ 1508. **Quiet Enjoyment.** And the following words take effect as if the grantor covenanted that "the grantee, his heirs and assigns, might, at any and all times thereafter, peaceably and quietly enter upon, and have, hold and enjoy the land conveyed, with all the buildings thereon and the privileges and appurtenances thereunto belonging, and receive and take the rents and profits thereof, to and for his and their use and benefit, without any eviction, interruption, suit, claim, or demand whatever by the said grantee or any other person." (1) That "the grantee shall have quiet possession of the land:" Va. 113,14; W.Va. 64,17. (2) That he "shall quietly enjoy said land:" Md. 44,72.

§ 1509. **Against Incumbrances.** And the following words take effect as if the grantor had covenanted that the grantee should "be freely and absolutely acquitted, exonerated, and forever discharged, or otherwise by the said grantor or his heirs, saved harmless, and indemnified of, from, and against any and every charge and incumbrance whatever." (1) That such land is "free from all incumbrances:" Va. 113,14; Ark. *Forms*, No. 127.

§ 1510. **Incumbrances by the Grantor.** And the following words take effect as if the grantor were to covenant that "he had not done or executed, or knowingly suffered, any act, deed, or thing whereby the lands and premises conveyed, or intended so to be, or any part thereof, are or will be charged, affected, or incumbered in title or estate or otherwise."

That "he has done no act to incumber the said lands:" Md. 44,73; Va. 113,16; W.Va. 64,19.

§ 1511. **Covenants in Leases; Rent.** The following words take effect, in a lease, as if the lessee were to covenant "that the rent reserved by the deed shall be paid to the lessor, or those entitled under him, in the manner therein mentioned."

That the lessee is "to pay the rent:" Va. 113,17; W.Va. 64,20.

§ 1512. **Against Assignments.** And the following words take effect as if the lessee were to covenant that he "will not, during the term, assign, transfer, or set over the premises, or any part thereof, to any person, without the consent, in writing, of the lessor, his representatives or assigns."

That he "will not assign without leave:" Va. 113,18; W.Va. 64,21.

§ 1513. **For Repairs.** And the following words take effect as a covenant "that the demised premises will, at the expiration or other sooner determination of the term, be peaceably surrendered and yielded up unto the lessor, his representatives or assigns, in good and substantial repair and condition, reasonable wear and tear excepted."

That the lessee "will leave the premises in good repair:" Va. 113,18; W.Va. 64,21.

§ 1514. **Quiet Enjoyment.** And the following words take effect as a covenant that "the lessee, his personal representatives and lawful assigns, paying the rent reserved and performing his or their covenants, shall peaceably possess and enjoy the demised premises, for the term granted, without any interruption or disturbance from any person whatever."

By the lessor "for the lessee's quiet enjoyment of his term:" Va. 113,20; W.Va. 64,23.

§ 1515. **Re-entry.** And the following words take effect as an agreement "that if the rent reserved or any part of it be unpaid for — days after the day in which it is due, or if any other of lessee's covenants be broken, then the lessor or those entitled in his place, may re-enter and repossess the premises."

That "the lessor may re-enter for default of — days in the payment of rent, or for the breach of the covenants:" Va. 113,21; W.Va. 64,24.

§ 1516. **Taxes.** And the following words take effect as if the lessee were to covenant that "all taxes, levies, and assessments upon the demised premises, or upon the lessor on account thereof, shall be paid by the lessee or those claiming under him."

A covenant "to pay all taxes:" Va. 113,17.

§ 1517. **The Lessor's Implied Covenants** in every lease are (1) to deliver the thing leased to the lessee; (2) to maintain it in a condition such as to serve for the use for which it was hired: La.\* 2692. (3) To cause the lessee to be in peaceable possession during the lease: Uta. 1204; La.\*

§ 1518. **The Lessee's Implied Covenants** are (1) to enjoy the thing leased as a good administrator, according to the use for which it was intended: Uta. 1204; La.\* 2710; (2) to pay the rent at the terms agreed on: La.\*

#### CHAPTER IV.—FORMALITIES OF CONVEYANCING.

**Note to Chapter.** — \*Throughout this chapter this sign means that the provision so noted applies also to the conveyance, etc., of personal property. See note to Title.

#### Art. 155. General Principles.

§ 1550. **Definitions.** (See also §§ 1300,1301.) *Land, real estate*, or the term *estate or interest in land*, as used in this chapter, is further defined to be (A) every interest, freehold or chattel, legal or equitable, present or future, vested or contingent, in land: Neb. 1,32,22; Ore. 6,56.

(B) "Lands, tenements, and hereditaments:" N.Y. 2,3,36; Ark. 645; Ore.; Ida. 1874-5, *Conveyances*, 35; Mon. G. L. 211; Uta. 651; N.M. 2749. See also § 1300, A.

It includes all chattels real, except leases for a term not exceeding (1) three years: N.Y.; (2) one year: Neb.; (3) without exception: Ark. It includes "real movable property:" N.M.; mining and land claims: Uta.

See, for most states, §§ 1300,1471.

§ 1551. **Deeds.**<sup>a</sup> A *deed* or *conveyance* in this chapter includes (1) every instrument by which any estate or interest in real property is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity: Vt. 1922; N.Y. 2,3,38; Pa. *Deeds, etc.* 76; Ill. 30,20; Mich. 5689; Wis. 2242; Minn. 40,26; Neb. 1,73,46; 1,32,23; Mo. 682; Ark. 660; Cal. 6215; Ore. 6,57; Nev. 230,303; Dak. Civ. C. 672; Ida. 1874-5, *Conveyances*, 36; Mon. G. L. 212; Wy. 1882,1,21; Uta. 652; N.M. 2752; Ariz. 2280.

(2) Mortgages: N.H. 135,4; Ill.; Col. 225; (3) leases and all conveyances under seal: Col.; (4) the award of arbitrators purporting to decide the title to real estate: Ct. 18,6,23; (5) powers of attorney: Vt. 1935,1946; Ill.; Md. 44,28; (6) all deeds conveying an estate of inheritance or freehold: R.I. 173,3; O. 4198; Md. 44,1; (7) all leases for years or an uncertain interest: O.; N.C. 1743; (8) conveyances of land, or of any interest therein: Ind. 2919 and 2956; Ill.; Neb. 1,32,3; Mo. 674; (9) conveyances of claims and improvements upon public lands: Neb. 1,73,30; (10) declarations or limitations of a use: Md.

*Except* (1) wills: N.Y.; Ind.; Mich. 6180; Wis.; Minn.; Neb. 1,32,4; W.Va. 82,1; Mo. 701; Ark. 646; Cal.; Ore.; Nev.; Col. 229; Dak.; Ida.; Mon.; Wy.; Uta.; Fla. 32,1; N.M. 2770; Ariz. (2) Leases for a term<sup>a</sup> not exceeding (a) three years; N.Y. 2,3,36 and 38; Pa. *Frauds, etc.* 1; Ind.; N.C.; Tenn.; Wy.; (β) one year: R.I.; Ct. 18,6,14; Mich. 6179; Wis. 2302; Minn. 41,10; Kan. 43,5; Neb.; Del. 120,3; Ark.; Cal. 6091; Wash. 2053; Dak.; Ida.; Mon.; Uta.; S.C. 1810; Ga. 2280; Miss. 1188; Ariz; (γ) seven years: Md.; (δ) six years: W.Va.; (ε) five years: Ky. 24,8. (3) Assignments of leases for more than one year; Vt. 1934. (4) Letters of attorney, or other

instruments containing a power to convey land as agent for the owner :<sup>a</sup> N.Y. 2,3,39 ; Mich. 5690 ; Minn. 40,27 ; Neb. 1,73,47 ; Dak. ; Wy. 1882,1,22 ; Ariz. (5) Executory contracts for the sale or purchase of land : N.Y., Ind., Mich., Wis., Minn., Neb., Dak., Ida., Mon., Wy., Ariz. ; (6) grants of estates at will : Cal.

And in New York, there are special exceptions of leases for life or years in certain counties : N.Y. 2,3,42.

NOTE. — <sup>a</sup> For other states, see the Statute of Frauds in Title VI. See also §§ 1624,1670,1300, 1301, 4471.

§ 1552. **Purchaser**, as used in this chapter, means every person to whom an estate or interest in land shall be conveyed for a valuable consideration, and also every assignee of a mortgage, lease, or other conditional estate : N.Y. 2,3,37 ; Mich. 5688 ; Wis. 2242 ; Minn. 40,25 ; Neb. 1,73,45 ; Wy. 1882,1,20.

**Art. 156. The Execution of the Deed.** [For notes to article, see note to Title.]

§ 1560. **In Writing.** The laws of most states specially require all deeds of real estate to be in writing, and signed by the party making them : N.H. 135,3 ; Mass. 120,1 and 3 ; Me. 73,10 ; Vt. 1927 ; R.I. 173,3 ; Ct. 18,6,1,5 ; N.Y. 2,7,1,6 ; 2,1,2, 137 ; N.J. *Frauds*, 2 ; Pa. *Frauds, etc.* 2 ; O. 4106 ; Ind. 2919 ; Mich. 5652 ; 6179 ; Wis. 2203,2302 ; Minn. 41,10 ; Kan. 22,7 ; Neb. 1,73,1 ; Md. 44,3 ; Mo. 674 ; Ark. 3381 ; Tex. 548 ; Cal. 6091 ; Ore. Civ. C. 771 ; M. L. 6,1 ; Nev. 228 ; Wash. 2312 ; Ida. 935 ; Mon. G. L. 178 ; Wy. 1882,1,1 ; Uta. 617 ; Ga. 2690 ; Ala. 2145 ; 1885, 84 ; Miss. 1187-8 ; N.M. 2751 ; Ariz. 2245.

So, in Florida, all deeds must be in writing : Fla. 32,1. In Louisiana of every donation *inter vivos* of immovable property or incorporeal things, an "act" must be passed before a notary public and two witnesses : La. 1536.

The party executing may sign by his mark : Ct., Mon., Ala. See also § 1023.

He must sign at the foot of the deed : Ala.

Or they may, in most states, be signed by his agent duly constituted : N.H. 135,1 ; Mass. ; Me. 73,15 ; Vt. 1922 ; Ct. ; N.Y. ; N.J. ; Pa. ; O. 4198 ; Ind. ; Mich. ; Wis. ; Minn. ; Kan. ; Mo. ; Ark. ; Cal. ; Ore. ; Nev. ; Dak. Civ. C. 622 ; Ida. ; Mon. ; Wy. ; Uta. ; Fla. ; N.M. ; Ariz.

Such agent must have written authority : N.Y. ; Pa. ; O. ; Wis. ; Minn. ; Neb. 1,73,56 ; Ark. ; Tex. ; Cal. ; Ore. ; Dak. ; Ida. ; Uta. C. Civ. P. 1206 ; Ala. ; Ariz. 2119 ; Mon.

See also the Statute of Frauds, Title VI. For the execution of such powers of attorney, see also Art. 167. For the law of agency, see in Division II.

Estates created by conveyance not in writing are generally only estates at will. See in Title VI., and § 2002.

§ 1561. **Form.** All deeds must be on a single sheet : O. 4149.

They may be on parchment or paper : Ala. 2145.

Indenting is not necessary : Md. 44,6.

"All deeds must be made on good consideration : " Ga. 2690.

§ 1562. **Delivery.** (A) It is also necessary that the deed should be delivered by the party executing : Mass. 120,1 ; R.I. 173,2 and 3 ; Tex. 548 ; Ga. 2690 ; Miss. 1188 ; Fla. 32,1.

So, a grant only takes effect from delivery (compare § 1406) : N.Y. 2,1,2,138 ; Cal.\* 6054 ; Dak.\* Civ. C. 606. The execution of an instrument is in other states expressly defined to be the subscribing, sealing (if a seal), and delivering it : Ind. 451 ; Cal. 11933 ; Ore. Civ. C. 744.



(B) A grant duly executed is presumed to have been delivered at its date: Cal.\* 6055; Dak.\* Civ. C. 607.

§ 1563. **Escrows.** (A) A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition; and, on delivery by the depository, it will take effect. While still in the possession of such third person, and subject to the condition, it is called an *escrow*: Cal. 6057; Dak.\* Civ. C. 609; Ga. 2693.

(B) In Georgia an *escrow*, when possessed by the grantee, is presumptive proof of a delivery, but may be rebutted.

(C) A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made: Cal.\* 6056; Dak.\* Civ. C. 608.

(D) Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered (1) where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or (2) where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed: Cal.\* 6059; Dak.\* Civ. C. 611.

(E) Redelivering a grant of real property to the grantor, or cancelling it, does not operate to retransfer the title: Cal.\* 6053; Dak.\* Civ. C. 610.

§ 1564. **Seal.** (A) In many states all deeds must be sealed by the party executing them (see § 1589): N.H. 135,3; Vt. 1927; R.I. 173,3; Ct. 18,6,1,5; N.Y. 2,1,2,137; Ind.<sup>a</sup> 2919; Mich. 5652; Wis. 2203; Md. 44,3; Mo. 674; Ore. 6,1; Wash. 2312; Wy. 1882,1,1; S.C. 1775; Fla. 32,1.

So, all bonds or powers of attorney to convey real estate: Ind. 4925.

(B) But, in many states, (1) the use of private seals<sup>b</sup> is absolutely abolished: O. 4; 1884, p. 198; 1883, p. 79; Ind. 2999; Io. 2112; Kan. 21,6; Neb. 1,81,1; Tenn. 2478; Tex. 4487; Dak. Civ. C. 623; Mon. G. L. 1163; Miss. 993.

(2) The word *seal*, or the letters *L. S.*, is unnecessary to any instrument: Ky. 22,2; Nev. 1883,39.

(3) A seal is not necessary to convey the legal title to land so as to enable the grantee to sue at law: Ala. 2948.

(4) The use of a seal or scrawl or other semblance of a seal by any private person in making an instrument does not in any way affect it or vary the rights of the parties: O.; Io.; Kan.; Neb.; Ky.; Tex.; Dak.; Mon.; Miss. 995.

(5) Official and court bonds are valid without a seal: Miss. 996.

(6) Except as importing consideration (see Title VI.), there is no difference between sealed and unsealed instruments<sup>b</sup> (except as to the time limited for commencing suits thereon; see Part IV.): Ky.<sup>c</sup> 22,3; Tenn.;<sup>c</sup> Tex.<sup>c</sup> 4488; Cal. 11932; Ore. Civ. C. 743,746; Miss.<sup>c</sup> 993-4.

And for other cases of contracts concerning personal property, see Title VI.

NOTES. — <sup>a</sup> But see below, in B. <sup>b</sup> As to corporations, see Part IV. <sup>c</sup> There would seem to be no difference, even as to consideration, in the noted states.

§ 1565. **Form of the Seal.** And in many states (1) a scrawl or other device may be affixed by way of private<sup>a</sup> seal, and the instrument will take effect as if sealed: N.J. *Evid.* 52; *Obligs.* 1; Ill. 29,1; Mich. 5699; Wis. 2215; Minn. 40, 31; Va. 140,2; 15,9; W.Va. 1882,143,15; Mo. 662; Cal. 11931; Ore. Civ. C. 742; Col. 3121; Wash. App. p. 11, § 3; Ida. 922; Wy. 1882,1,24; Uta. C. Civ. P. 10 and 1189; C. L. 6 and 652; Ga. 5; Miss. 994; Fla. 162,87; N.M. 2742,2771.

So, in a few, the letters *L. S.* or the word *seal*: Ct. 19,11,17; Ida.; Uta.

(2) All writings which import on their face to be under seal are to be taken as such, and have effect as if sealed: Ala. 2194.

(3) A seal of a court, corporation, or officer may be an impression upon the paper, as well as upon wax, or a wafer affixed: N.H. 1,10; Mass. 3,3; Me. 1,6;



Vt. 17; R.I. 24,14; Ct. 19,11,17; N.Y. Civ. C. 29; O. 1884, p. 198; Mich. 2; Wis. 4971; Io. 45; Minn. 4,1; Kan. 104,1; Va. 15,9; W.Va. 1882,143,15; N.C. 3765; Ark. 1460; Cal. 14,10014,11931; Ore. Civ. C. 742; Col. Civ. C. 385; Wash. 434; Dak. Civ. C. 2130; Ida. Civ. C. 10; G. L. 922; Uta.; Ga. 5; N.M. 659; Ariz. 3.

And the same is true of a private seal, in Rhode Island, Connecticut, Ohio, and Idaho.

**Definitions.** A *seal* is a particular sign made to attest in the most formal manner the execution of an instrument: Cal. 11930; Ore. Civ. C. 741; Uta. C. Civ. P. 1188.

A public seal must be a stamp or impression, made as above (3); but a private seal may be made by a mere wafer or drop of wax, or by a scroll or scrawl, as in (2): Ore., Ida.

A scroll or other sign made in another state or country, and there recognized as a seal, is so regarded in the home state: Cal, Ore., Ida., Uta.

NOTE. — <sup>a</sup> For corporate seals, etc., see Part III., and § 1565 (3).

§ 1566. **Witnesses.** (A) In many states, witnesses are necessary to a deed even (it would seem) to make it valid between the parties: N.H. 135,3; Ct. 18, 6,1,5; O. 4106; Mich. 5658; Wis. 2216; Minn. 40,7; Neb. 1,73,1; Md. 44,3; Ore. 6,10; Wash. 2312; Wy. 1882,1,8; Uta. 617; S.C. 1775; Ga. 2690; 1885,84; Fla. 32,1 and 16; La. 2234.

(B) In others, they are only necessary when there is no acknowledgment: N.Y. 2,1, 2,137; N.C. 1245; Ark. 650; Tex. 554; Ala. 2146.

So, in most states, a deed executed without witnesses might be valid as between the parties, or except as against purchasers (so expressly stated in New York), that is, witnesses are only necessary in order to prove the deed for record, and consequently, if the deed be acknowledged, there would, as before, be no need for witnesses; (see §§ 1580-1): Mass. 120,12; Me. 73,18; Vt. 1945; N.Y. 2,3,12; 2,1,2,136; N.J. *Conveyances*, 13; Io. 1959; Del. 83,14; Va. 117,2; W.Va. 1882, 149,2; Ky. 24,15; Tenn. 3811; Cal. 6161; Gt. 213; Dak. Civ. C. 648; Ida. 1874-5, *Conveyances*, 11. Compare §§ 1570,1571.

(C) But in other states, witnesses are not necessary in any case, even for proof; though a deed may be proved by attesting witnesses: R.I. 173,8; Pa. *Deeds, etc.* 10; *Ann. Dig.* 1877-8,3; Ill. 30,24; N.C. 1246,(9).

The number of witnesses required, is in most states, two: N.H.; Vt.; Ct.; Pa.; O.; Mich.; Wis.; Minn.; Va.; W.Va.; Ky.; Tenn.; Ark.; Tex.; Ore.; Wash.; S.C.; Ga.; Ala.<sup>a</sup> 2160; Fla.; La.; in others, one: Mass.; Me.; N.Y.; N.J. *Conveyances*, 4; Ill.; Io.; Neb.; Md.; Col.; Ida.; Wy.; Uta.; Ala.<sup>a</sup> 2145; three, if the party is blind: La.

But where the grantor cannot write, or signs by mark, there must be one more witness than is required above: Ala.; and the same would result from the provisions of § 1023, in other states.

NOTE. — <sup>a</sup> In Alabama, one witness is required in any case, there being no acknowledgment, as in A; two are required when the deed is proved, or when the party cannot write. (Compare § 1023.)

§ 1567. **The Attestation.** (A) Witnesses attest (1) the execution: N.Y. 2,1,2, 137; Cal. 11935; Ore. Civ. C. 747; Ala. (2) So, in others, they attest the signing and sealing: O. 4106; Mich. 5732; Fla.; the delivery: <sup>a</sup> N.Y., Mich., Fla.

(B) It is in most states sufficient if the grantor *acknowledge* that he executed the deed in their presence: O.; Ark.; Tex.; Cal. 11935; Ore.; Col. See also § 1601.

(C) The witnesses must sign at the grantor's request: Cal., Ore., Col.; and in his presence: Col., S.C. See also § 1601.

The date of their subscribing must be stated with their signatures, if after the time of execution: Ark.

For citations, see also § 1566.

NOTE. — <sup>a</sup> Perhaps "execution" includes delivery, as used in (1). Cf. § 1562. See also in Art. 159.

§ 1563. **Foreign Deeds.** By ordinary law, deeds executed out of the State, intended to affect real estate within it, must be executed according to its laws; and so expressly in Wash. 2316; Wy. 1882,1,10.

But in some states, a conveyance executed in another state (or even, in O., Ill., Wis., Minn., Kan., Neb., Ore., Fla., in a foreign country) according to the laws of such state (or country), may be valid within the State: Ct. 18,6,1,7; O. 4111; Ill. 30,20 and 22; Mich. 5659,5724,5661; Wis. 2218,2220; Minn. 40,10; Kan. 22,25; Neb. 1,73,6; Ore. 6,11 and 13; Fla. 32,16 and 17.

In others, deeds, etc., and proofs or acknowledgments of the same executed in a foreign country and in accord with the laws of the State, may be made in the language of such country, and when accompanied by a sworn translation into English of the same by the recorder of land titles in the country where recorded, be recorded and received in evidence as if originally in English: Ky. 24,37; Mo. 677; Col. 219.

§ 1569. **Special Kinds of Deeds.** Contracts of sale of land or any interest therein must in Michigan be executed in presence of two witnesses, who shall subscribe their names thereto as such, and the vendor named in such contract and executing the same may acknowledge the execution thereof before any judge or commissioner of a court of record, or before any notary public or justice of the peace within the state; and the officer taking such acknowledgment shall indorse thereon a certificate of the acknowledgment thereof, and the date of making the same, under his hand: Mich. 5709.

When the vendor named in the contract has ceased to be bound in law by the provisions of the contract, and is entitled to a release therefrom, the vendee named in said contract, his heirs or assigns shall, when requested by said vendor, execute a discharge of said contract in the same manner as now provided by law for the discharge of mortgages, and for a refusal to so discharge he shall be subject to the same penalties as are provided for a refusal to discharge mortgages (§ 1902): Mich. 5713.

But no contract for sale of land is deemed invalid because not acknowledged or recorded: Mich.

## Art. 157. Acknowledgment.

§ 1570. **Necessity for.** (A) Commonly, a deed must be acknowledged by the grantor (or proved — see Art. 159) in order to be recorded: N.H. 135,3 and 10; Mass. 120,5; Vt. 1927; R.I. 173,4; N.Y. 2,3,4; 2,1,2,137; 2,3,16; N.J. *Conveyances*, 13; Pa. *Deeds, etc.* 10,76; Ind. 2933; Ill. 30,28; Mich. 5707; Wis. 2232; Io. 1942; Minn. 40,32; Kan. 22,9,19; Neb. 1,73,2 and 17; Del. 83,14; Va. 117,2; W.Va. 1882,149,2; N.C. 1885,147,3; Ky. 24,15; Tenn. 2850; Mo. 691; Ark. 660; Cal. 6161; Ore. 6,22; Nev. 246; Col. 217; Dak. Civ. C. 623; Wy. 1882,1,1 and 26; Ga. 2706; Miss. 1215; Fla. 32,6; La. 2234,2253; Ariz. 129; D.C. 440. See also § 1631.

(B) But in several states, it might seem that a deed which is not duly (§ 1566) witnessed must be acknowledged in order to have any effect whatever even as between the parties: Me. 73,17; Ct. 18,6,1,5; Ind. 2919; Mich. 5658; Minn. 40,1; N.C.; Tenn. 2811; Mo. 674; Ark. 650; Tex. 554; Ore. 6,1; Nev. 230; Ida. 1874-5, *Conveyances*, 4; Mon. G. L. 180; Wy.; Uta. 617,631; Ala. 2145-6; Fla. 32,9; Ariz. 2247. But the courts would probably hold such unacknowledged deed to be valid, at least as against the grantor, as in § 1571.

And if witnessed, but not acknowledged, it has no effect until duly (Art. 158) proved: Me., Ct., Mo.

So, all deeds of gift must be acknowledged or proved and recorded within two years, or they are absolutely void : N.C. 1252.

(C) In a few, a deed must (by the terms of the statute) be acknowledged in all cases whether witnessed and proved, or not : O. 4106 ; Md. 44,1 ; Wash. 2312 ; N.M. 2752.

(D) In South Carolina, there is no acknowledgment ; but proof is necessary for record : S.C. 1777.

§ 1571. **Unacknowledged Deeds** are commonly, in states mentioned under § 1570 A, like all unrecorded deeds, valid (1) only as between the parties : N.H. 135,4 ; Mass. ; Vt. 1931 ; R.I. 173,4 ; Pa. *Deeds, etc.* 76 ; Tex. 549. See § 1611.

(2) They are valid except as against purchasers for value without notice : N.Y. 2,1,2,137 ; Ky. 24,8 ; Miss. 1209,1215 ; and as against creditors : Ky., Miss.

An act which is not *authentic* through any defect of form or incompetence of the officer, avails as a private writing, if signed by the parties : La. 2235.

For other states, see §§ 1570,1610,1611.

§ 1572. **Effect.** In most states, a conveyance duly acknowledged or proved (see below, and in Art. 159) may be read in evidence without further proof : N.Y. 2,3,16 ; Civ. C. 935 ; N.J. *Conveyances*, 4 and 16 ; Ill. 30,35 ; Mich. 5685 ; Io. 3659 ; Kan. 22,26 ; Neb. 1,73,13 ; Mo. 696 ; Cal. 11951 ; Ore. 6,22 ; Nev. 257 ; Col. 216 ; Ida. 1874-5, *Conveyances*, 29 ; Civ. C. 931 ; Mon. G. L. 205 ; Wy. 1882, 1,17 ; Uta. 623 ; Ariz. 2273. So, in two others, of a certified copy : Io. ; Pa. *Deeds*, 74. See § 1625.

But such acknowledgment, etc., is not conclusive ; but may, in several, be rebutted : Mich. ; Mo. 698 ; Ark. 666 ; Ariz. 2275 ; as if a witness be shown to have been incompetent : N.Y. Civ. C. 936 ; Mo. 699 ; Nev. 259,260 ; Ariz. 2276.

But the acknowledgment or proof with proper certificate of a deed does not make it evidence unless duly recorded : Del. 83,16 ; except as to the private examination duly taken and certified of a married woman, which remains valid although the deed upon which it is taken is not recorded : Del.

§ 1573. **Manner.** If there is more than one grantor, the acknowledgment need only be made by one of them : Mass. 120,6 ; Me. 73,17 ; Pa. *Deeds, etc.* 10 and 74 ; Del. 83,3.

The officer must make known the contents of the deed to the grantor making acknowledgment : N.J. *Conveyances*, 4.

Except where specially so provided, an acknowledgment need not be taken in the county where the deed is executed : Del. 83,7 ; and so in all other states. An acknowledgment may be made by power of attorney first proved in the superior court : Del. 83,3.

Acknowledgment is made by the grantor's appearing in person before the officer (§ 1582) and stating that he had executed the deed for the consideration and purposes therein mentioned : Ark. 656 ; Tex. 4308.

§ 1574. **Form.** In a few states, all officers authorized to take the acknowledgment or proof of deeds are required to keep a record of the same ; and such records are public records : Tex. 4324-8 ; Nev. 315. See also Evidence, in Part IV.

§ 1575. **Foreign Deeds.** A conveyance of real estate situated without the State may be read in evidence without further proof, (1) if acknowledged and proved in the manner prescribed for conveyances within the state : N.Y. 2,3,27 ; (2) or in the manner prescribed by the laws of any other of the United States where the subject land is situated (if duly authenticated) : N.Y.

§ 1576. **The Certificate.** Generally, a certificate of the acknowledgment (or proof ; see § 1599) must be appended <sup>a</sup> or indorsed by the officer taking it : Mass. 120,6 ; Me. 73,23 ; N.Y. 2,3,15 ; N.J. *Conveyances*, 4 ; O.<sup>a</sup> 4106 ; Ind. 2950 ; Ill.



30,24; Mich. 5658; Wis. 2216; Io. 1958; Minn. 40,8; Kan. 22,11; Neb. 1,73,12; Md. 44,12; Del. 83,8; Va. 117,3; W.Va. 1882,149,2; 1883,13; N.C. 1246; Ky. 24,15-17; Tenn. 2855; Mo. 678; Ark. 654; Tex. 4311; Cal. 6188; Ore. 6,10; Nev. 246 and 233; Col. 210-2; 220; Wash.<sup>b</sup> 2320; Dak. Civ. C. 648; Ida. 1874-5, *Conveyances*, 6 and 19; Mon. G. L. 182; Wy. 1882,1,8; Uta. 221,633; Ala. 2158; Miss. 1209; Fla. 32,14; N.M. 2752; Ariz. 2249; D.C. 442. So, probably, in all states, by implication.

*Except* when acknowledged before the register of deeds, no such certificate is necessary: Va., W.Va., Ky.

Such certificate is, in many states, expressly made a prerequisite for record: Mass. 120,5; Me.; N.Y. 2,3,16 and 34; N.J. *Conveyances*, 13; Mich. 5673; Wis. 2232; Minn. 40,20; Kan. 22,19; Neb. 1,73,13; Va.; W.Va.; Ky.; Nev.; Wash.<sup>b</sup> 2321; Ida.; Mon. G. L. 195; Uta. 646; Ala. 2160; Miss. 1215; La. 2253; N.M. 2761; Ariz. 2262; but the same would probably be implied in all the states above mentioned.

NOTES. — <sup>a</sup> It must be on the same sheet as the instrument. <sup>b</sup> Only when taken in a foreign country.

§ 1577. **Form of Certificate.** The certificate must, in all the states above mentioned, be signed by the officer making it. And in many, the seal of the officer must be annexed if he have one: Ind. 2950,2999; Io. 1961; Minn. 72,11; Kan. 22,15; Ky. 24,16; Mo. 679; Ark. 652,654; Tex.; Cal. 6193; Nev. 233; Wash.; Dak. Civ. C. 666; Ida. 1874-5, *Conveyances*, 6 and 19; Mon. G. L. 182; Uta. 633; Ariz. 2249; D.C. 442. For citations, see also § 1576.

And, if taken out of the United States, an official seal is necessary in all cases: Ark. 653. See also § 1582, notes <sup>f</sup> and <sup>g</sup>.

But in one, the seal of the officer before whom the acknowledgment of deeds is taken is no longer necessary; the seal is, however, declared to be *prima facie* evidence of the proof or acknowledgment: Pa. *Deeds*, etc. 18-19.

It is no objection to the record of a deed that no official seal is appended to the recorded acknowledgment or proof, if when it purports to have been taken by an officer having an official seal, there be a statement in the certificate that it is made under his hand and seal of office; and such statement shall be presumptive evidence that the seal was attached to the original certificate: Neb. 1,73,20.

§ 1578. **Content of Certificate.**<sup>a</sup> In many states, (A) no acknowledgment of any conveyance can be taken without proof or knowledge by the officer taking it of the identity of the person making it: N.Y. 2,3,9; Ill. 30,24; Mich. 5726; Io. 1958 and 1963; Kan. 22,11; Neb. 1,73,38; Tenn. 2860; Mo. 680; Ark. 655; Tex. 4309; Cal. 6185; Ore. 6,16; Nev. 234; Col. 212; Dak. Civ. C. 659; Ida. 1874-5, *Conveyances*, 7; Mon. G. L. 183; Uta. 634; Fla. 32,10; N.M. 2754; Ariz. 2250.

The same would probably follow in other states from the words "personally known to me," etc., in the certificate <sup>b</sup> (Wis., Del., Tenn., Ala., D.C.), or from the following provision.

The certificate must state that the identity of the person making the acknowledgment was known or proved to the person taking it: N.J. *Conveyances*, 4; Tenn. 2855; Mo. 681; Nev. 235; Col.; Ida. *ib.* 8; Mon. G. L. 184; Uta. 635; Ala. 2158; Miss.<sup>c</sup> 1220; N.M. 2754; Ariz. 2251; D.C. 442.

If the clerk is not acquainted with the person wishing to make the acknowledgment, he files the instrument, writing on the record the date and reason of postponement; and then within twenty days the person may produce witnesses to prove his identity; and the deed so acknowledged after such proof will take effect from the first filing: Tenn. 2860.



So, in several, (B) the certificate must set forth substantially all the above matters required to be done or proved, to make the acknowledgment effectual: N.Y. 2,3,15; N.J.; Ill.; Mich.; Mo. 681; Ark. 655; Uta. 635; Fla. 32,14; N.M.; Ariz.

Thus, the name of the witness who proved the grantor's identity must be inserted: Io., Tex., Nev., Ida., Mon., Uta., Ariz. The name and official character of the officer taking the acknowledgment: Md. 44,14. The time of acknowledgment: Md. It must state that the grantor acknowledged the instrument to be his free act and deed: Io., Kan., Md., Nev., Ida., Mon., Uta., Miss.<sup>c</sup> In other states, this would be implied from the provisions of § 1576.

In one, the officer taking the acknowledgment must, if the grantor signs by mark, or he have good cause to believe that the effect of the deed is not fully known to the grantor, explain the contents and purport of the deed; but failure to do so does not invalidate it: Ind. 2948.

NOTES. — <sup>a</sup> For certificates of deeds by married women, see Section II. <sup>b</sup> Cf. also § 1579. <sup>c</sup> Only when taken in a foreign country.

§ 1579. **Statutory Forms** for the certificate are provided in several states: —

(1) Before me, E. F., this — day of —, A. B. acknowledged the execution of the annexed deed (provided the deed be witnessed and signed by two attesting witnesses).

Ind. 2947; Mich. 5732.

(2) State of — } Before me —, on this day personally appeared —, known to me  
County of — } [or, proved to me on the oath of —] to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same (for the purposes and consideration therein expressed, in Missouri, Arkansas, Texas, Nevada).

[SEAL.] Given under my hand and seal of office, this — day of —. A. B.

Mo. *Forms*, 108; Ark. *Forms*, No. 144; Tex. 4312; Cal. 6189; Dak. Civ. C. 666; Ariz. 2252-3.

(3) State of —, — County, ss. Personally came before me this — day of —, 18—, the above [or, within] named A. B. and C. D. his wife [or, if an officer, adding the name of his office] to me known to be the persons who executed the foregoing [or, within] instrument and acknowledged the same. ——. [Insert designation of officer taking acknowledgment]

Wis. 2217.

(4) Personally came before me —, C. D. [and E. F. his wife; see Division II.], known to me personally [or, proved upon oath of G. H.] to be such, and severally acknowledged this indenture to be their deed.

Del. 36,8; 83,9.

(5) — } ss. On this — day of —, A. D. —, personally appeared before me  
— } [title of officer] in and for —, A. B., personally known [or, satisfactorily proved by the oath of C. D., a competent and credible witness for that purpose by me duly sworn] to me to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

Nev. 236-7; Ida. 1874-5, *Conveyances*, 9-10; Mon. G.L. 185,186; 1881, p. 1, § 2; Uta. 636,637.

(6) State of —. } I [name of officer and title] do hereby certify that [name of grantor,  
County of —. } and wife if acknowledged by her] personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and seal this — day of —.

Signature.

[SEAL.]

Ill. 30,26.

(7) On this — day of —, 18—, before me personally appeared A. B., to me known to be the person described in, and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Minn. 1883,99,1; Mo. 1883, p. 20, § 1.

(8) State of —, county of —. I hereby certify that on — day of —, in the year —, before the subscriber [description of officer] personally appeared — and acknowledged the foregoing deed to be his act.

And if taken out of the State, to the above is added: —

In testimony whereof I have caused the seal of the court to be affixed [or, have affixed my official seal] this — day of —, A. D. —.

Md. 44,78 and 80.

(9) County of —, to wit : I [description of officer] for the county aforesaid, in the state of —, do certify that E. F., whose name is signed to the writing above, bearing date on the — day of —, has acknowledged the same before me in my county aforesaid. Given under my hand this — day of —.

Va. 117,3 ; W. Va. 1882,149,2 ; 1883,13.

(10) State of —. } I [description of officer] hereby certify that — whose name is  
County of —. } signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day, that being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date. Given under my hand this — day of —, A. D. 18 —.

A — B —.

Ala. 2158.

(11) State of —. } Personally appeared before me [description of officer] the within-  
County of —. } ss. named A. B., who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned. Given under my hand this — day of —, A. D. —.

Miss. 1218.

And generally, no deed of land situated in the State is deemed defective because of any informality or imperfection of acknowledgment, if it shall sufficiently appear by such certificate that the person making the same was legally authorized to take such acknowledgment, and that the grantor was personally known to him, and he or they personally appeared before him, and acknowledged such deed to be their free act and deed : Mich. 5726.

And if such deed was executed out of the State, it shall be sufficient if the certificate under seal of office of the clerk or other proper certifying officer of the court of record of the county or district within which such acknowledgment was taken, is appended, that the officer taking the acknowledgment was, at the date thereof, such officer as he is therein represented to be : Mich.

§ 1580. **Effect.** The certificate is *prima facie* evidence of the facts therein contained : Wash. 2321.

Compare §§ 1572,1625.

§ 1581. **Foreign Acknowledgments**, or proofs, of conveyances intended to have effect in the State, and (A) taken within the United States, may (1) be taken and drawn either according to the laws<sup>a</sup> of the home state or of the foreign state, and will be valid : Vt. 1946 ; Ct.<sup>c</sup> 18,6,1,7 ; N.Y.<sup>b</sup> 1858,259,1–2 ; O. 4111 ; Ill. 30,20 ; Wis. 2218 ; Kan. 22,25 ; Ore. 6,12.

(2) In others, they must be taken according to the laws of the home state : N.J. *Conveyances*, App. 5 ; Ky. 24,16–17 ; Wash. 2316.

(3) In others, they must be taken according to the laws of the foreign state : Neb. 1,73,4 ; Wy. 1882,1,9.

(4) Or of the United States : Ky. 24,40 ; 1884,209. Compare §§ 1568,1583.

(B) So, in several, conveyances acknowledged in a foreign country, to be recorded within the state, may be acknowledged either according to the laws of the home state or of such foreign country : <sup>a</sup> O. ; Ill. 30,23 ; Wis. 2220 ; Minn. 40,10 ; Kan. ; Fla. 32,17.

The same rules respectively apply to the certificates : Vt.

If a foreign conveyance is executed and acknowledged according to the laws of such country, the certificate of acknowledgment shall certify that fact : Wis. 2220. Compare also § 1583.

NOTES. — <sup>a</sup> This provision is not to be extended so as to affect the officers having jurisdiction to take the acknowledgment, contrary to § 1582. <sup>b</sup> But it is only so valid when both the grantor and the officer taking it are dead. <sup>c</sup> The act of 1884,32 would, however, imply a doubt as to this.

§ 1582. **The Officer.** (A) Within the State, acknowledgments may be made (1) before any justice of the peace : N.H. 135,3 ; Mass. 120,6 ; Me. 73,17 ; Vt. 1927 ; R.I. 173,3 ; Ct.<sup>a</sup> 18,6,1,5 ; Pa.<sup>a</sup> *Deeds*, 10 and 27 ; O. 4106 ; Ind.<sup>e</sup> 2933 ; Ill.<sup>e</sup>

30,20; Mich. 5658; Wis. 2216; Io. 1955; Minn.<sup>a,f</sup> 72,11; Kan. 22,9; Neb.<sup>a</sup> 1, 73,3; Md.<sup>a,d,e</sup> 44, 8-9; Va. 117,3; W.Va. 1882,149,2; 1883,13; N.C.<sup>a,n</sup> 1246; Mo.<sup>a,c</sup> 676; Ark. 651; Cal.<sup>a,e</sup> 6181; Ore. 6,10; Nev.<sup>e</sup> 231; Col.<sup>e</sup> 210; Wash. 2315; Dak.<sup>e</sup> Civ. C. 656; 1885,1; Ida.<sup>a,f</sup> 1874-5, *Conveyances*, 5; Mon.<sup>e</sup> G. L. 181; Wy. 1882,1,8; Uta.<sup>a,f</sup> 220; Ga.<sup>a</sup> 2706; Ala. 2155; Miss. 1217; Fla. 32,16; La. 2253; N.M.<sup>a,g</sup> 2753; Ariz.<sup>a,f</sup> 2248-9; D.C. 441.

So, in one other, before *any two* justices of the peace: Del.<sup>a,e</sup> 83,3.

(2) Before any notary public: N.H.; Mass.; Me.; Vt.;<sup>n</sup> R.I.; Ct.<sup>a</sup>; N.Y.<sup>a</sup> 1859, 360,1; Pa. *Deeds, etc.* 35; O.; Ind.;<sup>e</sup> Ill.;<sup>g</sup> Mich.; Wis.; Io.; Minn.;<sup>a,f</sup> Kan.; Neb.;<sup>a</sup> Del. 36,2; Va.; W.Va.; N.C.;<sup>a,n</sup> Tenn.<sup>g</sup> 2852; Mo.; Ark.; Tex. 4305; Cal.;<sup>a</sup> Ore.; Nev.; Col.;<sup>g</sup> Wash. Civ. C. 655; Ida.;<sup>a,f</sup> Mon.; Wy.; Uta.;<sup>a,f</sup> Ga.;<sup>a</sup> Ala.; Miss. 1884,80; Fla.; La. 2234; N.M.<sup>g</sup> 2774; Ariz.<sup>f</sup> 2193,2248; D.C.

[**Note.** — The courts herein below referred to are named according to the table in § 551; but where capital letters are used the particular name in such state is employed.]

(3) Before the judge (or clerk, in Ohio, Indiana,<sup>e</sup> Illinois,<sup>g</sup> Wisconsin, Arkansas, California,<sup>a</sup> Dakota,<sup>a,g</sup> Wyoming, Mississippi,<sup>g</sup>) of any court of record: Ct.,<sup>a</sup> O., Ind.,<sup>e</sup> Ill.,<sup>g</sup> Mich., Wis., Cal.,<sup>a</sup> Dak.,<sup>a,g</sup> Wy., Ga.

So, before the judge (or clerk, in Iowa, Kansas, Missouri, Nevada, Idaho,<sup>g</sup> Montana,<sup>a,g</sup> Utah,<sup>g</sup> New Mexico,<sup>g</sup> Arizona,<sup>g</sup>) of any court having a seal: Io.; Kan.; Mo.; Nev.; Ida.;<sup>g</sup> Mon.;<sup>a,g</sup> Uta.<sup>g</sup> 632; N.M.;<sup>g</sup> Ariz.<sup>g</sup> Before the judge (or clerk, in Neb.;<sup>a</sup> W.Va.; N.C. 1885,188) of any court: R.I.; Neb.;<sup>a</sup> Del.;<sup>g</sup> Ore. Civ. C. 893.

Before any court commissioner: Pa. Ann. Dig. 1875-6, *Deeds, etc.*, 7; Wis.; Minn.;<sup>a,f</sup> any commissioner in chancery of a court of record: Va.; any commissioner of a court of record: Mich.; "before a woman appointed for the purpose:" Me.

(4) Before the judge (or clerk: Minn.,<sup>a,f</sup> Cal., Col.,<sup>g</sup> Wash., Uta.,<sup>a</sup> Ala.) of the supreme court: N.Y. 2,3,4; N.J. *Conveyances*, 4; Pa. *Deeds, etc.*, 23; Minn.;<sup>a,f</sup> N.C.<sup>n</sup> 949,1246; Ark.; Cal. 6180; Ore.; Col.; Wash.; Uta.;<sup>a</sup> Ala.; Miss.<sup>g</sup>

Before supreme court commissioners: N.Y.

(5) Before the Judge (or clerk: Ct. 1878,29; 1881,4; Ill.;<sup>g</sup> Minn.;<sup>a,f</sup> Va.; N.C.;<sup>n</sup> Tex.; Col.;<sup>g</sup> Wash.; Uta.;<sup>a</sup> Ga.;<sup>a</sup> Ala.; Fla.) of superior courts: N.Y. (or the district court, in New York City, 1882,410,1391); Minn.;<sup>a,f</sup> Md.<sup>a</sup> 44,8-9; Del.;<sup>g</sup> N.C.;<sup>n</sup> Ark.; Cal. 6180, Amt.; Col.; Wash.; Ala.; Miss.;<sup>g</sup> Fla; before a commissioner of the Superior Court: Ct.;<sup>a</sup> before a judge of the Court of Common Pleas: N.J., *Conveyances*, 5; Pa. *Deeds, etc.* 24,25; or the clerk: N.J. 1885,133.

(6) Before the chancellor or judge of the court of chancery: N.Y., N.J., Del., Ala., Miss.;<sup>g</sup> or before the clerk of such court: Ala.; or before a master in chancery: Vt., N.J., Ill., Mich.

(7) Before the judge (or clerk: Va.; N.C.;<sup>n</sup> Ky. 24,15; Tenn. 2851; Tex.) of any county court: N.Y.,<sup>a</sup> Tex., Ore., Col.<sup>g</sup>

(8) Before any judge (or clerk or register, in Vermont, Minnesota,<sup>a,f</sup> Utah<sup>a</sup>) of probate: Vt.; O. 526; Minn.;<sup>a,f</sup> Md.;<sup>e</sup> Wash.; Uta.;<sup>a</sup> Ala.; before a surrogate: N.Y. 1884,309.

(9) Before the judges of police courts: O. 1787.

(10) Before the judge of any United States court of record: Ct.,<sup>a</sup> D.C.; or the clerk thereof: Col.<sup>g</sup> 211.

(11) Before any mayor of a city: R.I.; N.Y.; Pa.<sup>a</sup> (in Philadelphia only) *Deeds, etc.* 26; O.; Ind.;<sup>e</sup> Kan.; Dak.;<sup>a,g</sup> Uta.;<sup>a</sup> before any city clerk: Kan.; before aldermen: Pa. (in Philadelphia only) *Deeds, etc.* 27; Uta.<sup>a</sup>; before the mayor of Wilmington: Del. 73,29.

(12) Before any town clerk: Vt.<sup>a</sup> 2689; R.I.; Ct.<sup>a</sup>

(13) Before the presiding officer of any municipal corporation: O.

(14) Before any county clerk: Vt., Ill., Wis., Kan., Col.,<sup>a,g</sup> Dak.,<sup>g</sup> Wy.; any county surveyor: O.; or auditor: Ind.,<sup>e</sup> Minn.,<sup>a,f</sup> Wash., Dak.;<sup>a,g</sup> any member of the county board of commissioners: Miss.

(15) Before any county recorder or register of deeds: Pa.<sup>a</sup> *Deeds*, 28 and 31; Ind.;<sup>e</sup>



Minn.;<sup>a,f</sup> Kan.; Va.<sup>c</sup> 117,2; W.Va.; Ky.; Tex.; Cal.;<sup>a</sup> Nev. 2995; Col.;<sup>g</sup> Dak.<sup>a</sup> Ida. 1874-5, p. 563, § 22; Mon. G. L. 395; Uta.;<sup>a,f</sup> La.; Ariz. 1883,50; before any city recorder: N.Y.; Pa. (in Philadelphia only); Uta.<sup>a</sup>

(16) Before any United States commissioner: Ill.;<sup>g</sup> Dak.; Wy. 1882,1,8; 1884,29,1.

(17) Before any commissioner of deeds: N.H.; N.Y.;<sup>a</sup> N.J. *Conveyances*, 60.

(18) Before any commissioner of the school fund: Ct.<sup>a</sup>

(19) Before any state senator: R.I.

(B) If the deed be acknowledged without the State, but within the United States, before (1) any justice of the peace: N.H.; Mass.;<sup>i</sup> Me.; Vt. 1946; R.I. 173,9; Ind.;<sup>e</sup> Ill.<sup>d</sup> 30,20; Mich.<sup>d</sup> 5659; Wis.<sup>d</sup> 2218; Io.<sup>d</sup> 1956; Minn.<sup>a,d,f</sup> 40,7; Kan.<sup>d</sup> 22,10; Va. 117,3; W.Va.; N.C.;<sup>d</sup> Ore.<sup>d</sup> 6,11; Nev.<sup>d</sup> 231,313; Mon.;<sup>a,d</sup> Miss.<sup>d</sup> 1219; Fla.;<sup>d,g</sup> D.C.<sup>d</sup> 441.

(2) Any notary public: N.H.; Mass.; Me.; Vt.; R.I.; N.J.<sup>d,i</sup> *Conveyances*, 59; Pa.<sup>g</sup> *Deeds, etc.* 32; O. 124; Ind.;<sup>e</sup> Ill.;<sup>g</sup> Mich.;<sup>d</sup> Wis.;<sup>d</sup> Io.; Minn.;<sup>a,d,f</sup> Kan.; Md.<sup>g</sup> 44,10 and 80; Del. V. 17,212; Va.; W.Va.;<sup>g</sup> N.C.;<sup>g</sup> Ky.<sup>g</sup> 24,16; Tenn.<sup>g</sup> 2853 and 2856; Mo.; Ark.;<sup>f</sup> Tex. 4306; Cal.<sup>a</sup> 6182; Ore.;<sup>d</sup> Nev. 313; Col.<sup>d</sup> 218; Wash.<sup>g</sup> 2317; Dak. Civ. C. 657; Ida. 1884-5, p. 87, § 1; Mon.;<sup>g</sup> Uta.<sup>f</sup> 632; Ala. 2156; Miss.;<sup>g</sup> Fla.;<sup>d,g</sup> N.M.<sup>g</sup> 2741; Ariz.;<sup>f</sup> D.C.<sup>d</sup>

(3) Before any commissioner of the home state, in the foreign state (see Part IV.): N.H.; Mass. 18,11; 120,6; Me.<sup>g</sup> 110,2; Vt.; R.I.; Ct.; N.Y.<sup>a,d,g</sup> 1850,270,2 and 5; N.J.<sup>g</sup> *Conveyances*, 7 and 45; Pa.<sup>g</sup> *Deeds, etc.* 38; O. 4111; Ind.;<sup>e</sup> Ill.<sup>g</sup> 26,1; Mich.; Wis.; Io.; Minn.<sup>f</sup> 72,13; Kan.; Neb.<sup>a,d</sup> 1,73,4 and 37; Md.<sup>h</sup> 44, 10 and 15; Del.<sup>g</sup> 83,10; V. 13, C. 28; Va.; W.Va.; N.C. 632; 1250; Ky.;<sup>g</sup> Tenn.;<sup>g</sup> Mo.; Ark.;<sup>f</sup> Tex.; Cal.; Ore.; Nev.; Col.;<sup>g</sup> Wash. 2316; Dak.; Ida.;<sup>f</sup> Mon.;<sup>g</sup> Wy.<sup>o</sup> 1882,1,9; Uta.;<sup>f</sup> Ga.;<sup>g</sup> Ala.; Miss.; Fla.<sup>g</sup> 32,12 and 16; Ariz.<sup>f</sup> 2184.

(4) Before any person authorized by the laws of such foreign state to take the acknowledgments of deeds therein: Vt.; Ct.;<sup>a</sup> N.Y.<sup>d</sup> 1848,195,1-2; N.J.<sup>d</sup> *Conveyances*, App. 5; Pa.<sup>d</sup> *Attys.* 7; *Deeds, etc.* 29,36,37; O. 4111; Mich.<sup>d</sup> 5724; Wis.;<sup>d</sup> Neb.;<sup>d</sup> Cal.;<sup>a</sup> Ore.;<sup>d</sup> Col.;<sup>d</sup> Wash.;<sup>d</sup> Dak.; Wy.;<sup>d</sup> Fla.<sup>d,g</sup>

(5) Before the judge of any court of record: N.J.;<sup>d,i</sup> Pa.<sup>g</sup> *Deeds, etc.* 20,21; Ind.;<sup>e</sup> Mich.;<sup>d</sup> Wis.;<sup>d</sup> Io.;<sup>g</sup> Minn.;<sup>a,d,f</sup> Kan.;<sup>g</sup> Del.;<sup>g</sup> N.C.; Tenn.;<sup>d</sup> Cal.;<sup>a</sup> Ore.;<sup>d</sup> Col.;<sup>g</sup> Dak.;<sup>g</sup> Ga.;<sup>d</sup> Ala.; Fla.;<sup>d,g</sup> D.C.;<sup>d</sup> or the clerk thereof: Ind.;<sup>d,e</sup> Wis.;<sup>d</sup> Io.;<sup>g</sup> Minn.;<sup>a,d,f</sup> Kan.;<sup>g</sup> Del.;<sup>g</sup> N.C. 640,1246,1250; Tenn.; Tex.;<sup>g</sup> Cal.;<sup>a</sup> Col.;<sup>g</sup> Wash.;<sup>g</sup> Dak.;<sup>g</sup> Wy.;<sup>o</sup> Miss.;<sup>g</sup> Fla.;<sup>d,g</sup> N.M.<sup>g</sup>

(6) Before the judge of any court having a seal: Md.<sup>g</sup> 44,13; Ky.;<sup>g</sup> Mo.;<sup>g</sup> Ark.;<sup>g</sup> Nev.;<sup>g</sup> Ida.;<sup>g</sup> Mon.;<sup>g</sup> Uta.;<sup>g</sup> N.M.;<sup>g</sup> Ariz.;<sup>g</sup> or the clerk thereof: Ky.;<sup>g</sup> Mo.;<sup>g</sup> Ark.;<sup>g</sup> Nev.;<sup>g</sup> Ida.;<sup>g</sup> Mon.;<sup>g</sup> Uta.;<sup>g</sup> N.M.;<sup>g</sup> Ariz.<sup>g</sup>

(7) So, before a judge of the supreme court of such foreign state: N.Y.,<sup>a</sup> N.J., Pa.,<sup>g</sup> Ill., Minn.,<sup>a,d,f</sup> Miss.; or the clerk thereof: Ill.,<sup>g</sup> Minn.,<sup>a,d,f</sup>

(8) Before a judge of any court: R.I.

(9) Before a judge of the superior court in such state: N.Y.,<sup>a</sup> N.J., Pa.,<sup>g</sup> Ill., Minn.,<sup>a,d,f</sup> Miss.; or the clerk thereof: Ill.,<sup>g</sup> Minn.;<sup>a,d,f</sup> or a judge of the "court of common pleas" therein: N.J.,<sup>d</sup> Pa.,<sup>g</sup> Ill.

(10) Before a judge of the probate court therein: Pa.;<sup>g</sup> or of any county court: Ill.

(11) Before any chancellor therein: N.J., Del.,<sup>g</sup> D.C.;<sup>d</sup> before any commissioner in chancery of a court of record: Va.; before any master in chancery: Pa. Ann. Dig. 1877-8, *Deeds, etc.* 4; Mich.;<sup>d</sup> Wis.<sup>d</sup>

(12) Before the clerk of any court: Va., W.Va., Ky.<sup>g</sup>

(13) Before a judge of the United States Supreme Court: N.Y.;<sup>a</sup> N.J.; Pa. *Deeds*, 16; Ill.; Minn.;<sup>a,d,f</sup> Md.;<sup>f</sup> Miss.; or a clerk thereof: Ill.,<sup>g</sup> Minn.,<sup>a,d,f</sup>

(14) Before a judge of the United States Circuit Court: N.Y.,<sup>a</sup> N.J., Ill., Del.,<sup>g</sup> Miss.; or a clerk thereof: Ill.,<sup>g</sup> Del.,<sup>g</sup> Col.,<sup>g</sup> Ala.



(15) Before a judge of the United States District Court : N.Y.,<sup>a</sup> N.J., Pa.,<sup>g</sup> Ill., Minn.,<sup>a, d, f</sup> Del.,<sup>g</sup> Ala., Miss., Fla. ;<sup>a, d, g</sup> or a clerk thereof : Ill.,<sup>g</sup> Minn.,<sup>a, d, f</sup> Del.,<sup>g</sup> Col.,<sup>g</sup> Ala.

(16) Before the judge of any United States court having a seal : Mo.,<sup>g</sup> Ark.,<sup>g</sup> Nev.,<sup>g</sup> Ida.,<sup>g</sup> Mon.,<sup>g</sup> Uta.,<sup>g</sup> N.M.,<sup>g</sup> Ariz.,<sup>g</sup> or before the clerk thereof : Mo.,<sup>g</sup> Ark.,<sup>g</sup> Nev.,<sup>g</sup> Ida.,<sup>g</sup> Mon.,<sup>g</sup> Uta.,<sup>g</sup> N.M.,<sup>g</sup> Ariz.,<sup>g</sup>

(17) Before the judge of any court of record of the United States : Md.,<sup>f</sup> Cal.,<sup>a</sup> Dak., Ala., N.M. ; or before the clerk thereof : Md., Mo., Cal.,<sup>a</sup> Col.,<sup>g</sup> Dak., Ala., D.C.<sup>d</sup>

(18) Before the mayor of any city : N.Y. 1845, 109, 1 ; N.J. ; Pa.<sup>g</sup> *Deeds, etc.* 12 ; Ind. ;<sup>e</sup> Ill. ;<sup>g</sup> Del. ;<sup>g</sup> N.C. ;<sup>g</sup> Ky. ;<sup>g</sup> Ark. ;<sup>g</sup> before the mayor of Philadelphia : N.Y. 1829, 222, 1 ; of Baltimore : N.Y.

(19) Before any county clerk : Ill., Wy. ;<sup>o</sup> " recorder : " Ind.,<sup>e</sup> W.Va. ; " auditor : " Ind.<sup>e</sup>

(20) Before any commissioner appointed by court in the home state to take such foreign acknowledgment : N.C. 1258 ; before any United States commissioner : Ill.,<sup>g</sup> D.C. ;<sup>d</sup> before " any magistrate : " Mass., Me., Vt.

(21) Before the Secretary of State : Ky.,<sup>g</sup> Col.<sup>g</sup>

In two, if the party making the deed be absent in the military or naval service of the United States, it may be acknowledged before any colonel, lieutenant-colonel, or major of the army, or any navy officer not below the rank of lieutenant-commander, etc. : R.I. 173, 3 ; Tenn. 2885.

So, in one other, before any officer above the rank of major : Pa. *Deeds*, 33 ; before the commanding officer of any military post of the United States not within the State : Wis.

(C) *In foreign countries* (1) before any minister, envoy, or chargé d'affaires of the United States resident in and accredited to such country : N.H. ; Mass. 120, 6 ; Me. ; Vt. 1946 ; R.I. 173, 9 ; N.Y. 2, 3, 5 and 7 ; 1859, 360, 3 ; 1829, 222, 1 ; 1863, 246, 1 ; 1865, 425, 1 ; N.J. *Conveyances*, 8 ; Pa.<sup>g</sup> *ib.* 17 and 30 ; Ind.<sup>g</sup> 2933, 2937 ; Ill.<sup>g</sup> 30, 20 ; Mich. 5661 ; Wis. 2220 ; Io. 1957 ; Minn. 40, 10 ; Neb. 1, 73, 6 ; Md.<sup>k</sup> 44, 11 ; Del. V. 13, C. 28 ; Va.<sup>g</sup> 117, 3 ; W.Va. ;<sup>g</sup> N.C. ;<sup>k, g</sup> Ky.<sup>g</sup> 24, 17 ; Tenn.<sup>g</sup> 2854 ; Mo. ; Tex. 4307 ; Cal. 6183 ; Ore. 6, 13 ; Nev. 231 ; Wash. 2319 ; Dak. Civ. C. 658 ; Ida. ; Uta.<sup>f</sup> 632 ; Miss. 1220 ; Fla.<sup>d, g</sup> 32, 13 and 17 ; Ariz.<sup>f</sup>

(2) Before any United States consul (or vice-consul) so resident therein : N.H. ; Mass. ; Me. ; Vt. ; R.I. ; Ct. ;<sup>a</sup> N.Y. 1829, 222, 1 ; N.J. ; Pa. ;<sup>g</sup> O. 4111 ; Ind. ;<sup>g</sup> Ill. ;<sup>g</sup> Mich. ; Wis. ; Io. ; Minn. ; Kan. 22, 10 ; Neb. ; Md.<sup>k</sup> ; Del. ; Va. ;<sup>g</sup> W.Va. ;<sup>g</sup> N.C. ;<sup>k, g</sup> Ky. ;<sup>g</sup> Tenn. ;<sup>g</sup> Mo. ; Tex. ; Ore. ; Nev. ; Col. ;<sup>g</sup> Wash. ; Dak. ; Ida. ; Mon.<sup>g</sup> 1881, p. 1, § 1 ; Uta. ;<sup>f</sup> Ga.<sup>g</sup> 2706 ; Miss. ; Fla. ;<sup>d, g</sup> N.M.<sup>d, g</sup> 2774 ; Ariz. ;<sup>f</sup> D.C.

(3) Before any diplomatic or commercial or consular agent of the United States so resident, etc. : R.I. ; N.Y.<sup>g</sup> 1863, 246, 1, 2, 3, 6 ; 1883, 80 ; Io. ; Neb. ; Md. 1882, 63 ; Del.<sup>a</sup> 83, 10 ; Va. ;<sup>g</sup> W.Va. ;<sup>g</sup> N.C. ;<sup>k, g</sup> Mo. ; Tex. ; Cal. ; Wash. ;<sup>k</sup> Dak. ; Ala.<sup>k</sup> 2156.

(4) Before any secretary of legation so resident, etc. : Ill. ;<sup>g</sup> Io. ; Ky. ;<sup>g</sup> Miss. ; D.C. 444.

If no consul in the place, before any civil officer with two subscribing witnesses, and a certificate of a consul resident in the county to the officer's identity, etc. : Fla. 32, 15.

(5) Before any notary public : Mass. ; Me. ; Vt. ; Ct. ;<sup>a</sup> Pa.<sup>g</sup> *Deeds, etc.* 32 ; Mich. ;<sup>g</sup> Wis. ;<sup>g</sup> Minn. ;<sup>g</sup> Kan. ; Neb. ;<sup>g</sup> Md. ; Tenn. ;<sup>g</sup> Mo. ;<sup>g</sup> Tex. ; Cal. ; Ore. ;<sup>g</sup> Nev. ; Dak. ; Ida. ; Mon. ;<sup>g</sup> Uta. ;<sup>f</sup> Ala. ; Fla.<sup>g, d</sup> 32, 17 ; N.M. ;<sup>d, g</sup> Ariz. ;<sup>f</sup> D.C.<sup>d</sup>

(6) Or justice of the peace : Mass., Vt., Ct.,<sup>a</sup> Kan.<sup>d</sup>

(7) Or United States commissioner in such country : Mich., Wis., Minn., Neb., Ore., Nev., Uta.,<sup>f</sup> Fla.

(8) Or a commissioner of the home state therein : N.H. ; Mass. 18, 15 ; Me. ;<sup>g</sup> Vt. ; R.I. ; N.Y.<sup>g, d</sup> 1875, 136 ; Pa. *Deeds, etc.* 46 ; O. 4111 ; Ill. 26, 1 ; Mich. ; Md. ;<sup>k</sup> Tenn. ;<sup>g</sup> Tex. ; Cal. ; Ore. ; Ida. ; Wy. ; Ga. ; Fla.<sup>g</sup>

(9) Or a commissioner of a court, specially authorized by commission : N.Y. 2, 3, 8.

(10) Before any magistrate: Mass., Vt.

(11) Before any magistrate or officer authorized by the laws of such country to take acknowledgments: Vt., Ill.,<sup>d,f</sup> Mich.,<sup>d,f</sup> Wis., Io.,<sup>d</sup> Ark.,<sup>g</sup> Wy.<sup>d</sup>

(12) Before the judge of any court of record: N.Y.,<sup>d,g</sup> 1870,208 (in Canada only); Del.,<sup>g</sup> Cal.; Col.;<sup>g</sup> Dak.; Ala.; Miss.; N.M.;<sup>d,g</sup> or clerk thereof: Del.,<sup>g</sup> Wy.

(13) Before the judge of any court having a seal: Ill., Kan.,<sup>g</sup> Mo.,<sup>g</sup> Ark.,<sup>g</sup> Nev.,<sup>g</sup> Ida.,<sup>g</sup> Uta.,<sup>g</sup> N.M.,<sup>g</sup> Ariz.;<sup>g</sup> or clerk thereof: Nev.,<sup>g</sup> Ida.,<sup>g</sup> Uta.,<sup>g</sup> Ariz.<sup>g</sup>

(14) Before the judge of any court: N.J.,<sup>d</sup> D.C.;<sup>d</sup> or any clerk of court: Va.;<sup>g</sup> or other proper officer of court: Kan.,<sup>g</sup> W.Va.,<sup>g</sup> Wash.

(15) Before the judge of any supreme court: N.Y. (in Canada); or of any superior court: Ky.<sup>g</sup>

(16) Before a chancellor or master in chancery: D.C.<sup>d</sup>

(17) Before the mayor or chief magistrate of a city or town: N.Y.<sup>g</sup> (in Canada and Great Britain only), N.J.,<sup>d</sup> Ill.,<sup>g</sup> Del.,<sup>g</sup> Va.,<sup>g</sup> W.Va.,<sup>g</sup> N.C.,<sup>g</sup> Ark.,<sup>g</sup> Col.,<sup>g</sup> Wash., Ala., Miss., N.M.<sup>g</sup>

Before the mayors of London, Liverpool, Dublin, and Edinburgh: Fla.

(18) Before the chief magistrate of a county: Wash., Ala., Miss.; or county clerk: Wy.

In case such minister, consul, etc., be the grantor, it is sufficient if the deed be executed before two witnesses with his official certificate and seal: R.I. 173,10.

NOTES. — <sup>a</sup> But such officer can act only within the district for which he was appointed. <sup>b</sup> In towns only. <sup>c</sup> In the county where the land lies. <sup>d</sup> Such officer's certificate must be further certified to, according to § 1583. <sup>e</sup> A double certificate, as in <sup>d</sup>, is required; but only when the certifying officer took the acknowledgment out of the county where the land lies. <sup>f</sup> An official seal is not necessary in all cases (see § 1577), but necessary in the noted cases, if the officer have a seal. <sup>g</sup> Such seal is absolutely necessary. See, however, in § 1577. <sup>h</sup> The acknowledgment is good, whether such officer taking it has qualified or not. <sup>i</sup> But such officer must also be authorized to take acknowledgments by the laws of such foreign state. <sup>k</sup> It does not appear that it is necessary for such consul, etc., to be resident in or accredited to the country where the acknowledgment is taken. But *quære*. <sup>l</sup> But such officer must be specially appointed by the governor of the home state to take such acknowledgments. <sup>m</sup> No seal necessary. <sup>n</sup> In the county where the grantor or subscribing witness resides. <sup>o</sup> Such officer must certify that it is taken according to the law of such state, etc.

§ 1583. **Double Certificate.** In cases where the certifying officer's certificate must be further certified, such further certificate may be made (1) by the clerk of the superior court for such county: N.Y. 1848,195,2; 1858,259,2; N.J.,<sup>a,d</sup> *Conveyances*, 59; Ind. 2934-5; Ill. 30,20; Md.<sup>h</sup> 44,9; N.C.<sup>h</sup> 1246; Nev.<sup>h</sup> 231; D.C. 443 and 445; (2) by the clerk of some court of record of the county: N.J. *Conveyances*, App. 5; Pa. *Attorneys in Fact*, 7; Ind.<sup>f</sup> 2935; Mich. 5726,5660; Wis. 2219; Minn. 40,9; Kan. 22,10; Neb. 1,73,5; N.C.;<sup>f</sup> Ore. 6,12; Nev.; Col.; Wash. 2317; Dak.<sup>h</sup> Civ. C. 666; Wy. 1882,1,9; Miss. 1219; Fla. 32,18. For citations, see also § 1582.

(3) By the county clerk: Cal. 6191; Col.;<sup>h</sup> Mon.; Wy.; (4) by the clerk of the County Court: N.J.: (5) by the "clerk of such court:" N.Y.<sup>c</sup> 1870,203,1; Tenn. 2857; Ga.; Fla.; N.M. 2774.

(6) By "the proper authority:" Io. 1956.

(7) By the judge of such court: Tenn. 2858-9; (8) in the case of a state commissioner, taking an acknowledgment under § 1582, B (3) or C (5), this further certificate must be subjoined under hand and seal of the Secretary of State; N.Y. 1850,270,4; 1875,136,2; Neb. 1,73,36; so, in case of a justice of the peace, under B (1): Minn.; or a notary public, B (2): Col.

(9) In the case of a judge of a court of record taking it, the governor of the state may append such second certificate: Tenn.

(10) In cases where the acknowledgment, etc., was taken before a judge (§ 1582, A 7) or commissioner of deeds (§ 1582, A 17), and is to be recorded in a different county, a certificate under the hand and seal of the county clerk must be appended: N.Y. 2,3,18.

(11) If in a foreign country, such second certificate may be made by any consul or minister of the United States: Ill. 30,22; Io. 1957; Fla.

Such further certificate must generally be attested by seal: N.Y., N.J., Ind., Ill.,

Mich., Wis., Io., Minn., Kan., Neb., Md., Tenn., Cal., Ore., Nev., Col., Wash., Mon., Wv., Ga., Miss., N.M., D.C.

This second certificate must certify (1) to the official character of the officer taking the first: N.Y.; N.J.;<sup>e</sup> Ind. 2950; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; N.C.; Tenn.; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Mon.; Wv.; Miss.; N.M.; D.C.

(2) To his signature (or seal, in case 8, above): N.Y., Ind., Mich., Wis., Minn., Neb., N.C., Cal., Ore., Nev., Col., Wash., Dak., Wv., Ga.

(3) To the fact that the deed is executed or acknowledged according to the laws of the foreign state or country: N.Y.;<sup>b</sup> Ill.;<sup>b</sup> Wis.;<sup>b</sup> Minn.<sup>b</sup> 40,10; Neb.; Ore.; Wash.; Wv.; Fla.

A certificate to this last effect must always be appended, even when the acknowledgment is taken by a state commissioner or clerk of court: Wv.

(4) To the fact that the officer had authority to take acknowledgments by the law of the state or country where taken: N.J.,<sup>a, d</sup> Pa., Ill.,<sup>g</sup> Io., Col.

But in many states, such double certificate is never necessary, (except in case 8) if the first certificate be officially sealed: Ind., Wis., Minn., Neb., Nev., Wash., Fla.

NOTES. — <sup>a</sup> In the case of certificate by a judge of a court of record. <sup>b</sup> This is only necessary when the proof, etc., was taken according to the laws of the foreign state, under §§ 1581, 1602. <sup>c</sup> In cases where the acknowledgment, etc., was taken by a judge of a court in Canada, under § 1582, C 12. <sup>d</sup> In the case of a notary. <sup>e</sup> In cases under B 5. <sup>f</sup> Only when the acknowledgment, etc., was made in another state (§ 1582, B). <sup>g</sup> When made by an officer in a foreign country under § 1582, C 11. <sup>h</sup> When made by a justice out of the county; see § 1582, note <sup>e</sup>.

§ 1584. **Miscellaneous Provisions.** When any of the officers mentioned in § 1582 are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy in the name of his principal: Cal. 6184; Uta. 632. Compare § 1023.

§ 1585. **Amending Acts.** (Special amending acts—*i. e.* fixing a particular date, or applying to a special class of instruments—are not inserted. See Ct. 1876, 24; 1877, 3; 1879, 72; 1875, 24; 1877, 74; 1884, 32; N.Y. 1882, 16 and 52; 1884, 304; N.J. 1878, 42; *Conveyances*, 50–56, 64; *App. ib.* 7; 1879, 190; 1882, 52; 1883, 109; 1884, 72; 1885, 209; Pa. 1881, 41; *Deeds, etc.* 41, 49–60; Minn. 123, 1–54; Kan. 22, 31; W.Va. 65, 13; N.C. 1885, 147, 2; *Code*, 1259–1263; Ark. 679–682; Cal. 6207; Ore. 1876, p. 27, § 1; Nev. 232; Wash. 2318, 2322; Wv. 1884, 5, 4; Uta. 1880, 23; Fla. 32, 19; N.M. 2741; Ariz. 2285.)

In a few states, when a person authorized to take the acknowledgment of deeds takes and certifies one after the expiration of his commission, the acknowledgment is good as if done before such expiration: Me. 73, 24; Ct. 1877, 41; 1879, 72; N.J. 1885, 30; Minn. 1883, 91.

In one, all acknowledgments and proofs of deeds are good after ten years, notwithstanding errors or imperfections, if the deed was duly recorded: N.J. *Conveyances*, 57; 1883, 161.

So, in many, all acknowledgments or proofs made according to the laws in force at the time may be recorded, though the law has been changed or a code enacted since: N.Y. 2, 3, 22; Mich. 5700; Wis. 2240; Mo. 2299; Tex. 4352; Cal. 6206; Ore. 6, 36; Nev. 267–8; Dak. Civ. C. 669–670; Ida. 1874–5, *Conveyances*, 41, 42; Mon. G. L. 217–8; Wv. 1882, 1, 25.

The legality of the execution, acknowledgment, proof, form, or record of any instrument is determined by the laws in force at the time: Tex. 4351; Cal. 6205.

All deeds previously to 1859 executed with a scroll instead of a seal are valid: Ind. 2998; Wis. 2206 Amt. (1883); Minn. 123, 23 (1875); 1885, 235; N.M. 1743 (1882) 2772. So, all deeds executed without a seal previous to 1879: Ct. 1875, 24; 1879, 72; Ind. (1859); Neb. 1, 81, 2; Ore. 1878, p. 82.

All deeds executed prior to 1877 purporting to convey real estate, but which are defective in form are in Arizona recorded in a separate book, and are notice to all persons interested: Ariz. 2285.

All deeds executed before 1876 are valid, though with only one witness, if the land is held in good faith by the grantee in such deed or those claiming under him: Ct.



1876,24; Minn. 1881, Ex. Sess. 77 (1881). All deeds made before 1877 acknowledged before a justice in the state who had not jurisdiction in the town or county where taken, are valid: Ct. 1877,3; Ill. 30,21 (1851); Md. 1880,256 (since 1867); W.Va. 1882,149,11; 1883,13 (since 1883). All deeds made before 1879 are valid, though there was no subscribing witness: Ct. 1879,72; Ore.; or though he was interested: Ct.; Minn. 123,27 (1877).

All deeds executed and proved, etc., (before 1884) according to the law of the state or country where made are valid, whether recorded or not: Io. 1966; 1884,203. All deeds acknowledged or recorded before 1872 are valid, notwithstanding any defect in the execution, acknowledgment, etc.: Io. 1967; Ark. 684 (1883); Nev. 314 (1871); N.M. 2773 (1874). So all deeds acknowledged before 1880, although the officer omitted a seal in appending the certificate: Io. 1968; Md. 44,25 (1878); W.Va.<sup>a</sup>; Ark. (1883). And though no second certificate to the certificate of a justice (§ 1583) was appended: Md. All deeds executed before the code are valid and binding notwithstanding any defect or informality therein, if it sufficiently appear by the contents of the deed what was intended: W.Va. 64,11; Tenn. 2894.

NOTE. — <sup>a</sup> Of deeds so acknowledged before a notary.

### Art. 159. Proof.

§ 1590. **Necessity.** In order to be recorded, or to have effect as evidence, a deed must be proved: S.C. 768. See for other states, §§ 1570,1572. An unacknowledged deed, if duly proved according to this article, is as effectual as if acknowledged: N.H. 135,10; and so, probably, in all the other states.

§ 1591. **Grantor Living.** (A) In many states, it seems that no deed can be proved unless the grantor refuses or fails (§ 1594) to acknowledge it: N.H. 135,10; Mass. 120,9; Me. 73,18 and 20; Vt. 1939; R.I. 173,6; Ct. 18,6,1,9; Mich. 5666; Wis. 2228; Io. 1959; Minn. 40,13; Kan. 22,12; Neb. 1,73,7.

(B) But in other states any unacknowledged deed may be proved as in this Article: N.Y. 2,3,4; N.J. *Conveyances*, 4 and 7; Pa. *Deeds*, etc. 10; Ill. 30,24; Del. 83,3; Ky. 24,15; Mo. 682; Ark. 657. So, in all other states not enumerated in A.

§ 1592. **Process.**<sup>a</sup> To prove a deed, there must generally (except in R.I., Pa., Ill., Md., N.C.,) be the requisite number of attesting witnesses, as specified in § 1566.

But it seems proof may be made by a witness who did not subscribe: Io. 1959; Kan. 22,14.<sup>b</sup> And a deed without witnesses may nevertheless be proved by proving the handwriting of the grantor, as in § 1595: R.I.<sup>c</sup> 173,8; Pa. Ann. Dig. 1877-8, *Deeds*, etc. 3; Ill. 30,24; Md. 1882,77; N.C. 1246 (9).

(A) Notice of the intent to prove and time of hearing must in a few states be given to the grantor (1) by seven days' personal service with a copy of the deed annexed (for citations, see § 1591): Mass.; Me. 73,21; Vt.; Mich.; Wis.; Minn.; (2) by fifteen days' personal service; but no copy of the deed is necessary: N.H.<sup>d</sup> 135,10; (3) by service of a warrant for examination of such grantor: R.I. 173,6.

(B) Proof of a deed may generally be made, either at home or abroad, (1) before the same officers respectively who are by § 1582 authorized to take the acknowledgment of a deed (for other citations, see § 1582): N.Y. 2,3,4; N.J. *Conveyances*, 4 and 7; Pa. *Deeds*, 10; Ind. 2936; Ill. 30,20; Io.; Kan. 22,13; Neb. 1,73,7; Del. 83,10; N.C. 1246; Ky. 24,15; Tenn. 2865-6,2869; Mo. 676; Ark. 651; Tex. 4305; Cal.; Ore. 6,17; Nev. 231; Col. 213; Ida. 1874-5, *Conveyances*, 5; Mon. 1881, p. 1, § 1; G. L. 181; Uta. 632; Ga. 2707; Ala. 2155-6; Miss. 1217; Ariz. 2248.



(2) It is made "according to the rules of the common law:"<sup>b</sup> Ct. 18,1,6,9; Ind. 2936; (3) before a justice of the peace of the county (or town, in Rhode Island) ( $\alpha$ ) where the land lies: Mass. 120,9; Me.<sup>c</sup> 73,21; Vt.<sup>c</sup> 1939; Mich. 5666; Wis. 2228; Minn.; ( $\beta$ ) where the grantor resides: N.H.; Mass.; Me.;<sup>c</sup> Vt.;<sup>c</sup> R.I.<sup>c</sup> 173,6; Mich.; Wis.; Minn.; ( $\gamma$ ) where the subscribing witness resides: N.H., Mass., Me.,<sup>c</sup> Vt.,<sup>c</sup> Mich., Wis., Minn. (4) Before any county court in the state, or any court out of the state, or any officer authorized under § 1582 in foreign countries: Va. 117,3.

(5) In the Superior Court of the state: Del. 83,3. (6) Before a notary public in the county ( $\alpha$ ) where the land lies: Me.;<sup>d</sup> ( $\beta$ ) where the grantor resides: Me.<sup>c</sup> (7) Before a commissioner of the home state, in foreign states or countries: Me. 110,2. (8) Before any judge in the town where the grantor dwells: R.I.<sup>c</sup> (9) Before the clerk of the County Court in the state, and any officer authorized under § 1582 in foreign countries: W.Va. 1882,149,2; 1883,13. (10) Before any person competent to administer an oath; or, without the State, before a commissioner of the State or special commissioner; or a clerk of a court of record, or a notary public, under official seal, and the notary's signature must be certified by a clerk of a court of record of the county; or, out of the United States, before a United States consul or vice-consul: S.C. 768. *Except*, proof may not be made, in the home state, before a notary public: Tenn.

In South Carolina (there being no acknowledgment) proof is made by the affidavit of a subscribing witness taken before some officer, within the State, competent to administer an oath, or before a commissioner specially appointed by the Court of Common Pleas of the county in which the instrument is to be recorded; or, if taken without the State, and within the United States, before a commissioner of deeds of the State, or the clerk of a court of record, certified under his official seal, or before a notary public, who shall affix his official seal and accompany the same with a certificate as to his official character from a clerk of a court of record of the county in which the affidavit is taken; or, if without the United States, before a United States consul or vice-consul: S.C. 1777.

NOTES. — <sup>a</sup> For citations, see § 1582. <sup>b</sup> And so, probably, in a few other states where there is no statutory provision for attesting witnesses, in § 1566. <sup>c</sup> Only in cases where the grantor *refuses* to acknowledge. <sup>d</sup> If he be resident in the State.

§ 1593. *Method.* (A) Generally, (1) only one attesting witness need be present at the hearing and testify, even in states which require more than one witness to the deed: N.H. 135,8; Mass. 120,9; R.I. 173,8; N.Y. 2,3,12; N.J. *Conveyances*, 4; Pa. *Deeds, etc.* 76; Mich. 5667; Wis. 2228; Io. 1959; Minn. 40,11 and 14; Del. 83,3; N.C. 1885,147,3; Ky. 24,15; Mo. 682; Ark. 657; Tex. 4314; Cal. 6195; Ore. 6,17; Nev. 238; Col. 213; Dak. Civ. C. 662; Ida. 1874–5, *Conveyances*, 11; Mon. G. L. 187; Uta. 638; Ga. 2707; Ala. 2159; Ariz. 2254.

(2) But in other states, all must give evidence (unless dead, etc., as in § 1595): Va. 117,3; W.Va. 1883,13; Tenn. 2850.

(3) In others, the laws are ambiguous (*i. e.*, the officer making proof may require both witnesses): Me. 73,18 and 21; Vt. 1940.

If, however, only one witness reside in the State, he may prove the execution, the handwriting of the other witness being proved by some other person: Tenn. 2862.

(B) (Compare also §§ 1601,1604.) The subscribing witness must state (1) that he knew the person described in, and who executed, the conveyance: N.Y.; Ill. 30,24; Neb. 1,73,7; Mo. 684; Cal. 6197; Ore.; Nev. 240; Dak. Civ. C. 662; Ida. *ib.* 13; Mon. G. L. 189; Uta. 640; Ariz. 2256.

(2) That he saw the grantor sign, or heard him acknowledge that he signed the deed: Me. 73,22; Neb.; Mo.; Ark.; Tex. 1; Col. "For the purposes and consideration therein stated:" Tex. Or, that the grantor executed the deed in his presence and in the presence of the other subscribing witnesses on the day of date; and that he and the other witnesses attested the same in presence of the grantor and of each other: Ala. Or, in others, merely that such grantor executed it: Vt. 1940; N.J.; Pa. *Deeds, etc.* 11; Io.; Cal.; Nev.; Dak.; Ida.; Mon.; Uta.; Ariz. "As his voluntary act or deed:" N.J. And "delivered it:" Io.

(3) That he subscribed his name as witness thereof in his presence: Ill., Mo., Ark., Tex., Cal., Col., Dak., Ida., Mon., Uta., Ariz. "At the request, or by consent, of the grantor:" Ill., Ark., Tex., Nev., Col., Uta.

(4) He must also prove the attestation of the other witness: Ky. (5) He must state his own place of residence: Ore. (6) The grantor's signature only need be proved: R.I. 173,8: Tenn. 2865,2867.

(C) A deed may also be proved by any of the parties who executed it: Cal. 6195. So, in Rhode Island, the process is by examination of the grantor, and commitment in case he still refuse to acknowledge: R.I. 173,6.

§ 1594. **Grantor Dead or Incapable.** (A) Deeds may be proved as above, except that notice to the grantor is of course unnecessary (1) when the grantor has died without making acknowledgment: N.H. 135,8; Mass. 120,7; Me. 73,18; Vt. 1938; R.I. 173,8; Pa. *Deeds, etc.* 11; Mich. 5664; Wis. 2227; Io. 1959; Minn. 40,11; Kan. 22,12; Neb. 1,73,7.

(2) Or has left the State: N.H., Mass., Me., Vt., R.I., Mich., Wis., Minn. Or whenever his attendance cannot be procured: Pa., Io., Kan., Neb.

(3) Or when he has become insane: N.H.

In other states (see § 1591, B, for citations), proof is, of course, made in the same way as if the grantor were living, there being no distinction between the two cases.

(B) The process of such proof is generally the same as in §§ 1592, 1593. But in some states proof can in this case only be made before certain specified officers or courts, and not before all mentioned in § 1582. Thus, (1) only before courts of record: N.H., Mass., Me., Mich., Wis., Minn., Kan. (2) Before justices of the peace: Pa. *Deeds, etc.* 11. (3) Only before a judge of a supreme or superior court: Vt., R.I. The testimony of only one subscribing witness is necessary, even in those states where more may be required under § 1593: Me., Vt.

And in Rhode Island the process is by oath of one or more witnesses, as in other states; and not by examination of the grantor, as in § 1593, C. Or, if there are no witnesses, proof is made as in § 1595 (see also in § 1592).

§ 1595. **Witnesses Dead.** (A) When the subscribing witnesses to a deed are all dead, the deed may commonly be proved (1) by evidence of the genuineness of the grantor's signature and of that of at least one subscribing witness: N.H.<sup>a, b, c</sup> 135,9; Mass.<sup>a, b, c</sup> 120,8 and 10; Me.<sup>a, b, c</sup> 73,19; Vt.<sup>a, b, c</sup> 1938, 1943; N.Y. 2,3, 30-31; Ill. 30,25; Mich.<sup>a, b, c</sup> 5665, 5668; Wis.<sup>a, b, c</sup> 2227; Minn.<sup>a, b, c</sup> 40,12 and 15; Kan.<sup>a, b, c</sup> 22,18; Neb. 1,73,10; N.C.<sup>a, b</sup> 1246; Ky. 24,15; Mo. 682; Ark. 658; Tex.<sup>a, b, c, d</sup> 4317; Cal.<sup>a, b, d</sup> 6198-9; Ore.<sup>a, b, c</sup> 6,18; Nev. 238; Dak.<sup>a, b, d</sup> Civ. C. 663; Ida. 1874-5, *Conveyances*, 11; Mon. G. L. 187; S.C. 1777 and 768; Ariz. 2254.

(2) The signatures of all attesting witnesses must be proved: N.H.; N.J.<sup>a, b, d</sup> *Conveyances*, 6; S.C. (3) Only the witnesses' signatures need be proved: Ga. 2708. (4) Either the grantor's or the witness's signature may be proved: Md. 1882,77; N.C. 1246(8); Uta. 638; Miss.<sup>a, b</sup> 1221. (5) Evidence, first of the witness's signature must be offered; and if that cannot be had, of the grantor's: Pa.<sup>a, b</sup> *Deeds, etc.* 15.

(B) And deeds may also be proved as above respectively, (1) when the witnesses are insane: N.H.; <sup>a, b, c</sup> Mass.; <sup>a, b, c</sup> N.J.; <sup>a, b, d</sup> Tenn. 2868; Tex.; <sup>a, b, d</sup> S.C.; Ga. (2) When they have been convicted of infamous crime: Tex.<sup>a, b, d</sup> (3) When they are absent from the State: N.H.; <sup>a, b, c</sup> Mass.; <sup>a, b, c</sup> Me.; <sup>a, b</sup> Vt.; <sup>a, b, c</sup> N.J.; <sup>a, b, d</sup> Mich.; <sup>a, b, c</sup> Minn.; <sup>a, b, c</sup> Neb.; N.C.; <sup>a, b</sup> Ky.; Tenn. 2864; Tex.; <sup>a, b, c, d</sup> Cal.; <sup>a, b, d</sup> Ore.; <sup>a, c</sup> S.C.; Ga.; Miss.<sup>a, b</sup> When they conceal themselves so as to avoid the subpoena: Cal., <sup>a, b, a</sup> Dak.<sup>a, b, d</sup> When their attendance "cannot be had:" N.H., <sup>a, b, c</sup> Pa., <sup>a, b</sup> Ill., Kan., Mo., Ark., Tex., Nev., Ida., Uta., Ariz. When they are "out of reach:" Mass., Pa.

(4) When their place of residence is unknown and cannot be ascertained by due diligence : Tex.,<sup>a, b, c, d</sup> Cal.,<sup>a, b, d</sup> (5) "When they are otherwise incompetent : " Tex.,<sup>a, b, c, d</sup> Ga. "Insane : " N.J.<sup>a, b, d</sup> (6) "Blind : " Tenn. ; "deaf and dumb : " Tenn. (7) When they refuse to testify, for one hour after appearance : Cal.,<sup>a, b, d</sup> Dak.<sup>a, b, d</sup> (8) Any conveyance may, in New York, be proved in this way and recorded, if the original deed be deposited at the same time in the record office. Such record is constructive notice to all purchasers, but does not entitle the conveyance to be read in evidence (§ 1625) : N.Y. 2,332-3.

(C) When one witness only resides in the State, he may prove the execution, and evidence be given of the handwriting of the other : Tenn. 2862. So, in or out of the State, where such other witness is dead or incompetent : Tenn. 2868, 2870.

(D) When the witnesses live out of the State, the deed may also be proved by their testimony given in any court of record : Tenn. 2863.

NOTES. — <sup>a</sup> Such proof will suffice only when the grantor himself is dead. <sup>b</sup> Or is absent from the state. <sup>c</sup> Or refuses to acknowledge. <sup>d</sup> Or his residence is unknown.

§ 1596. **Process.** (A) Proof under § 1595 is commonly made as in other cases respectively. Notice to the grantor, if living, must be given as in § 1592 : Mass. 120, 10 ; Vt. 1943 ; N.J. ; <sup>a, b, c</sup> Mich. ; Wis. 2229 ; Minn. 40, 15.

(B) But, in a few states, it can be made only (1) in the superior court : N.J., N.C., Ore.

(2) In others, it may be made before all officers in § 1582 mentioned in the several states respectively except (a) commissioners of deeds : N.Y. 2,330 ; (β) except county judges, not counsel in the Supreme Court : N.Y. For citations, see also § 1595.

(3) It can only be made before a court of record, etc., as in § 1594 : N.H. 135, 8 ; Mass. 120, 8 and 10 ; Me. 73, 19 ; Vt. 1943 ; Mich. ; Wis. ; Minn.

(4) Before the courts having authority to take proof under § 1594, if the grantor be dead ; otherwise, as in § 1592 : R.I. 173, 8. (5) Before a justice of the Supreme Court : Pa. *Deeds*, etc. 15. (6) Before a justice of the Court of Common Pleas : Pa. (7) Before the Circuit Court : N.J. *Conveyances*, 6.

NOTES. — <sup>a</sup> By posting. <sup>b</sup> By publication. <sup>c</sup> Whether the grantor be living or not.

§ 1597. **Method.** (A) (1) At least two disinterested witnesses must swear to each signature : N.H. 135, 9 ; Pa. ; Ill. ; Mo. 682, 687 ; Ark. 658. Two witnesses to the proof generally : Tex. 4320. (2) But in other states, only one separate witness to each is necessary : Nev. 243 ; Ida. 1874-5, *Conveyances*, 16 ; Uta. 638 ; Miss. 1222 ; Ariz. 2254. Only one is necessary to both : Ga. (3) The surviving party to the deed must be examined : Pa.

(B) If the grantor signed by mark, execution is proved by proof of handwriting of two subscribing witnesses, and of the place of residence of the witnesses testifying : Tex. 4319.

(C) The evidence taken must satisfactorily prove (1) the existence of one or more of the cases enumerated in § 1595 respectively as authorizing such proof : N.Y. 2,331 ; Neb. ; Mo. 686 ; Tex. 4318 ; Cal. 6199 ; Nev. 242 ; Dak. Civ. C. 664 ; Ida. *ib.* 15 ; Mon. G. L. 191 ; Uta. 642 ; S.C. ; Ga. ; Ariz. 2258.

(2) That the witness testifying knew (a) the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine : Tex. ; Cal. ; Nev. 243 ; Dak. ; Ida. ; Mon. G. L. 192 ; Uta. 643 ; Ariz. 2259 ; and so (β) that he knew the subscribing witness and his signature, etc. : N.H., Tex., Cal., Nev., Dak., Ida., Mon., Uta., Ariz.

(3) It must set forth the place of residence of the witness giving evidence : N.Y., Tex., Cal., Dak.

§ 1598. **Subpœnas** to attesting witnesses may generally be issued by the court or officer taking proof in any of the above cases : N.Y. 2,313 ; Mich. 5669 ; Wis. 2230 ; Io. 1965 ; Minn. 40, 16 ; Kan. 22, 17 ; Neb. 1, 73, 8 ; N.C. 1268 ; Tenn. 2871 ; Mo. 689 ; Tex. 4321-3 ; Cal. 6201 ; Ore. 6, 19 ; Nev. 244 ; Dak. Civ. C. 668 ; Ida. 1874-5, *Conveyances*, 17 ; Mon. G. L. 193 ; Uta. 644 ; Ariz. 2260.



§ 1599. **A Certificate** must generally be annexed to or indorsed upon the deed by the court or officer taking proof, as in § 1576 : Mass. 120,5 and 9 ; Me. 73,23 ; Vt. 1940 ; N.Y. 2,3,15 ; N.J. *Conveyances*, 4 ; Pa. *Deeds, etc.* 15 ; Ill. 30,24 ; Mich. 5667,5673 ; Wis. 2228 ; Io. 1960 ; Minn. 40,14 and 20 ; Kan. 22,14 ; Neb. 1,73,12 ; Va. 117,3 ; Ky. 24,16 ; Tenn. 2873 ; Mo. 685 ; Ark. 654 ; Tex. 4316,4320 ; Cal. 6193 ; Ore. 6,21 ; Col. 213 ; Ida. 1874-5, *Conveyances*, 14 ; Uta. 646 ; Ala. 2159. So, probably, in all states.

So, in other states, the evidence of the witnesses must be reduced to writing (signed, in Colorado), and attached to the deed or the certificate : Vt. 1938 ; N.Y. 2,3,15 and 31 ; Tex. ; Col. ; S.C. 1777.

### § 1600. Form.

The certificate may be under seal or not, according to the usual practice of the court or officer : Kan. 22,15. See §§ 1577,1582. It must be under seal : Tex. 4320,4314.

§ 1601. **Content.** (A) In most states, the subscribing witness must be known or his identity proved to the officer taking the proof (compare also § 1578) : N.Y. 2,3,12 ; Ill. 30,24 ; Neb. 1,73,7 ; Mo. 683 ; Ark. 655 ; Tex. 4315 ; Cal. 6196 ; Ore. 6,17 ; Nev. 239 ; Col. 213 ; Dak. Civ. C. 662 ; Ida. 1874-5, *Conveyances*, 12 ; Mon. G. L. 188 ; Uta. 639 ; Ala. ; Ariz. 2255.

And this must be stated in the certificate : Ill. ; Mo. 685 ; Ark. ; Tex. ; Nev. 241 ; Ida. *ib.* 14 ; Mon. G. L. 190 ; Uta. 641 ; Ariz. 2257.

Such proof of identity must be made by at least two (in Illinois, Arkansas, Texas, Nevada, Colorado, Idaho, Montana, Utah, Arizona, one) witnesses, whose names are to be inserted in the certificate : Ill., Mo., Ark., Tex., Nev., Col., Ida., Mon., Uta., Ariz. For citations, see also § 1600.

(B) The certificate must further state (1) whether the grantor was present at the hearing : Mass. 120,13 ; Me. 73,22 ; Vt. 1940 ; Mich. ; Wis. ; Io. ; Minn. ; (2) generally all matters required to be done, known, or proved in the proof (§§ 1593,1597) : N.Y. 2,3,15 ; N.J. *Conveyances*, 6 ; Ill. ; Neb. 1,73,12 ; Mo. 685,688 ; Tex. 4320 ; Cal. 6200 ; Ore. 6,21 ; Dak. Civ. C. 665 ; Ida. ; Mon. ; Uta. ; (3) the reasons for the proof : Io. ; (4) the title of the court or officer taking it : Io. ; Kan. ; Tenn.<sup>a</sup> 2883 ; (5) that it was satisfactorily proved that the grantor was dead, or not to be had, or that he had refused to acknowledge : Io., Kan. ; (6) the names of the witnesses : N.Y. ; Io. ; Kan. ; Neb. ; Ky. 24,18 ; Cal. ; Ore. ; Col. ; Dak. ; and their residences : N.Y., Neb., Ky., Cal., Ore., Dak. ; (7) that the execution was proved by them : Me. ; Io. ; Kan. ; Tenn. 2873 ; Mo. ; Ore. ; Nev. ; Ida. ; Uta. ; Mon. ; Ariz. [so by implication in all states] ; (8) that they gave evidence that they were acquainted with the grantor : Tenn., Nev., Ida., Mon., Uta., Ariz. ; (9) that the witnesses were dead, incompetent, etc., if proof was made as in § 1595 : Mo., Tex. ; (10) the substance of their testimony : N.Y., Neb., Cal., Ore., Nev., Col., Dak., Uta. ; (11) that such witness gave evidence that he subscribed his name to the conveyance as a witness thereof : Nev., Col., Ida., Uta., Ariz. And see also §§ 1567, 1593,1604.

NOTE. — <sup>a</sup> When taken out of the State.

§ 1602. **Foreign Proof.** Commonly, proof of deeds made abroad or out of the State must be made according to the laws of the State. It is so specially enacted in Kentucky. See § 1581. Or according to the laws of the United States : Ky. 24,40 (1884,209).

But in most states, deeds proved abroad, according to the laws of the state (or country, in Vermont, Illinois, Kansas) where executed, are valid, and may be recorded in the state : N.Y.<sup>a</sup> 1858,259,1-2 ; Vt. 1946 ; Ct. 18,1,6,7 ; O. 4111 ; Ill. 30,23-24 ; Kan. 22,25 ; Neb. 1,73,4.

NOTE. — <sup>a</sup> But see § 1581, note *b*, which also applies here.



§ 1603. **Special Cases.** If proved out of the State, the certificate must state the capacity in which the person taking proof acted, and the state where: Tenn. 2383. If by record out of the State, a copy thereof must be annexed, certified by the clerk under his official seal, or private seal if no official seal; and the presiding judge must certify to his official character: Tenn. 2382.

§ 1604. **Statutory Forms.**

(A)

- (1) State —, }  
County —. }

Before me — on this day personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed as a witness to the foregoing instrument, and, after being duly sworn by me, stated on oath that he saw —, the grantor or person who executed the foregoing instrument, subscribe the same [or that the grantor, etc., acknowledged in his presence that he had executed the same for the purposes and considerations therein expressed], and that he had signed the same as a witness at the request of the grantor, etc.

Given under my hand and seal of office this — of —, A. D. —.

[SEAL.]

Mo. *Forms*, Nos. 111-112; Ark. *Forms*, No. 145; Tex. 4316.

- (2) State of —, }  
County of —. }

On this — day of —, 188—, before me, A. B. [description of officer], in and for said county, personally appeared C. D., personally known to me [or satisfactorily proved to me by the oath of E. F., a competent and credible witness, for that purpose by me duly sworn] to be the same person whose name is subscribed to the annexed instrument as a witness thereto, who, being by me duly sworn, deposes and says that he resides in —, county of —, and state of —; that he was present and saw G. H., personally known to him to be the same person described in and who executed the annexed instrument as a party thereto, sign, seal, and deliver the same, and heard him acknowledge that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned, and that he, the deponent, thereupon signed his name as a subscribing witness thereto at the request of the said G. H.

In witness whereof, etc.

Uta. 641.

(B — Proof by Handwriting. § 1597.)

- (3) State of —, }  
— County. }

Personally appeared before me — [description of officer], —, and —, subscribing witnesses to the within deed, who, being first sworn, deposed and said that they are acquainted with —, the bargainor, and that he acknowledged the same in their presence to be his act and deed upon the day it bears date. Witness my hand at office this — day of —, 18—.

Tenn. 2873.

- (4) The State of —, }  
— County. }

I [name and style of officer] hereby certify that —, a subscribing witness to the foregoing conveyance, known to me, appeared before me this day, and, being sworn, stated that —, the grantor in the conveyance, voluntarily executed the same in his presence, and in the presence of the other subscribing witness, on the day the same bears date; that he attested the same in the presence of the grantor and of the other witness, and that such other witness subscribed his name as a witness in his presence. Given under my hand this — day of —, 18—.

A — D —.  
Ala. 2159.

- (5) State of —, }  
County of —. } ss.

Personally appeared before me [description of officer] the within named C. D., one of the subscribing witnesses to the foregoing instrument, who, being first duly sworn, deposed and said that he saw the within named A. B., whose name is subscribed thereto, sign and deliver the same to the said C. D. [or that he heard the said A. B. acknowledge that he signed and delivered the same to the said C. D.], that he, this deponent, subscribed his name as a witness thereto, in the presence of the said A. B., and that he saw the other subscribing witness, E. F., sign the same in the presence of the said A. B., and that the witnesses signed in the presence of each other, on the day and year therein named. Given under my hand, etc.

Miss. 1218.

(6) State of —, }  
County of —. }

Be it remembered that on this — day of —, 18—, before me, — [description of officer], came — and —, and upon their oaths stated that the signatures of —, the grantor in the foregoing deed, and of —, a witness thereto, are genuie, and are in the handwriting of the said — and — respectively.

In testimony whereof I have hereunto set, etc., this — day of —, 18—.

[Signature.]

Ark. Forms, No. 146.

§ 1605. **Appeal from Proof.** In two states, the grantor or person interested under him, has an appeal from the court or justice before whom the deed is at first proved; (1) to the County Court: Vt. 1942; (2) to the Supreme Court: R.I. 173,6-7.

§ 1606. **Proof by Action.** When the acknowledgment or proof is properly made, but defectively certified, any party interested may obtain a judgment correcting the certificate by action in court: Tex. 4353; Cal. 6202; Dak. Civ. C. 667. So, any person interested under an instrument entitled to be proved for record may institute an action in court against the proper parties to obtain a judgment proving such instrument: Tex. 4354; Cal. 6203; Dak. Civ. C. 667. See also in Part IV.

## Art. 161. Record.

§ 1610. **Necessity for Record.** In order to be wholly valid, a deed of real estate (see § 1551) must in all the states be recorded in the proper registry of deeds: N.H. 135,4; Mass. 120,4; Me. 73,8; Vt. 1927; R.I. 173,3; Ct. 18,6,1, 11; N.Y. 2,3,1; N.J. *Conveyances*, 14; Pa. *Deeds, etc.* 76; O. 4134; Ind. 2926; Ill. 30,28; Mich. 5683; Wis. 2232; Io. 1941; Minn. 40,1 and 21; Kan. 22,19; Neb. 1,73,1; Md. 44,16; Del. 83,14; V. 16,520,1; Va. 117,2; W.Va. 64,2; 96,5; N.C. 1885,147,1; Ky. 24,8; Tenn. 2811; Mo. 691; Ark. 664; Tex. 549; Cal. 6214; Ore. 6,1; Nev. 252; Col. 215; Wash. 2314; Dak. Civ. C. 651; Ida. 1874-5, *Conveyances*, 24; Mon. G. L. 201; Wy. 1882,1,13; Uta. 618; S.C. 1776; Ga. 2705; Ala. 2152; Miss. 1212; Fla. 32,6; La. 2264,2251; D. 2501; N.M. 2761; Ariz. 2268; D.C. 446.

§ 1611. **Unrecorded Deeds.** (See § 1625 also.) A deed, unrecorded,<sup>a</sup> (A) is void as against (1) purchasers<sup>b</sup> or incumbrancers without notice for value whose deed is duly recorded first: N.Y. 2,3,1; 1882,410,1748-9; N.J. *Conveyances*, 14; 1880,171,1-2; 1883,169,3; Pa. *Deeds, etc.* 76; Ann. Dig. 1877-8,5; O. 4134; Ind.<sup>c</sup> 2931; Ill. 30,30; Mich. 5683; Wis. 2241; Io. 1941; Minn.<sup>e</sup> 40,21; Neb. 1,73,16; Md. 44,19; Del. 83,17; Va. 114,5; W.Va. 96,5; N.C. 1885,147; Ky. 24,8; Tenn. 2889,2890; Ark. 671; Tex. 549,4332; Cal. 6214; Ore. 6,26; Nev. 254; Col. 215; Wash. 2314; Dak. Civ. C. 671; Ida. *ib.* 26; Mon. G. L. 202; Wy. 1882,1,15; Uta. 620; Ga. 2705; Miss. 120,9; Fla. 32,6 and 20; La. 2253; Ariz. 2270; D.C. 446, U.S. 1878,69.

(2) And as against all creditors of the grantor: Ill.; Minn.; Neb.; Del.; Va.; W.Va.; N.C.; Ky.; Tenn.; Ark.; Tex.; Miss. 1212; Fla.; La. 2266; (3) as against a subsequent judgment creditor: N.J., Minn.; (4) it is fraudulent and void as against subsequent purchasers or incumbrancers for value without notice, even though their deeds be not recorded: O. 4134; 1885, p. 230; Ind.;<sup>c</sup> Ark.; Fla.; La. 2253; (5) it is void even as between the parties: Md. 44,17-18. So, of a deed of gift not recorded within two years: N.C. (See § 1570.)

(B) But it is valid as against (1) the grantor, his heirs, and devisees (as between the parties: N.J., Neb., Tenn., Mo., Tex., Cal., Nev., Dak., Ida., Mon., Uta.,

Miss., La., Ariz.): N.H. 135,4 ; Mass. 120,4 ; Me. 73,8 ; Vt. 1931 ; R.I. 173,4 ; Ct. 18,6,1,11 ; N.J. ; Ind. 2926 ; Kan. 22,21 ; Neb. 1885,41,13 ; Tenn. 2887 ; Mo. 693 ; Tex. 4332 ; Cal. 6217 ; Nev. ; Dak. Civ. C. 675 ; Ida. *ib.* 24 ; Mon. G. L. 200 ; Uta. 618 ; Miss. 1212 ; La. 2266 ; N.M. 2763 ; Ariz. 2268.

Or against (2) persons having actual notice of it : <sup>b</sup> Mass., Me., (?) Ind., Kan., Del., Tenn., Mo., Tex., Cal., Dak., Uta., Ga., Miss., N.M. ; (3) or against purchasers *not* for valuable consideration : Miss. ; (4) as against all persons, except as in (A) specified : N.J.

(C) In Maryland, any deed, not at first recorded, is valid, when finally recorded, against every one except persons with prior recorded deeds who have purchased in good faith and for value, if the grantee took possession under the unrecorded deed, from the time of such possession : but as against all persons who have become creditors before the recording, without notice of such deed, it takes effect only as a contract for the conveyance of land : Md. 44,23-24.

NOTES. — <sup>a</sup> *i. e.*, if not recorded within the time limited by § 1615. <sup>b</sup> This is probably law in other states also. <sup>c</sup> The fact that such subsequent purchaser's deed is only a quitclaim makes no difference, either as affecting his good faith or otherwise.

§ 1612. **Creditors and Purchasers**, as the words are used in this chapter, include all creditors and purchasers who but for the instrument would have title to the property conveyed, or a right to subject it to their debts ; and not creditors and purchasers of the grantor merely : Va. 114,11 ; W.Va. 96,9.

A purchaser is not affected by record of a deed or contract made by a person under whom his own title is not derived : Va. 114,12 ; W.Va. 96,10 ; nor by such record made by any person before the date of a deed or contract made to or with such person duly recorded, and from which his title is derived : Va., W.Va.

§ 1613. **Record Office**. (A) In all the states, there is a land record office in every county (in Rhode Island, Connecticut, Vermont,<sup>a</sup> in every town) : N.H. 135,3 ; Mass. 120,4 ; 24,5 ; Me. 7,1 ; Vt. 1927 : R.I. 173,3 ; Ct. 18,6,1,11 ; N.Y. 2,3,1 ; N.J. *Conveyances*, 14 ; Pa. *Deeds*, 1 ; O.<sup>b</sup> 1137 ; Ind. 2931 ; Ill. 30,28 ; Mich. 5673 ; Wis. 2232 ; Io.<sup>b</sup> 1941 ; Minn. 8,174 ; 40,1 ; Kan.<sup>b</sup> 22,19 ; Neb. 1,18,78 ; Md. 44,16 ; Del. 35,1 ; Va. 114,5 ; W.Va. 1882,149,7 ; N.C. 3650 ; Ky. 24,9 ; Tenn. 520,5013 ; Mo. 3805 ; Ark. 664 ; Tex. 4294 ; Cal. 6169 ; Ore. 6,23 ; Nev. 252 ; Col. 215 ; Wash. 2314 ; Dak. Civ. C. 651 ; Ida. 1874-5, p. 557, § 1 ; Mon. G. L. 200 ; Wy. 1882,1,13 ; Uta. 214 ; S.C. 1776 ; Ga. 2705 ; Ala. 2147 ; Miss. 1209 ; Fla. 32,20 ; N.M. 429 ; Ariz. 122. So, in Louisiana, in every parish : La. 2264. In the District Columbia, one recorder : D.C. 467.

(B) Such office is kept (1) by a special officer, in many states, called the register of deeds or of the county : N.H. ; Mass. ; Me. ; N.J.<sup>c</sup> *Register, etc.* 1 ; Mich. ; Wis. ; Minn. ; Kan. ; <sup>b</sup> Neb. 1885,41,1 ; N.C. ; Tenn. ; Dak. ; Wy. ; La. ; the recorder : Pa., O., Ind., Ill., Io., Del., Mo., Ark., Cal., Nev., Col., Ida., Mon., Uta., La., Ariz., D.C. ; the register of mesne conveyances : S.C.

Or such office is kept (2) by the county clerk : <sup>a</sup> Vt.<sup>d</sup> 1929 ; N.Y. ; Ill.<sup>e</sup> 115,1 ; Neb.<sup>e</sup> 1885, 41,2 ; Tex. ; Ore. ; Col. 578 ; Wy. 28,3,7 ; by the clerk of the superior court for the county : Md. 57,8 ; N.C. ; Ky. ; Mo.<sup>e</sup> 3828 ; Ark. 5551 ; Ga. 2705 ; by the clerk of the Court of Common Pleas : N.J. ; by the clerk of the County Court : Va., W.Va. ; by the judge of probate for the county : Ala. ; by the town clerk, in each town : Vt.,<sup>a</sup> R.I., Ct. ; by the county auditor : Wash. ; by the clerk of the Chancery Court in the county : Miss. ; by the clerk of the Corporation, Hustings or Chancery Court, if within the jurisdiction of such court : Va. 114,1 ; 1877,48 ; by the clerk of the probate court : N.M.

NOTES. — <sup>a</sup> So, in Vermont, the deed may be recorded with the county clerk besides the usual record with the town clerk : Vt. 1930. <sup>b</sup> A transfer of land must also be entered in a transfer record book by the county clerk, or auditor, before being recorded by the register of deeds ; see § 1623. <sup>c</sup> In Essex county only. <sup>d</sup> For lands in unorganized places only. <sup>e</sup> Except in counties over a certain population.



§ 1614. **Place of Record.** (A) A deed is *always* (in all states) to be recorded in the county where the land lies. (For citations, see §§ 1610, 1613; also Mass. 24, 13; Ind. 2952; Neb. 1, 73, 18; Tex. 4333; Cal. 6169; Dak. Civ. C. 651; Ga. 1956.)

(B) A conveyance of land in several counties must be recorded in every county (town, or other record district) where the subject land lies, or (1) it will only affect land situated in the county (town or other record district) where it is recorded: Del. 83, 15; Va. 114, 6; W. Va. 96, 6. So, by implication, in all states. (2) It seems that it must be so recorded, and in each and every county where the land lies, or it is of no effect whatever, even as between the parties: Md. 44, 17-18. (3) In Tennessee, the provision is simply that a deed of land conveying several tracts lying in different counties shall (or may) be recorded in each of them: Tenn. 2843. (4) When it contains one tract of land lying in two or more counties, it may be registered in either: Tenn.

§ 1615. **Time of Record.** (A) Generally, no deed can take full effect until recorded; and it follows that record must be made immediately after execution, to be valid against subsequent purchasers who may record their deeds first. This law is expressly enacted in Md. 44, 19; Tex. 4334; La. 2266. And compare § 1611 A.

So, in Tennessee, unless proved in a court of equity that the person claiming under the subsequent instrument had notice of the prior one: Tenn. 2074.

(B) But in some states, a deed is valid as a recorded deed for all purposes from the time of its execution, (1) if recorded any time within a year from its execution: Del. (but see below) 83, 14; V. 16, 520, 1; Ga. 2705; (2) within six months therefrom: Pa. *Deeds*, 76; Ann. Dig. 1877-8, § 5 (except in Philadelphia); O. 4134; Fla. 32, 20; (3) within sixty days: Va. 114, 7; Ky. 24, 14; (4) within forty-five days: Ind. 2931; (5) within forty days: S.C. 1776; (6) within fifteen days: N.J. *Conveyances*, 14; 1880, 171, 2; (7) within five days: Ore. 6, 26; (8) on the day of execution: Del. V. 17, 213, 4.

And a deed recorded after such prescribed times is valid against subsequent creditors and purchasers for value without notice only from the date of record: O.; Ky. 24, 22; S.C.; Ga. This is law also in New Jersey, and, probably, in Pennsylvania.

(C) But even in the states in B mentioned, *mortgages or trust deeds* have priority according to record: N.J. *Mortgages*, 22; Pa. *Deeds, etc.* 103; O. 4133; Del. 83, 19; Va.; Ky. 24, 10.

*Except*, that (1) mortgages to secure the purchase money may be recorded at any time within sixty days: Pa.; thirty days: Del. 83, 21 and 18; V. 17, 213, 1. See also § 1864. And (2) instruments of defeasance within sixty days: Pa. 1881, 91; Del.; within ninety days: Ind. 2932. Mortgages recorded at the same time have priority according to their dates: Del. 83, 20.

(D) In one state, a *deed made out of the State* is so valid from the time of execution (1) if recorded in the state within twelve months of its execution: Pa. *Deeds, etc.* 77; and in one other, if out of State and in the United States, four months: Ky. 24, 14; if out of the United States, twelve months: Ky.

(E) In Maryland a deed is to be recorded within six months to be valid against existing creditors; but may be recorded at any time thereafter and have effect against creditors and purchasers from time of such record: Md. 44, 16 and 22.

(F) In Alabama, conveyances of unconditional estates, or mortgages or instruments in the nature of a mortgage of real property to secure any debt created at the date thereof, are void as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice, unless the same have been recorded within three months of their date; and all other conveyances of real property, mortgages, or deeds of trust to secure any debts other than those specified above, are inoperative and void as to purchasers for value, mortgagees, and judgment creditors without notice, unless recorded before the rights of such purchasers, etc., accrue: Ala. 2166-7. This provision includes absolute conveyances of real property made defeasible by a defeasance or other instrument, in which case such defeasance, etc., must be recorded according to its character within the proper time, or it will be void as against purchasers for value, mortgagees, and judgment creditors without notice of the original grantee: Ala. 2163.



§ 1616. **Limitation.** No deeds<sup>a</sup> can be recorded at all if not filed for record (1) within one year of the execution : Del.<sup>a</sup> 83,14; Ala.<sup>b</sup> 2154; (2) within two years : N.C.<sup>c</sup> 1252,1264.

**Mortgages** must be filed for record within six months of their *date* : Md. 44,16 and 22.

If a conveyance is not recorded until after ten years from its date, such record is not evidence, but only acts as notice to subsequent purchasers and incumbrancers : N.J. *Conveyances*, 15.

In North Carolina, all deeds of gift of estates of any nature (*i. e.*, either real or personal) must be proved and recorded within two years from the making thereof or they are void : N.C. 1252.

NOTES. — <sup>a</sup> “Deeds” does not here include written contracts for the sale of land. <sup>b</sup> It will not be evidence (§ 1625) unless recorded within such time. <sup>c</sup> It includes only deeds of gift, contracts of sale, and leases.

§ 1617. **Effect of Filing.** A deed is deemed to be recorded, and takes effect as a record, in most states, from the time it is filed for record; *i. e.*, from the time the minute is made on the deed, index, or entry-book, according to § 1618 : Mass. 24,15; Me. 7,15; 73,28; Ct. 18,6,1,11; N.Y. 2,3,24; N.J. *Conveyances*, 14; Pa.<sup>a</sup> *Deeds, etc.* 103; O.<sup>a</sup> 4133; Ind. 2951; Ill. 30,30; Mich. 5675; Wis. 759; Io. 1944; Minn. 8,177; Kan. 22,20; Neb. 1,73,15; Del. 35,6; N.C. 3654 (but *quære*); Ky. 24,10–11; Tenn. 2887; Mo. 693,3817; Ark. 670; Tex. 5562,4334; Cal.<sup>b</sup> 6170; Ore. 6,24; Nev. 253; Col. 215; Wash. 2314,2731; Dak. Civ. C. 651; Ida. 1874–5, *Conveyances*, 25; Mon. G. L. 201; Wy. 28,3,9; 1882,1,14; Uta. 619; S.C. 769; Ala. 2149; Miss. 1213; Fla. 1885,3592; La. 2254,2264; N.M. 431; D.C. 447; U.S. 1878,69.

In Delaware, if two or more deeds are filed for record at the same time, they have priority (1) according to their respective dates : Del. 83,20. (2) According to the time of sealing and delivery : D.C. 448. If filed on the same day, the one first recorded has priority, in respect to property in that county affected by it : Va. 114,9; W.Va. 96,8; 1882,50.

NOTES. — <sup>a</sup> Of mortgages only. <sup>b</sup> Being duly proved, or acknowledged and certified.

§ 1618. **Entry and Receipt.** The register must, in most states, note the day, hour, and minute of filing (1) on the record : Vt. 2688; N.Y. 2,3,24–5; 1882,410,1750; N.J. *Conveyances*, 26–7; *Mortgages*, 17 and 19; Minn. 8,177; Del. 35,6; N.C. 3654; Tenn. 529; Mo. 3817; Ark. 5561; Tex. 4298; Cal. 4241; Wash. 2731; Ida. 1874–5, p. 561, §§ 13–14; Ala. 2148; Miss. 1223; Ariz. 134.

(2) In the index or entry-book : N.H. 27,5; Mass. 24,14–15; Me. 73,28; Pa. *Deeds, etc.* 2–3; Ind. 2951; Ill. 115,12; Mich. 5675; Wis. 759; Io. 1943; Minn.; Kan. 25,92; Neb. 1,18,81; Md. 57,10; Ky. 24,33; Ark. 5560; Tex. 4297; Col. 580; Mon. G. L. 391; Wy. 1,3; 28,3,9; Ariz. 1881,16.

(3) On the back of the deed, noting also the liber and folio where it is recorded : Mass. 24,21; Me. 7,15; 73,28; Vt. 1735; R.I. 173,5; Ct. 18,6,1,11; N.Y.; N.J.; Pa.; O. 1144; Ill. 115,11; Mich. 5681; Wis. 758; Io. 1944; Minn.; Kan.; Neb. 1,73,32; 1885,41,5; Md. 57,13; Del. 35,6; N.C.<sup>a</sup> 3654; Tenn.; Mo. 3818; Ark. 670; Tex. 4299; Cal. 4241–2; Ore. 6,24; Col.; Wash. 2732; Ida.; Mon.; Wy. 1882,1,13; Uta. 218 and 221; S.C. 769; Ala.; Miss.; La. 2254; N.M. 431; Ariz. 134,5; D.C. 446, U.S. 1878,69.

This entry must be made (1) immediately after filing : N.H.; Mass.; Me.; Ct.; Pa.; O.; Ind. 5930; Ill.; Wis.; Io.; Minn.; Kan.; Neb.; Ky.; Tex.; Col.; Mon.; Wy.; Ariz. (2) Within an hour : Me.<sup>b</sup> (3) In the order in which the deeds are received : Mass.; Ill.; Mich. 5675; Minn. (4) “Immediately after record.” N.Y.; Ill.; Md. 57,11.

In a few states, the recorder is required to give the person filing a deed for record a receipt, stating the day, hour, and minute of delivery : N.J.; Pa.; O.; Ind.; Ill. 115,10; Del.; Ark.; Tex.; Ala. 2149; Miss.

The recorder is to "certify" the time when the instrument was lodged for record: Ky. 24,23.

NOTES. — <sup>a</sup> Applies only to mortgages or trust deeds. <sup>b</sup> *i. e.*, the entry in the *index*.

§ 1619. **Manner of Record.** In most states, it is provided that all deeds shall be recorded in the order in which they are filed for record: N.Y. 2,3,24; N.J. *Conveyances*, 32; Pa. *Deeds*, 3; O. 4133,1145; Ind. 5931; Ill. 115,9; Neb. 1,73,15; N.C. 3654; Tenn. 529; Mo. 3817; Ark. 5561; Tex. 4298; Cal. 4241; Wash. 2731; Ida. 1874-5, p. 561, § 13; S.C. 769; La. 2254; Ariz. 134.

"Within thirty days after filing:" Ct. 3,3,3,5; S.C.; within twenty days after: N.C. 3654. If two or more are delivered at the same time, they are recorded in the order of their dates: N.J. See also § 1617.

But in other states, the provision is simply that they be recorded as soon as practicable or without delay (the entry on the index having effect as a record): N.J. *Conveyances*, 26; Io. 1946; Del. 35,6; N.C.; <sup>a</sup> Tenn.; Mo.; Ark.; Tex.; Cal.; Wash.; Ida. *ib.* 13; Miss. 1225; La.; N.M. 431; Ariz.

They are recorded at length: N.H. 135,3; Vt. 1927; Ct.; N.J.; Mich. 5676; Io. 335; Minn. 8,180; Wy. 1882,1,13; Uta. 219.

The certificate of acknowledgment or proof must (probably, in all states) be recorded at length with the deed: Mass. 120,5; Me. 73,23; N.Y. 2,3,20; N.J.; Ind. 2952; Mich.; Neb. 1,73,14; Md. 44,12; Del. 35,6; 83,14; V. 16,520,1; Va. 117,8; W.Va. 1882,149,7; Ky. 24,23; Tenn. 529; Mo.; Ark. 664; Tex.; Cal.; Ida.; S.C. 1777; Ala. 2148; La. 2253; Ariz.

So, also, the double certificate mentioned in § 1583: Neb.; Tenn. 2838. So, the commission to take testimony of acknowledgment, if any: Tenn. So, all other acknowledgments or papers annexed to the deed: N.J., Del., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Cal., Wash., Ida., Ala., Miss., Ariz.

Interlineations and erasures must be noted: Mass. 24,16; N.J.; Mich. 5677; W.Va.; Mo.; Ark.; Tex.

Maps and plans may commonly be recorded with the deed: Ct. 3,3,3,8; N.J.; Va.; W.Va.; Mo.; Cal.; Col. 581; Wash. 2728; Ida.; Mon. G. L. 389; Uta. 217; Ala.; Miss.; Ariz.

The memorandum of livery of seisin made in deeds of feoffment: S.C. 1780.

In all cases where any notice is required, a copy of the notice or advertisement with affidavit of service, posting, or publication must be recorded with the deed: R.I. 173,11.

NOTE. — <sup>a</sup> Applies only to mortgages or trust deeds.

§ 1620. **Indexes.**<sup>a</sup> (A) The records of all deeds must be entered alphabetically in two indexes or entry-books, — one under grantors' names, the other under grantees': N.H. 27,6; Mass. 24,22; Vt. 2680; N.Y. 1843,199,1; 1882,410,1752; Pa. *Records*, 7; Ind. 5931; Ill. 115,12; Wis. 759-760; Minn.<sup>b</sup> 8,177; Kan. 25,91; Neb. 1,18,80; Md. 57,9; Del. 35,4; W.Va. 1882,149,7; Ky. 24,33; Tenn. 529; Mo. 3816,3819; Tex.<sup>a</sup> 4300,4301; Cal. 4236; Col.<sup>a</sup> 579,580; Ida. 1874-5, p. 558, § 11; Mon. G. L. 390,393; Wy.<sup>a</sup> 28,3,8-9; 1,1; S.C. 769; Miss. 1224; La. D. 3083; Ariz.<sup>a</sup> 131.

So, in many states, an index is to be kept of the names of all the parties alphabetically: Me. 73,28; Ct. 3,3,3,5; N.J. *Conveyances*, 33; O. 1153; Mich. 5682; Io. 1945; Minn.<sup>a</sup> 8,180; N.C. 3663; Ark.<sup>a</sup> 5563-4; Ore. 6,25; Wash. 2728; Uta. 218; N.M. 434-5.

With reference to the liber and folio of the record in all the above states.

(B) And in Nebraska, every register must also keep a "numerical" index and record all deeds therein affecting the several quarter-sections of land: Neb. 1,18,84-5; 1885,41,7. [So, in many states, there are record laws for the platting of towns.] So, the county commission-

ers may require the register to keep a "local" index, with a certain amount of space for each quarter-section of land in the state: O. 1154; Ill.; Wis. 762; Kan. 25,95. So, in two, the county auditor keeps a record book and index of plats: Io. 948-50; Mon. G. L. 392.

In several states, there is one index or entry-book for deeds, and (1) a separate one for mortgages: N.Y. 1843,199,1; 1882,410,1747 and 1755; N.J. *Mortgages*, 17; Pa. Ann. Dig. 1875-6, *Deeds*, etc. 1; Ind. 5933,5939; Mich. 5674; Neb. 1,18,88; Cal.; Ore.; Ida.; Ariz. (2) A separate book is kept for town lots: Wy. 1,5; (3) for mechanics' liens: Mich. 8379; Neb.; Cal.; Ida.; (4) for attachments and execution sales: Wis. 761; Cal. 4236-7; Ida.; (5) for organizations of corporations (see also in Part III.): Wis. 763. (6) Separate books are to be kept also for chattel mortgages: Tenn. 529; Cal.; (7) for releases of mortgages: Cal., Ida.; (8) for powers of attorney: Tenn., Cal., Ida.; (9) for leases: Tenn., Cal., Ida.; (10) for marriage certificates: Mo. 3821; Cal.; Ida.; (11) for assignments of mortgages and leases: Cal., Ida.; (12) for wills: Cal., Ida.; (13) for official bonds: Mo. 3823; Ark. 5565; Cal.; Ida.; (14) for notices of lis pendens: Cal., Ida.; (15) for transcripts of judgments: Cal., Ida.; (16) for married women's property: Cal., Ida.; (17) for pre-emption claims: Cal., Ida.; (18) for instruments relating to personal property: Ark.; La. 2251; D. 2501.

NOTES. — <sup>a</sup> In the noted states, this index book is a different book from the *entry-book*, required by § 1618; but in other states it is the same. <sup>b</sup> Of the *entry-book*.

§ 1621. **Books of Record.** In many states, there are separate books of record; thus, in detail, besides the book for ordinary deeds, there is also a book (1) for mortgages, trust deeds, or defeasible deeds in the nature of mortgages: N.Y. 2,3,2; N.J. *Mortgages*, 17-18; O. 1143; Ind. 5933; Mich. 5676; Minn. 8,180; Neb. 1,18,82; Mo. 3814; Tex. 4304; Cal. 6171; Ore. 6,23; Dak. Civ. C. 652; Ga. 267; La. 2252.

(2) For releases of mortgages and liens: Va. 1884,527,5; W.Va. 1882,49,5; (3) for conveyances of personalty: Mo. 3815; Cal. 4235; Wash. 2727; S.C. 769; Ga.; (4) for maps and plans: O.; Mich. 1473; Kan. 25,93; (5) for conveyances of town lots when the plats are recorded: Io. 1947; (6) for marriage contracts: Wash.: (7) instruments relating to the separate property of married woman: Wash.; (8) for marriage contracts and certificates of marriage: Mo., Cal.; (9) judgments, attachments, and lis pendens: Wash.: (10) for registrations of births: Mo.; (11) patents of lands: Wash.; (12) for official bonds: Mo., Cal., Wash.; (13) for mechanics' liens: Neb. 1,18,83; Cal.; Wash.; Uta. C. Civ. P. 1064; N.M. 1880,16,8; (14) for leases: O.; (15) for apprentices' indentures: Ind.; Del. 35,5; (16) miscellaneous records: Neb. 1885,41,10; Ariz. 130; (17) every class of instruments (§ 1624) must, in a few, be recorded in a separate book: Ill. 115,9; Minn.; Cal. 4235; Ida. 1874-5, p. 558,10.

§ 1622. **Custody of the Deed.** Commonly, after record, the deed may be delivered to the person entitled to it: Wis. 758; Kan. 25,92; Va. 117,8; W.Va. 1882,149,7; Kv. 24,29; Mo. 3818; Ark. 5025,5562; Tex. 4299; Cal. 4242; Col. 580; Wash. 2732; Ida. 1874-5, *Conveyances*, 14; Mon. G. L. 391; Wy. 28,3,9; Ala. 2148; Ariz. 135.

Except that (1) when a deed is recorded more than one year from the date of execution, the recorder is required to keep it in the office, subject to the inspection of all persons for one year after record: Mo. 3838. And, in several, a deed proved only by handwriting (§§ 1595-7) may be recorded only if the original deed be deposited in the record office at the same time: N.Y. 2,3,32; Cal. 6162; Dak. Civ. C. 649.

When a mortgage with the release therein is filed for record, the mortgage is to be retained by the recorder, and not again allowed to be withdrawn: Md. 44,42.

The recorder must make a minute in the entry-book of the person to whom the deed was delivered: N.H. 27,5; La. 2256.

§ 1623. **Requisites for Record.** Commonly, a certificate of acknowledgment or proof is necessary. Cf. §§ 1576,1599,1570,1592.

But, in Connecticut, an unacknowledged deed (and any instrument intended as a conveyance of lands which by reason of a formal defect operates only as the conveyance of an equitable interest) may be recorded; and such record operates as notice to all the world: Ct. 18,6,1,13. Compare also § 1631.



In a few states, no deed of absolute conveyance can be recorded (1) unless indorsed by the county auditor as having been recorded in the plat-book (see § 1620) : O. 1159 ; Io. 1953 ; Neb. 1,18,86 ; S.C. 247. Or (2) by the county clerk [for tax-purposes] : Kan. 22,33 and 35.

No instrument can be recorded unless its recitals show whether the grantor or land-owner was married or single, name of husband or wife, whether husband or wife is dead, whether land was separate or community property, whether grantee was single or married, and name of husband or wife : Tex. 1879,115,1.

No deed can be recorded unless executed, as required by law (Arts. 155,156) : Minn. 40,32. [The same is doubtless law everywhere.] A deed may be admitted to record without acknowledgment or proof, but will not have effect as notice according to § 1625 : Miss. 1215.

§ 1624. **What may be Recorded.**<sup>a</sup> The following instruments (besides ordinary deeds of real estate, as in § 1551) must (for the word *may* in the several statutes is probably mandatory ; *i. e.*, such an instrument not recorded will only be valid as an unrecorded deed) be recorded :<sup>b</sup> (1) <sup>c</sup>all trust deeds and mortgages : N.H. 135,4 ; Vt. 1931 ; R.I. 173,4 ; N.Y. 2,3,3 ; N.J. *Mortgages*, 22 ; Pa. *Deeds*, 100 ; Ind. 2931 ; Ill. 30,28 ; Wis. 2242 ; Minn. 40,26 ; Neb. 1885,41,3 ; Md. 44,19 ; Del. 35,4 ; Va.\* 114,5 ; W.Va.\* 96,5 ; N.C. 1254 ; Ky. 24,9 ; Tenn.\* 2837 ; Mo.\* 3813 ; Ark. 5558 ; Tex. 4331 ; Cal.\* 7952,6164,4235 ; Dak. Civ. C. 650 ; Ida. 1874-5, p. 558,9 ; Wy. 1882,1,13 ; S.C.\* 1776 ; Miss. 1212 ; Ga. 1956 ; Fla. 32,6 ; Ariz. 129 ; D.C., U.S. 1878,69.

And all defeasible deeds in the nature of mortgages : N.Y. ; N.J. ; Pa. ; Wis. ; N.C. ; Tenn. ; Mo.\* ; Ark. ; Tex. ; S.C. 769 ; Miss. All assignments of mortgages : N.J. *Mortgages*, 32 ; Pa.<sup>b</sup> *Deeds*, *etc.* 66 ; Ind. 1093 ; Wis. ; Minn. ; Cal. 7934. All releases of mortgages :<sup>d</sup> Del. V. 11, C. 612 ; W.Va. 1882,49,5 ; Tenn. ; Cal. 4235 ; Ida. ; Ariz.

(2) All deeds for the absolute conveyance of real estate or any interest therein : N.H. ; R.I. ; Ct. 18,6,1,11 ; Pa. *Deeds*, *etc.* 10 ; Ind. 2926 ; Va.\* ; N.C. ; Tenn.\* ; Tex. 4332 ; S.C. ; Miss. ; all deeds of gift : Va.,\* W.Va.,\* Tenn.\* ; all bonds : Mo., Ark., Tex. ; all official bonds : Mo. ; Ark. 5559 ; Cal. ; Ida. ; Tex. ; Ariz. ; all covenants : Mo., Ark., Tex. ; all bargains and sales : N.H. ; R.I. ; Pa. ; Tex. 4332 ; Miss. ; all "transfers" of real property : Wy. ; Uta. 216 ; Fla. ; conveyances for life : Mass. 120,4 ; Me. 73,8 ; Vt. ; R.I. ; Ind. ; S.C. ; conveyances for a term of years : Tex., Miss. ; conveyances in tail : Mass., Me., Vt. ; renunciations of dower : S.C. ; conveyances of a future estate : Ind. All other instruments concerning lands and tenements, or goods and chattels duly proved or acknowledged : Mo. ; Ark. ; Tex. 4336. Any instrument (or judgment, in California) affecting the title to, or possession of, real property : Ill. ; Kan. 25,9 ; Cal. 6153 ; Col. 215 ; Dak. Civ. C. 647.

(3) All leases (a) for life :<sup>e</sup> Ct. 18,6,1,14 ; N.J. *Conveyances*, 19 ; S.C. ; (β) for more than five years : Va. 114,4 ; W.Va. ; Ky. 24,8 ; (γ) for more than three years : N.Y. 2,3, 36 and 38 ; O. 4112 ; Ind. 2926 ; Mich. 5689 ; Wis. 2242 ; Minn. 40,26 ; N.C. ; Tenn. ; (δ) for more than two years : N.J. ; (ε) for more than one year : Vt. 1931 ; R.I. ; Ct. 18,6, 1,14 ; Tex. ; Cal. 6214 ; Dak. Civ. C. 671 ; Ida. ; S.C. 1810 ; Me. ; Ariz. ; (ζ) for more than seven years : N.H. ; Mass. ; Me. ; Md. 44,1 ; (η) for more than twenty-one years : Pa. *Deeds*, *etc.* 78 ; Del. 83,17 ; V. 16,520,2. (θ) All leases unaccompanied by possession or occupation by the lessee : Pa., Del.<sup>f</sup> And all assignments of such leases : Vt. 1934 ; N.J. *Mortgages*, 21 ; or mortgages of them : N.J. *Mortgages*, 22. Leases for terms less than, as respectively required above, are valid against subsequent purchasers, though unrecorded : Cal. ; and the same law is implied in all states.

(4) All contracts and bonds (a) for the sale or purchase of land :<sup>g</sup> Ct. 18,6,1,13 ; N.Y.<sup>b</sup> 2,3,39 ; N.J.<sup>b</sup> *Conveyances*, 23 ; Ind.<sup>b</sup> 2957 ; Mich.<sup>b</sup> 5690 ; 5712 ; Wis.<sup>b</sup> 2238 ; Neb.<sup>b</sup> 1,73,47 ; Md.<sup>b</sup> 44,27 ; Va. ; W.Va. ; N.C. ; Tenn.\* ; Tex. ; Ore.<sup>b</sup> 6,34 ; Nev. 252 ; Wy.<sup>b</sup> 1882,1,22 ; Uta. 618 ; Miss.<sup>b</sup> 1214 ; D.C.<sup>b</sup> 449. (β) Or for the conveyance of a term of five years or more : Md.<sup>b</sup> Va., W.Va. So, all agreements by which an equitable interest is created : Ct. ; N.Y. 2,3,38. But in several states, no executory contract for the sale of land need be recorded : N.Y. ; Ind. 2956 ; Mich. ; Wis. ; Minn. ; Neb. ; Wy. See also § 1551.

(5) <sup>h</sup>All marriage settlements or contracts : Va. ; W.Va. ; N.C. 1269 ; Ky. 24,8 ; Tenn. ; Mo. ; Ark. ; Tex. 4335-6 ; 4332 ; Cal. ; Ida. ; S.C. ; Miss. 1211 ; La. 2265 ; D. 3086 ; Ariz.

(6) All instruments describing or concerning the separate property of married women :<sup>h</sup> Tex., Cal., Ida., Miss., La. (7) Certificates of marriage :<sup>h</sup> Mo., Ark., Cal., Ida., Ariz. (8) All certificates of renunciation of dower : S.C. (9) All written statements furnished the recorder



for record showing sex and date of birth of any child or children, the name, business, and residence of father, and maiden name of the mother: Mo.

(10) All powers of attorney<sup>i</sup> to convey real estate: N.H. 135,6; Mass. 120,14; Vt. 1935; N.J. *Conveyances*, 64; Pa. *Attorneys in Fact*, 7; O. 4132; Ind.; Ill.; Mich.<sup>b</sup> 5690; Wis.<sup>b</sup> 2237; Io. 1969; Minn.<sup>b</sup> 40,27; Kan. 22,23; Neb.;<sup>b</sup> Md. 44,28; Del. 83,12; Va.<sup>b</sup> 117,1; N.C. 1246; Ky.<sup>a,b,n</sup> 24,13; Tenn.; Tex.<sup>a,b</sup> 4336; Cal.; Ore.;<sup>b</sup> Nev. 255; Col.; Ida. 1874-5, *Conveyances*, 27; Mon. G. L. 203; Wy.<sup>b</sup> 1882,1,22; Uta. 621; Miss.<sup>b</sup> 1179; Ariz. See Art. 167. Powers of attorney authorizing the satisfaction of mortgages: Pa.<sup>b</sup> *Deeds*, etc. 66. Powers of attorney authorizing other specified acts: Pa.<sup>b</sup> *Deeds*, etc. 70; *Attorneys in Fact*, 6; 1885,35. Revocations of powers of attorney: Tenn. (See also § 1673.) (11) All deeds creating trusts (see also § 1710): S.C.

(12) All wills duly proved must be recorded, indexed, or entered in the registry of deeds (a) for the county or counties where the land affected lies: Me.<sup>b</sup> 7,16; N.Y.; Ill.<sup>b</sup> 30,33; Minn. 47,35; Neb.<sup>b</sup> 1,73,22; 1885,41; Cal.; Col. 230; Ida.; Ariz. So, they must be indexed or entered in such county registry: N.Y.; Neb. 1,73,24 and 55. So, of wills executed in other states devising land in the State: Ill.<sup>b</sup> Tenn.<sup>a</sup> In Alabama, all wills and conveyances creating estates in land in remainder or reversion or upon a condition after an estate for life are inoperative and void as against creditors of the life-tenant in possession after a possession of five years by such tenant, unless the will or conveyance be recorded within five years from the entry and possession of such tenant: Ala. 2169. But in other states, no wills need be recorded: Wis.; Mo. 701. And so in other states, by silence of the laws. See also in Part IV., Division I.

(13) Notices of mechanics' liens:<sup>j</sup> Mich. 8379; Cal.; Ida.; Wy.; Uta. C. Civ. P. 1064; S.C.; Ariz. 1480. So in most states; see § 1963.

(14) Attachments on real estate:<sup>k</sup> Me.; Ct. 3,3,3,7; Cal.; Ida.

(15) Notices of lis pendens:<sup>k</sup> Mass. 126,13; Mich. 5765; Minn. 75,34; Cal.; Ida.; Ariz.

(16) Decrees of partition of real property:<sup>k</sup> N.H. 27,9; Cal. 4238.

(17) Transfers of property in trust for the benefit of creditors:<sup>k</sup> Cal. 6164.

(18) Deeds of personal property in trust for charitable or literary institutions: N.J. App. *Conveyances*, 1.

(19) Writings of any kind declaring uses or trusts: N.J. 1881,215.

(20) Levies or executions on real estate: N.H. 27,7; Mass. 172,3; Me. 7,16; Vt. 2679; Ct. 19,16,31; Mich. 5675; Md. 1882,469; Ga.<sup>b</sup> 2709. See also in Part IV.

(21) All patents or grants by the State:<sup>l</sup> Me.<sup>m</sup> 1885,354; N.Y.<sup>b</sup> 1845,110; Pa.<sup>b</sup> *Deeds*, etc. 62; O. 4115; 1881, p. 8; Ind. 470; Mich. 5679; Wis.<sup>b</sup> 2235; Kan.<sup>b</sup> 76,1; Mo.<sup>b</sup> 3826; Ark. 4305; Tex.<sup>m</sup> 4329; Ore.<sup>b</sup> 6,37; Cal.<sup>m</sup> 6160; Col.<sup>b</sup> 1317; Uta. 619; Ala. 2231. Or by the United States, of land lying in the state: O. 4137; Ind.; Mich.; Wis.;<sup>b</sup> Minn. 73,93; Neb. 1883,63,1; 1885,41,21; Cal.;<sup>m</sup> Ore.;<sup>b</sup> Dak. Civ. C. 647; Uta.; Ala. All instruments transferring or conveying any right of improvement, occupancy, or pre-emption:<sup>l</sup> Tenn. Transfers or assignments of plats: Tenn. Certificates of survey or location of land: Tenn. Notices of pre-emption claims:<sup>l</sup> Cal., Ida., Ariz.

(22) Any release or other instrument being evidence of the payment or satisfaction of any legacy charged on land.: Pa.<sup>b</sup> *Deeds*, etc. 61 and 71. So, any such release, etc., given to any executor, administrator, assignee, guardian, or trustee, whether relating to real or personal estate: Pa.<sup>b</sup> 1. So, all releases of legacies or recognizances charged upon lands within the state, but made out of it: Pa.<sup>b</sup> *Deeds*, 68.

(23) All deeds by sheriffs:<sup>k</sup> Pa.;<sup>b</sup> Mich. 5678; Ark. 668; Ore.; La.; Ariz. 2286. All deeds by coroners:<sup>k</sup> Pa.<sup>b</sup> All deeds by marshals:<sup>k</sup> Pa.,<sup>b</sup> Mich. All deeds by treasurers: Pa.<sup>b</sup> All deeds of county commissioners:<sup>k</sup> Pa.<sup>b</sup> *Deeds*, 65. (24) All deeds by executors, administrators, and guardians:<sup>k</sup> Mich., Ark.

(25) All deeds made by decree of court: N.H. 27,8; Pa.;<sup>b</sup> Ariz. Deeds by commissioners in chancery: Ark. A purchaser at sheriff's sale may have the execution under which the property was sold recorded with the deed: Ga.

(26) All decrees, orders, and judgment of a court affecting the title to real estate, or liens or mortgages: Pa. *Records*, 28; O. 4138-4141; Neb. 1885,41,16; Md. 57,6; 1882,469; Tex. 4339; Cal. 4238; Ore.; Col. 230; Wash. 2730; La. Sheriff's deeds or certificates of such recorded judgment or mortgage:<sup>k</sup> N.H. 27,10; Minn. 8,190; Cal. 4237; Col. 224; La. A certificate of the decree, judgment, discontinuance, dismissal, non-entry, or other final disposition, which may be recorded in the office where the original memorandum was recorded: Mass.

126,14. The decree may be abbreviated in recording: Tex. 4340. So, a certified copy of such judgment, record, or decree must be so recorded: Vt. 770; Wis. 2236; Neb.<sup>b</sup> 1,73,23; Tenn.; Ark.; Tex. 4338; Mich. 6650; Cal.<sup>m</sup> 6159; Dak.<sup>m</sup> Civ. C. 647; Ida. Memoranda of judgments rendered in any county other than that in which the debtor resides: Tenn. All "judgment liens:"<sup>o</sup> Cal. All receipts for taxes: Pa.<sup>b</sup> *Deeds*, 63. All receipts for taxes on unseated lands: Pa. All receipts for moneys paid for the redemption of unseated lands: Pa.<sup>b</sup> *Deeds*, 67. In South Carolina, the holders of all certificates or titles issued by or under the authority of the United States district tax commissioners for South Carolina, may record the same in the record office for Beaufort County, and such recording be legal notice of title: S.C. 1783.

NOTES. — <sup>a</sup> Compare also § 1551. All such "conveyances" must generally be recorded. And see § 1621. <sup>b</sup> These may be recorded; and in the cases noted the word would seem to indicate an option; the effect of record is, however, as in other cases. <sup>c</sup> Cf. also § 1856. <sup>d</sup> Cf. also § 1905. <sup>e</sup> Cf. also §§ 1471,1551. <sup>f</sup> But record is unnecessary if the lessee come into possession within one year after the lease. <sup>g</sup> See §§ 1551,1569. <sup>h</sup> See Marriage Contracts, Marriages, etc., in Division II. <sup>i</sup> See also § 1670. <sup>j</sup> See Art. 196. <sup>k</sup> See also in Part IV. <sup>l</sup> See Art. 111. <sup>m</sup> No acknowledgment is necessary. <sup>n</sup> Such power need be recorded only if the conveyance made under it is to be recorded.

§ 1625. **Effect of Record.** (A) Generally, a conveyance or instrument which has been duly <sup>a</sup> recorded may be read in evidence without further proof (see also § 1572): Mich. 5685; Minn. 73,96; Tenn. 2886; Ark. 664; Dak. C. Civ. P. 493; Wy. 1882,1,17; S.C. 2225; Ga. 2712; Ala. 2154; Miss. 1209; N.M. 2767.

(B) And the record, or a certified copy thereof, may be read in evidence with like force and effect as the original conveyance (see also in Part IV.): Me.<sup>b</sup> 82, 110; N.Y. <sup>c</sup> 2,3,17 and 26; Civ. C. 935; 1882, 410,1745; N.J. *Conveyances*,<sup>d</sup> 29; Pa. *Deeds*, etc. 74; *Evidence*, 26; Mich. 5685; Minn.; Del. 35,10; 83,14; Va. 172,5; W.Va. 85,5; N.C. 1251; Ark.<sup>e</sup> 669; Ore. 6,27; Wash. 431; Ida. 1874-5, p. 562,18; La. 2257; 2267-8; Ariz. 139.

But (C) in other states, so only when the original instrument is lost or out of the power of the party producing it: Vt.<sup>g</sup> 1936; Ill. 30,35; Io. 3660; Kan. 22,27; Neb. 1,73,13; Mo. 697; Ark. 665; Cal. 11951; Nev. 258; Col. 216; Dak. C. Civ. P. 494; Ida. 1874-5, *Conveyances*, 30; Civ. C. 931; Mon. G. L. 206; Wy.; Uta. 624; Ga. 2713; Ala.; N.M. 2768; Ariz. 2274.

But in most states such record or recorded conveyance, or a copy thereof, is not conclusive, but only *prima facie* evidence: N.Y.; Ind. 2954; Mich.; Io. 3662; Minn.; Kan. 22,29; Neb.; Ky. 24,28; Tenn.; Mo. 698; Ark. 666; Ore.; Nev. 259-60; Col. 583; Wash. 2737; Ida. *ib.* 31-2; Mon. G. L. 207,208; Wy.; Uta. 625; N.M. 2769; Ariz. 2275.

Thus it may be rebutted by evidence (1) that the acknowledgment, proof, or certificate was improperly made or taken: N.Y. Civ. C. 936; (2) that proof was made upon the oath of an incompetent witness: Neb.; Mo. 699; Ida.; Nev.; Mon.; Uta. 626; Ariz. 2276; (3) "by other competent testimony:" Mich., Ore., Wy.; (4) and, of course, record does not validate fraud or forgery. See N.J. *Conveyances*, 67; Tenn. 2886.

It is, however, conclusive evidence of the existence of the record, and *prima facie* evidence of the existence of the instrument: Ct. 3,3,3,4; O. 1151,4143; 1880, p. 211; La.; and *prima facie* evidence of the execution of the instrument in proceedings to cure a defect or mistake in it: O.

A deed duly recorded or filed for record (§ 1617) is notice (1) to all the world:<sup>a</sup> N.J. 1883,169,1-2; Pa. Ann. Dig. 1875-6, *Deeds*, etc., 3; O. 4134; Mich. 5675; Minn. 40,28; Kan. 22,20; Tenn. 2888; Mo. 692; Ark. 670; Tex. 4342; Cal.<sup>f</sup> 4239; Nev. 253; Wash. 2314; Dak. Civ. C. 674; Ida. *ib.* 25; Mon. G. L. 201; Uta. 618-9; Ariz. 2269; (2) to subsequent purchasers and (mortgagees: Kan., Mo., Cal., Nev., Ida., Mon., Uta., N.M., Ariz.) incumbrancers: Ill. 30, 30; Mo.; Cal. 6213; Nev.; Ida.; Mon.; Wy. 1882,1,14; Uta. 619; Miss. 1213, 1215; N.M. 2762; Ariz.; or creditors: Ill.

A bond or contract for sale of land and interests in land duly recorded is notice to and takes precedence of any subsequent purchaser, and operates as a lien upon the land therein described, according to its import and meaning : Wis. 2245.

And the opposite party in a suit may always require production of the original instrument, if procurable : N.J. *Conveyances*, 31 ; N.C. So, in other states. See Evidence, in Part IV.

A deed, when duly recorded, takes effect, as between the parties thereto, from its date : Md. 44,17. See § 1615. In New Mexico, abstracts of title certified as correct by an abstract company of the territory are *prima facie* evidence like the record : N.M. 2744.

In many Western states the recorder, on payment of a small fee, is required to furnish abstracts of title.

NOTES. — <sup>a</sup> It must be duly recorded ; *i. e.*, such provisional record as is allowed by § 162 is not sufficient. <sup>b</sup> But not by the grantee in such deed, nor person claiming to be such grantee's heir or servant. <sup>c</sup> See also § 1595, B. <sup>d</sup> But see § 1616. <sup>e</sup> As to administrator's and sheriff's deeds only. <sup>f</sup> As to deeds of partition only. <sup>g</sup> As to powers of attorney only.

§ 1626. **Amending Statutes.** (See also § 1589.) In Georgia, a deed more than thirty years old, appearing genuine on its face, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence, without proof of its execution : Ga. 2700.

In Tennessee, whenever a deed has been registered twenty years or more, the same shall be presumed to have been upon lawful authority, and the probate be good though the certificate has not been transferred to the register's book, without regard to its form : Tenn. 2898. When a deed has been recorded more than thirty years, it is good, although the name of the grantor is not recorded : Tenn. 2899.

All instruments in writing heretofore recorded take effect as notice, notwithstanding any defect or informality in the record, acknowledgment, or certificate ; and duly certified copies are evidence accordingly (§ 1625) : Kan. 22,28 ; Mo. 2305 ; Ark. 673,683 ; Nev. 311,2 ; Ida. 1874,5 ; *Conveyances*, 52 ; Minn. 1885,179 ; Mon. G. L. 228 ; Uta. 629,630.

In New Jersey, ancient deeds, if accompanied by affidavit of the person delivering them that he claims title to lands affected thereby, and that continuous adverse undisputed possession has been held under such deed for forty years, shall be recorded in special books ; the originals are kept in the record office, and such record is notice to subsequent purchasers : N. J. *Conveyances*, 1.

Where a deed has been recorded thirty years, the record or a certified copy may, if corroborated by evidence of enjoyment thereunder, or other proof, be read in evidence, and have force like the original deed, notwithstanding any defect in the proof or acknowledgment : N.J. *Conveyances*, 3 ; so, if recorded ten years : Mo. 2310.

All recorded deeds may be read in evidence, whether properly executed, acknowledged, etc., or not : Minn. 123,7 ; Tex. 4357 ; so of all deeds recorded thirty years : Mo. 2332.

So, any deed recorded before 1839 is valid, notwithstanding various specified informalities : Tenn. 2900 ; Tex. 4356 (1860) ; but does not have effect as notice : Tex.

See also Del. V. 13, C. 29 ; N.C. 1279 ; Mo. 2300-4 ; Ark. 674-684 ; S.C. 1778-9 ; Ariz. 2285.

§ 1627. **Record in Several Counties.** It is in most states not necessary to record the original deed in every county (or town) where the subject land is situated ; but a certified copy of the first record may be recorded in every other county with the same effect : N.H. 135,5 ; N.J. 1885,178 ; Pa. *Deeds, etc.* 73 ; O. 1149 ; Ill. 30,29 ; Wis. 2233 ; Minn. 40,33 ; Neb.<sup>a</sup> 1885,41,23 ; N.C. 1253 ; Tenn. 2837,2849 ; Mo. 3835. See also § 1614.

But in several, such certified copies may be recorded only when the original deed has been lost, after being once recorded : Me. 73,26 ; Ct. 18,6,12 ; Mich. 5716-7 ; W.Va. 1882,149,8.

And there must be an order of court : Mich.

NOTE. — <sup>a</sup> Of powers of attorney only.

§ 1628. **Lost Deeds.** In Georgia, if an original deed is lost or destroyed, a copy may be established by petition in court, which shall have all the effect of the original : Ga. 2701.

So, it may be established by a proceeding in the nature of perpetuating evidence : Pa. *Deeds, etc.* 93-4.

If the lost deed was recorded, a copy of the record is good proof : La. 2269. See § 1625. See also in Part IV.



In Maine, if a deed duly executed and delivered is lost or destroyed before being recorded, the grantee, or any person claiming under him, may file a copy in the proper record office, and it shall have effect as if the deed were duly recorded for ninety days, if the deed be duly proved in that time by the depositions of the subscribing witnesses and other persons cognizant of the facts and such depositions be duly recorded to perpetuate evidence : Me. 73,25.

§ 1629. **Re-record.** In a few states, the copy of any record or recorded deed duly attested and authenticated may be re-recorded on proof of the loss of the original deed and the record : N.Y. 1843, 210,5 ; Neb. 1,73,21.

It may be recorded, when necessary, in other counties, on proof of the loss of the original deed alone : Va. 117,9.

So, a certified copy of the record of any deed affecting property in the State which has legally been recorded in any other state, may be recorded in the State in like manner and have like effect as if executed and acknowledged in the State : Miss. 1222. So, a deed recorded in a foreign country : Miss.

There are generally proceedings provided for establishing lost or destroyed records.

§ 1630. **Foreign Records.** A conveyance of real estate situated without the State, acknowledged or proved and certified in like manner as a deed to be recorded in the State, is evidence without further proof, as if it related to property in the State : N.Y. Civ. C. 946 ; Va. 172,17 ; W.Va. 85,21 ; S.C. 2226. See also in Part IV.

So, in New York, such a conveyance duly authenticated according to the law of the state where the land lies.

A certified copy of the record in the state where the land lies is presumptive evidence of the conveyance and its due execution, if the original cannot be had : N.Y. Civ. C. 947 ; N.C. 1344.

There are in New Jersey special provisions relating to records in certain English cities : N.J. *Conveyances*, 65. See also Evidence, in Part IV.

Certified copies of deeds which have been recorded in other states for ten years or more are *prima facie* evidence thereof, and may be re-recorded in the State with like effect as the original deed : Kan. 22,27.

§ 1631. **Provisional Record.** (A) Pending proceedings for proof any person interested in a deed that has not been acknowledged may, before or during proceedings for proof, file a copy in the record office, which shall have the same effect as if the deed were duly recorded, if the deed is proved and recorded within a specified time, such time being (1) sixty days : N.H. 135,7 ; Vt. 1944 ; (2) forty days : Me. 73,20 ; (3) thirty days : Mass. 120,11 ; Mich. 5671 ; Minn. 40,18-19 ; Neb. 1,73,11 ; or (4) until the determination of the case on appeal, or otherwise : R.I. 173,7 ; Ct. 18,6,1,9.

Or (if at the expiration of such time such proceedings are still pending) the effect of such record is continued until six or seven days from the termination of the proceedings : Mass. ; Vt. ; Mich. 5672 ; Wis. 2231 ; Minn.

Whenever a conveyance of lands, a part of which are situated in the State and a part in some other state, shall have been recorded in such other state, a copy of the record of such conveyance, certified by the officer whose duty it is under the laws of such other state to certify to the record of conveyances, may be recorded in every county in the State in which any part of said lands is situated, in the same manner and with like effect as the original : Wis. 2234.

(B) And in Connecticut, when the grantor refuses to acknowledge, the grantee, or his heirs, etc., may file a caveat in the record office, claiming title to the premises, which shall secure the right of the grantee until the action is tried.

In other states conveyances may be recorded, and are deemed notice to subsequent purchasers and creditors from the time they are filed for record, even when not duly acknowledged or proved, although they cannot be read in evidence as records : Ct. 18,6,13 ; Ill. 30,31 ; Col. 217 ; Wash. 2323 ; Ala. 2153. See also § 1623.

§ 1632. **Proceedings for compelling Record.** In a few states, any person having an interest in real estate of which any other person has an unrecorded deed or other evidence of title, may, on petition in court, compel such other person to record his deed



or other evidence (tendering him the fees of record) : N.H. 135,11 ; Pa. *Deeds, etc.* 82-83.

In Maine, the statutes give the process against only a *previous* holder of the land having such unrecorded deed, etc. : Me. 73,27.

So, in two others, only against a person who has sold or conveyed such land, or an estate or interest therein : Vt. 1947-9 ; Mich. 5714.

## CHAPTER V. — POWERS.

### Art. 165. General Powers.

§ 1650. **Note.** — The chapter relating to general powers does not apply to simple powers of attorney to convey land, in the name, and for the benefit of the owner : N.Y. 2,1,2,134 ; Ind. 2987 ; Mich. 5650 ; Wis. 2157 ; Minn. 44,60 ; Kan. 114,19 ; Dak. Civ. C. 297 ; Ala. 2221.

§ 1651. **Definition.** In five states, a power is defined to be an authority to do some act in relation to lands, or the creation of estates therein or charges thereon, which the owner granting or reserving such power might himself lawfully perform : N.Y. 2,1,2,74 ; Mich. 5591 ; Wis. 2102 ; Minn. 44,2 ; Dak. Civ. C. 298.

Powers as authorized by this chapter, are divided into (1) general or special, and (2) beneficial or in trust : N.Y. 2,1,76 ; Mich. 5593 ; Wis. 2104 ; Minn. 44,4 ; Dak. Civ. C. 300.

**General Powers** are, in five, defined to be those which authorize the alienation in fee of the lands to which the power extends, by any conveyance, will, or charge, and to any person whatever : N.Y. 2,1,2,77 ; Mich. 5594 ; Wis. 2105 ; Minn. 44,5 ; Dak. Civ. C. 301.

**Special Powers** are, in the same, defined to be those where either the disposition is to be made to particular persons, or class, or which authorize the conveyance of a particular interest less than a fee : N.Y. 2,1,2,78 ; Mich. 5595 ; Wis. 2106 ; Minn. 43,6 ; Dak. Civ. C. 302.

**Beneficial Powers** are defined to be those where no other person than the donee has any interest in the execution : N.Y. 2,1,2,79 ; Mich. 5596 ; Wis. 2107 ; Minn. 44,7 ; Dak. Civ. C. 303.

**Powers in Trust.** A general power is defined to be *in trust* where any person or class of persons other than the donee is designated as entitled to the proceeds or any portion thereof, or other benefits to result from the alienation of the lands according to the power : N.Y. 2,1,2,94 ; Mich. 5611 ; Wis. 2121 ; Minn. 44,22 ; Dak. Civ. C. 305.

A power is in trust when any person or class, other than the donee, has by its terms an interest in its execution : Dak. Civ. C. 304.

§§ 1722,1727, and the provisions concerning the resignation and removal of trustees, apply also to powers in trust and the grantees of such powers : N.Y. 2,1,2,102 ; Mich. 5619 ; Wis. 2129 ; Minn. 44,30 ; Dak. Civ. C. 358.

A special power is defined to be *in trust* when the disposition authorized is limited to be made to any person or class other than the donee, or when any person or class other than the donee is entitled to any benefit from the disposition authorized by the power : N.Y. 2,1,2,95 ; Mich. 5612 ; Wis. 2122 ; Minn. 44,23 ; Dak. Civ. C. 306.

Every power is *absolute* by which the donee can in his lifetime dispose of the entire fee for his own benefit : N.Y. 2,1,2,85 ; Mich. 5602 ; Wis. 2112 ; Minn. 44,13 ; Dak. Civ. C. 340 ; Ala. 2207.

§ 1652. **General Principles.** Powers as they existed at common law [before these statutes] are abolished : N.Y. 2,1,2,73 ; Mich. 5590 ; Wis. 2101 ; Minn. 44,1 ; Dak. Civ. C. 296.

A *general* and *beneficial* power may be given to a married woman to dispose of, or devise, during her marriage and without the husband's concurrence, lands conveyed or devised to her in fee : N.Y. 2,1,2,80 ; Ind. 2984 ; Mich. 5577 ; Minn. 44,8 ; Kan. 114,16 ; Ky.<sup>a</sup> 113,4 ; Tenn.<sup>a</sup> 3009 ; Dak. Civ. C. 335.

And under such power she may create any estate as if unmarried : N.Y. *ib.* 130 ; Mich. 5646 ; Minn. 44,38 and 56 ; Ky.<sup>a</sup> ; Dak. Civ. C. 332.

And a *special* and beneficial power may be granted (1) to a married woman to dispose, during the marriage and without her husband's concurrence, of any estate less than a fee belonging to her in the lands to which the power relates : N.Y. 2,1,2,87 ; Mich. 5604 ; Minn. 44,15 ; Dak. Civ. C. 342 ; (2) to a life tenant of the lands embraced in the power to make leases for twenty-one years or less, to commence during his life : N.Y. ; Mich. ; Wis. 2114 ; Minn. ; Dak.

This power last mentioned is not assignable as a separate interest, but is annexed to his estate, and will pass by any conveyance of his estate unless specially excepted ; then it is extinguished : N.Y. 2,1,2,88 ; Mich. 5605 ; Wis. 2115 ; Minn. 44,16 ; Dak. Civ. C. 344.

It may be released by him to any person entitled to an expectant estate in the lands, and is thereupon extinguished ; N.Y. 2,1,2,89 ; Mich. 5606 ; Wis. 2116 ; Minn. 44,17 ; Dak. Civ. C. 345.

A mortgage executed by such tenant (or by a married woman by virtue of any beneficial power : N.Y. Mich., Minn., Dak.), binds the power in the same manner as the lands : N.Y. 2,1,2,90-91 ; Mich. 5607 ; Wis. 2117 ; Minn. 44,17 ; Dak. Civ. C. 346. And the effect is that the mortgagee is entitled in equity to an execution of the power so far as the satisfaction of his debt may require, and that any subsequent estate created by the donee becomes subject to the mortgage : N.Y. ; Mich. 5608 ; Wis. 2118 ; Minn. 44,19 ; Dak. Civ. C. 347.

No other special or general beneficial power is valid than those authorized in these sections : N.Y. 2,1,2,92 ; Mich. 5609 ; Wis. 2119 ; Minn. 44,20 ; Dak. Civ. C. 349.

NOTE. — <sup>a</sup> Such power must be to dispose by will only.

**§ 1653. Creation.** No person is capable of granting a power who is not at the same time capable of alienating some interest in the lands to which the power relates : N.Y. 2,1,2,75 ; Mich. 5592 ; Wis. 2103 ; Minn. 44,3 ; Dak. Civ. C. 307.

Powers must be created by deed in writing : Wis. 2302 ; Col. 1515. Compare § 1551.

A power may be created by deed or will : N.Y. 2,1,2,106 ; Mich. 5623 ; Wis. 2133 ; Minn. 44,34 ; Dak. Civ. C. 309 ; Ariz. 2119. See also §§ 1470,1551,1624, and the Statute of Frauds in Title VI.

A power may be vested in any person capable of holding lands : N.Y. 2,1,2,109 ; Mich. 5626 ; Wis. 2136 ; Minn. 44,37 ; in any person whatever : Dak. Civ. C. 308.

The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he could grant to another : N.Y. 2,1,2,105 ; Mich. 5622 ; Wis. 2132 ; Minn. 44,33 ; Dak. Civ. C. 310 ; Ala. 2208 ; and every power so reserved is subject to the provisions of this chapter as if granted to another : N.Y., Mich., Wis., Minn.

**§ 1654. Record.** A power is only valid against purchasers for value, without notice, from the time it is recorded : N.Y. 2,1,2,107 ; Mich. 5624 ; Wis. 2134 ; Minn. 44,25 ; Dak. Civ. C. 312 ; so, as against creditors, not until so recorded : Mich., Wis., Minn., Dak.

So, creations of powers must be executed in the same manner as deeds of conveyance : Io. 1934 ; Kan. 22,8 ; Neb. 1,32,3.

As against other persons, it is valid from the time the creating instrument takes effect : N.Y., Mich., Wis., Minn., Dak.

§ 1655. **Revocation.** Every power (beneficial or in trust: Ind., Wis., Minn.) is irrevocable, unless authority to revoke is granted or reserved in the instrument creating it: N.Y. 2,1,2,108; Ind. 2985; Mich. 5625; Wis. 2135; Minn. 44,36; Kan. 114,17; Dak. Civ. C. 311; Ala. 2217.

For record, see Title VI., Statute of Frauds; and compare §§ 1624,1673.

§ 1656. **Effect.** Where an absolute (§ 1651) power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee, absolute in respect to the rights of creditors or purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts: N.Y. 2,1,2,81; Mich. 5598; Wis. 2108; Minn. 44,9; Dak. Civ. C. 336; Ala. 2204.

When a general and beneficial power to devise the inheritance is given to a tenant for life or years, it is deemed an absolute power within meaning of above: N.Y. 2,1,2,84; Mich. 5601; Wis. 2111; Minn. 44,12; Dak. Civ. C. 339; Ala. 2207.

So also, if no particular estate is limited, the donee of the power takes a fee to the same extent as in the principal provision: N.Y. 2,1,2,82; Mich. 5599; Wis. 2109; Minn. 44,10; Dak. Civ. C. 337; Ala. 2205.

And if no future estate is limited on the estate of the donee, he takes an absolute fee: N.Y. 2,1,2,83; Mich. 5600; Wis. 2110; Minn. 44,11; Dak. Civ. C. 338; Ala. 2206.

Where a grantor reserves to himself for his own benefit an absolute power of revocation, he is deemed to be still the absolute owner of the estate conveyed, so far as concerns the rights of creditors and purchasers: N.Y. 2,1,2,86; Ind. 2982; Mich. 5603; Wis. 2113; Minn. 44,14; Kan. 114,14; Dak. Civ. C. 341; Ala. 2203. Compare also § 4592.

So, where a power to revoke a conveyance of any interest in lands and to reconvey the same is given to any person other than the grantor in such conveyance, and such person shall thereafter convey such interest to a purchaser for value, such subsequent conveyance is valid: Ind. 4918; Minn. 41,4. See also § 4592.

If a conveyance to a purchaser under either of the last two paragraphs is made before the person making the same is entitled to execute his power of revocation, it is valid from the time such power vests in such person: Ind. 4919; Minn. 41,5.

Every trust power, unless its execution is made to depend on the will of the donee, is imperative, and imposes a duty upon the donee of which the performance may be compelled in equity for the benefit of those interested: N.Y. 2,1,2,96; Mich. 5613; Wis. 2123; Minn. 44,24; Dak. Civ. C. 350.

And it does not cease to be imperative because the donee has a right of selection among the persons designated: N.Y. 2,1,2,97; Mich. 5614; Wis. 2124; Minn. 44,25; Dak. Civ. C. 351.

Every estate or interest given by a parent to a descendant by virtue of a beneficial power, or a power in trust with right of selection, is deemed an advancement to such descendant to the same extent and under the same circumstances that a gift of real or personal estate would so be: Mich. 5643; Minn. 44,53.

§ 1657. **Claims of Creditors.** A special and beneficial power is liable in equity to the claims of creditors in the same manner as other interests that cannot be reached by execution, and execution of the power may be decreed for the benefit of the creditors: N.Y. 2,1,2,93; Mich. 5610; Wis. 2120; Minn. 44,21; Dak. Civ. C. 348; Ala. 2220.

The execution in whole or in part of any trust power may be decreed in equity for the benefit of the creditors or assignees of any appointee, when the interest of the appointees is assignable: N.Y. 2,1,2,103; Mich. 5620; Wis. 2130; Minn. 44,31; Dak. Civ. C. 356.



Every beneficial power, and the interest of any person entitled to compel the execution of a trust power, passes to the assignees of such donee or appointee under any general assignment authorized by law for benefit of creditors: N.Y. 2,1,2,104; Mich. 5621; Wis. 2131; Minn. 44,32.

§ 1658. **Execution.** (See also in Part IV., Equity Jurisdiction.) If a donee, with right of selection, dies leaving the power unexecuted, its execution shall be decreed in equity for the benefit of the appointees equally: N.Y. 2,1,2,100; Mich. 5617; Wis. 2127; Minn. 44,28; Dak. Civ. C. 354; Ala. 2214.

Where a disposition under a power is directed to be made to or among or between several persons, without any specification of the share to be allotted to each, all the appointees share equally: N.Y. 2,1,2,98; Mich. 5615; Wis. 2125; Minn. 44,26; Dak. Civ. C. 352; Ala. 2213.

But if the terms import that the donee may appoint as he sees fit, he may allot the whole to one or more of the appointees to the exclusion of the others: N.Y. 2,1,2,99; Mich. 5616; Wis. 2126; Minn. 44,27; Dak. Civ. C. 353; Ala.

If the disposition is directed to be made to or among the children of any person, without restricting it to any particular children, it may be made in favor of the grandchildren or other descendants: Ala. 2216.

If a power in trust has been created by will and no donee named, its execution devolves on the court: N.Y. 2,1,2,101; Mich. 5618; Wis. 2128; Minn. 44,29; Dak. Civ. C. 355.

Where there is defective execution, in whole or in part, of a power in trust, proper execution may be decreed in equity in favor of the appointees: N.Y. 2,1,2,131; Mich. 5647; Wis. 2154; Minn. 44,57; Dak. Civ. C. 357; Ga. 3167.

And purchasers for value claiming under such defective execution are entitled to the same relief in equity as if they were purchasers from an actual owner: N.Y. 2,1,2,132; Mich. 5648; Wis. 2155; Minn. 44,58; Dak. Civ. C. 333.

A power cannot be executed by a person incapable of aliening lands: N.Y. 2,1,2,109; Mich.<sup>a</sup> 5626; Wis.<sup>a</sup> 2136; Minn.<sup>a</sup> 44,37; Dak. Civ. C. 314.

The permitted period of suspension of the absolute right of alienation, in any instrument executing a power, shall be computed from the date of the power, not of the execution of such instrument: N.Y. 2,1,2,128; Mich. 5644; Wis. 2152; Minn. 44,54; Dak. Civ. C. 330.

And no estate can be conferred by this instrument which the appointee could not have taken under the instrument creating the power: N.Y. 2,1,2,129; Mich. 5645; Wis. 2153; Minn. 44,55; Dak. Civ. C. 331.

A power of sale or lease, unless expressly restricted, is taken to authorize either public or private sale or leasing: Pa. *Attorneys in Fact*, 5.

A special and beneficial power to lease land for more than the time limited in Art. 134, is void only as to such excess, but valid to authorize leases for the time allowed: Dak. Civ. C. 343.

NOTES.—<sup>a</sup> Except in the case of a married woman; see §§ 1652,1659.

§ 1659. **Form of Executing Instrument.** When a power is vested in several persons, all of them, or all the survivors,<sup>a</sup> must join to execute it: N.Y. 2,1,2,112; Mich. 5628; Wis. 2137; Minn. 44,39; Cal. 5860; Dak. Civ. C. 318; Ala. 2219.

A married woman may execute a power during marriage by grant or devise, as authorized by the power, without the concurrence of her husband, unless by terms of the power execution by her during marriage is expressly or impliedly forbidden: Pa. *Wills*, 21; Mich. 5627; Minn. 44,38; Dak. Civ. C. 315; N.Y. 2,1,2,110-1; but no power vested in married women during infancy can be executed before full age: N.Y., Mich., Dak.

The execution of a power must be by an instrument sufficient to pass the estate if the person executing were the actual owner: N.Y. 2,1,2,113; Mich. 5629; Wis. 2138; Minn. 44,40; Dak. Civ. C. 317; Ala. 2210. See also § 1652.



When the donor has directed its execution by an instrument not so sufficient, the power is not void, but it must be executed in accordance with these rules : N.Y. 2,1,2,118 ; Mich. 5634 ; Wis. 2143 ; Minn. 44,44 ; Dak. Civ. C. 321 ; Ala. 2212.

And the executing instrument (except when a will) must be attested, acknowledged or proved, and recorded, like any other deed : N.Y. 2,1,2,114 ; Mich.<sup>b</sup> 5630 ; Wis. 2139 ; Minn.<sup>b</sup> 44,41 ; Dak.<sup>b</sup> Civ. C. 328.

So, if a married woman execute a power by grant, such grant shall be acknowledged by her in the manner prescribed in Division II. in relation to conveyances by married women, and shall not be valid unless so acknowledged : Mich. 5633 ; Wis. 2142 ; Dak. Civ. C. 316 ; N.Y. 2,1,2,117.

Or, if a will, it must be duly executed according to the law of wills so as to be valid if the property subject to the power were the husband's : N.Y. 2,1,2,115 ; Mich. 5631 ; Wis. 2140 ; Minn. 44, 42 ; Va. 118,5 ; W.Va. 1882,84,4 ; N.C. 2139 ; Ky. 113,6 ; Dak. Civ. C. 319 ; Ala. 2211.

Where a power is to be executed by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the donee's death : N.Y. 2,1,2,116 ; Mich. 5632 ; Wis. 2141 ; Minn. 44,43 ; Dak. Civ. C. 320.

Where superfluous formalities are directed by the donor, their observance is not necessary to a valid execution : N.Y. 2,1,2,119 ; Mich. 5635 ; Wis. 2144 ; Minn. 44, 45 ; Va.<sup>d</sup> 118,5 ; W.Va. ;<sup>d</sup> N.C.<sup>d</sup> 2139 ; Ky. ;<sup>c,d</sup> Dak. Civ. C. 322. But this does not apply to wills in execution of a power made by married women : Ky.

The conditions of execution prescribed by the donor, if merely nominal and evincing no intention of actual benefit to the party in whose favor they are to be performed, may be wholly disregarded : N.Y. 2,1,2,120 ; Mich. 5636 ; Wis. 2145 ; Minn. 44,46 ; Dak. Civ. C. 323.

Subject to the above exceptions, the intentions of the donor as to mode, time, and conditions of execution are to be observed : N.Y. 2,1,2,121 ; Mich. 5637 ; Wis. 2146 ; Minn. 44,47 ; Dak. Civ. C. 324.

When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument of execution or certified in writing thereon, and the instrument itself or the certificate must be signed by such person : N.Y. 2,1,2,122 ; Mich. 5638 ; Wis. 2147 ; Minn. 44,48 ; Dak. Civ. C. 325 ; Ala. 2215.

And such signature must be duly proved or acknowledged before record, as if it were made to a conveyance of lands : N.Y., Mich., Wis., Minn., Dak.

If the consent of several persons is necessary, of whom some are dead, that of the survivors is sufficient : Dak. Civ. C. 326.

No disposition under a power is void because more extensive than the power authorized ; but every estate so created is valid so far as the terms of the power permit : N.Y. 2,1,2,123 ; Ind. 2983 ; Mich. 5639 ; Wis. 2148 ; Minn. 44,49 ; Kan. 114,15 ; Dak. Civ. C. 329 ; Ala. 2209.

Every instrument executed by the donee which he would have had no right to execute except under the power is deemed a valid execution, although such power is not referred to in it : N.Y. 2,1,2,124 ; Mich. 5640 ; Wis. 2149 ; Minn. 44,50 ; Dak. Civ. C. 327.

Lands embraced in a power to devise pass by a will purporting to convey all the real estate of the testator, unless the contrary intent appears expressly or by necessary implication :<sup>e</sup> N.Y. 2,1,2,126 ; Pa.<sup>e</sup> 1879,101,3 ; Mich. 5642 ; Wis. 2151 ; Minn. 44,52 ; Va.<sup>e</sup> 118,16 ; W.Va.<sup>e</sup> 1882,84,15 ; N.C.<sup>e</sup> 2143 ; Ky.<sup>e</sup> 113,22 ; Cal.<sup>e</sup> 6330 ; Dak.<sup>e</sup> Civ. C. 733 ; Mon.<sup>e</sup> Pr. C. 487 ; Uta.<sup>e</sup> 1881,44,1,2,14. For execution of powers under wills by married women, see above.

Instruments in execution of a power are affected by fraud in law and equity, like conveyances by owners or trustees : N.Y. 2,1,2,125 ; Mich. 5641 ; Wis. 2150 ; Minn. 44,51 ; Dak. Civ. C. 334.

NOTES. — <sup>a</sup> See in Probate Code, Part IV. <sup>b</sup> So, whether it be a power of revocation or otherwise. <sup>c</sup> Except in the case of a will by a married woman. <sup>d</sup> In the case of execution by will. <sup>e</sup> This provision is extended to personal property, and a bequest of the personal estate of the testator generally includes personal estate of which he has a general power to appoint, unless a contrary intention appear in the will.

**Art. 167. Powers of Attorney.**

§ 1670. **Execution.**<sup>a</sup> (A) Commonly a power of attorney to convey real estate must be executed (Art. 156), acknowledged or proved (Arts. 157-159), and recorded (Art. 161) in all respects like deeds: N.H.<sup>b</sup> 135,6; Mass. 120,14; Vt. 1935; Ct. 18,6,1,5; N.Y.<sup>b</sup> 2,3,39; N.J.<sup>b</sup> *Conveyances*, 16,17 and 64; O. 4108; Ind. 2920,2957; 1883,78,1; Mich.<sup>b</sup> 5690; Wis. 2237; Kan. 22,22-3; Neb.<sup>b</sup> 1,73,47; 1885,41; Md. 44,28; Del. 83,11; Va.<sup>b</sup> 117,1; W.Va. 1882,1491-2; N.C.<sup>b</sup> 1249; Ky. 24,13; Tenn. 2837; Mo. 694; Ark. 661-2; Cal. 7933; Nev. 255; Ida. 1874-5, *Conveyances*, 27; Mon. Prob. C. 503; Ala. 2157; Miss. 1179-80; N.M. 2765; Ariz. 2271.

(B) So, in others; but the power of attorney need be recorded only when or before the conveyance under it is made: Mass.; Ct. 18,6,1,11; N.J.; O. 4132; Ind. 1883, 78,2; Kan.; Md.; Del. 83,11; Ark.; Col. 209,214; Fla. 32,7.

(C) In others, it seems it *need not* be recorded at all: R.I.; N.Y.; N.J.; Mich.; Wis.; Minn. 40,27; Neb.; Va.; N.C.; Tex.; Ore.; Wy. See note *b*; also § 1624. And specially,

All letters of attorney and other powers in writing must be proved by two attesting witnesses before any mayor or city officer of the city or town where they are executed, and certified under the seal of such city, etc.: Pa. *Attorneys in Fact*, 1.

They may, unless they concern the conveyance of land by a married woman and are made out of the state, be acknowledged or proved, in addition to the modes prescribed for deeds, before a mayor of a city or clerk of a court of record, duly certified: N.C.

They may be proved within the state before any justice of the peace by one attesting witness: Pa. *ib.* 2.

A power of attorney to execute a sealed instrument must be sealed if a seal is necessary to validity of the instrument: Ore. Civ. C. 774.

Any power of attorney concerning any matter may be recorded, like deeds, in the county where the attorney is resident or the business is to be transacted: N.C.

Every letter of attorney, or other instrument containing a power to do any act other than conveyance of real estate as agent or attorney for another, may be acknowledged or proved in same manner as deeds; and thereupon be read in evidence: Mo. 501.

A power of attorney may be recorded in any county: W.Va. 1882,149,1.

The effect of recording a power of attorney is generally to make it evidence like deeds (see § 1625): Vt. 1936; N.Y.; N.J. *Conveyances*, 17; Mich.; Ore.; Wy. 1882,1,22; Miss.

Powers of attorney to convey real estate, and letters of attorney authorizing sales, contracts, collections, and transactions in respect to personal estate, when executed and proved or acknowledged in other states or countries in the manner required for other conveyances, may be recorded in like manner and with like effect: Pa. *Attorneys in Fact*, 7, *Deeds*, 70.

NOTES. — <sup>a</sup> Cf. § 1624. <sup>b</sup> Such record is optional, not necessary. See below, and § 1624, note *b*.

**§ 1671. Forms of Power of Attorney to sell Lands.**

Know all that I, A. B., of —, county —, do hereby appoint C. D., of —, county —, my attorney in fact, with full power to sell and convey in fee simple, with general warranty of title, all that land [description].

Witness my signature the —, 1880.

A. B.

Miss. 1184.

A power of attorney to transact any business need only to plainly express the authority conferred: Miss. 1186. See also Mo. *Forms*, 114.

When the attorney in fact executes the deed, he must subscribe the name of the principal to it, and his own name as attorney in fact: Cal. 6095.

An authority to sell or dispose of premises, if not restrained, will authorize the acknowledgment of a deed therefor: Del. 83,12.

§ 1672. **Acknowledgment.** The certificate of acknowledgment of an attorney in fact must be substantially in the following form: —

(1) State of —, }  
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name and quality of the officer] personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument as the attorney in fact of —, and acknowledged to me that he subscribed the name of — thereto, as principal, and his own name as attorney in fact.

Cal. 6192; Dak. Civ. C. 666.

(2) On this — day of —, 18—, before me personally appeared A. B., to me known to be the person who executed the foregoing instrument in behalf of C. D., and acknowledged that he executed the same, as the free act and deed of said C. D.

Minn. 1883,99,2; Mo. 1883, p. 20, § 1; *Forms*, 113.

§ 1673. **Revocation.** In three states a power of attorney to convey lands is deemed revoked when the instrument containing the revocation is recorded in the office where the power is, or would properly be, recorded: Md. 44,29; Tenn. 2030; Ark. 663.

So, in many states, no power which has been duly recorded is deemed revoked by any act of the party creating it until such revocation is recorded as above: N.Y. 2,3,40; Ind. 1883,78,1; Mich. 5692; Wis. 2246; Io. 1969; Minn. 40,29; Kan. 22,24; Neb. 1,73,19; 1885,41,14; Mo. 695; Cal. 6216; Ore. 6,35; Nev. 256; Dak. Civ. C. 673; Ida. 1874-5, *Conveyances*, 28; Mon. G. L. 204; Wy. 1882,1,23; Uta. 622; Miss. 1182; N.M. 2766; Ariz. 2272.

In one, a power of attorney is deemed in force until the agent or attorney has had notice of his principal's death or revocation of the power: Pa. *Attorneys in Fact*, 3. So, in one other, the death of principal does not operate as a revocation as to one who, without notice of such death, in good faith and without fraud deals with such agent believing, on good reason, that he is still such: Miss. 1183.

In Maryland, all payments of money, transfers of property, or other dealings made or had to or with any person acting under a power of attorney or other agency duly executed or created by any person within the state, are binding on the representatives or assignees of such person, although at the time of the payments, etc., he were dead or had assigned his interest, provided the person so paying, etc., to the attorney had not notice of such death or assignment: Md. 44,31.

§ 1674. **Delegation.** In Pennsylvania, any trustee or executor with power to convey real estate in the state may make a conveyance under such power by an attorney duly constituted: Pa. *Attorneys in Fact*, 4; *Trustees*, 69. But this does not authorize him to delegate the discretion vested in himself for the general management of the trust.

§ 1675. **Form of Deed by Attorney.** In Delaware, a deed by an attorney under a power may be acknowledged by him in any county: Del. 83,12.

It may be acknowledged by him in the same manner as by a principal grantor: Io. 1962.

He must acknowledge that he subscribed both the name of his principal and his own name as attorney in fact: Cal. 6192.

In Maryland, any person executing a deed conveying real estate as agent or attorney for another must describe himself and sign in the deed as agent or attorney: Md. 44,30.

But in two states, if in such deed the words of conveyance or signature are in the name of the attorney, it is as much the principal's deed as if they were in the name of the principal by the attorney, if it be manifest in the face of the deed that it should be construed to be that of the principal to give effect to its intent: Va. 112,3; W.Va. 82,3.

So, in two others, no deed under a power duly executed, etc., is invalid because the attorney is named therein, as such attorney, as the grantor, instead of his principal: Pa. *Attorneys in Fact*, 8; O. 4110; Miss. 1180; nor because the certificate of acknowledgment is so worded, but all such deeds are as valid, if within the power, as if executed by the principals in their own proper person: O., Miss.



And in New Jersey, generally, whenever any attorney duly authorized has failed to convey the title of his principal by reason of any informality in the recitals or in the subject-matter or the execution of the deed, the deed is nevertheless good as though the informality did not exist: N.J. 1883,203.

And in Tennessee, deeds may be signed either by the attorney for his principal, or by writing the name of the principal by him as agent, or by simply writing his principal's name if the agency appear on the face of the deed: Tenn. 2819.

§ 1676. **Amending Statutes.** In all cases where deeds conveying real estate have been executed by any person purporting to act as attorney in fact, which deeds have been recorded twenty years in the proper county, it is presumed until the contrary be shown that such conveyance was properly made by the attorney; and the deed passes the legal title to the estate conveyed: Tenn. 2901. So powers of attorney if duly recorded for twenty years are deemed valid, whether properly proved and acknowledged or not: Tenn. 2902. See also N.J. 1882,63.

## CHAPTER VI. — USES AND TRUSTS.

### Art. 170. Uses and Trusts in Land.

#### § 1700. Civil Law in Louisiana.

Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantages which it may produce, provided it be without altering the substance of the thing.

The obligation of not altering the substance of the thing takes place only in the case of perfect usufruct.

There are two kinds of usufruct: —

Perfect usufruct, which is of things which the usufructuary can enjoy without changing their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied, — as a house, a piece of land, furniture, and other movable effects.

An imperfect or *quasi* usufruct, which is of things which would be useless to the usufructuary if he did not consume or expend them, or change the substance of them, — as money, grain, liquors.

Perfect usufruct does not transfer to the usufructuary the ownership of the thing subject to the usufruct; the usufructuary is bound to use them as a prudent administrator would do, to preserve them as much as possible, in order to restore them to the owner as soon as the usufruct terminates.

Imperfect usufruct, on the contrary, transfers to the usufructuary the ownership of the things subject to the usufruct, so that he may consume, sell, or dispose of them as he thinks proper, subject to certain charges hereinafter prescribed.

Usufruct is an incorporeal thing, because it consists in a right.

Usufruct is divisible; for if this right is vested in several persons at a time, there is but one usufruct, which is divided among them, each having his portion. The reason is because the object of this right is the receiving the fruits of the thing, which are corporeal and divisible.

Usufruct may, from its origin, be conferred on several persons in divided or undivided portions: La. 533-539.

§ 1701. **General Principles.** In several states, except as in this article specified (see § 1703) all uses and trusts are expressly abolished: N.Y. 2,1,2,45; Mich. 5563; Wis. 2071; Minn. 43,1; Cal. 5847; Dak. Civ. C. 273; Ala. 2185-2186. See also Statute of Frauds (Title VI.) for other cases of void trusts.

*Except* (1) trusts arising by implication of law: N.Y. 2,1,2,50; Mich. 5568; Wis. 2076; Minn. 43,6; Cal. 5852; Dak. Civ. C. 279.

In Georgia, the technical rule that a use cannot be limited on a use, or a trust on a trust, is abolished; and the last trust will always be the one executed: Ga. 2315.



§ 1702. **The Statute of Uses** (27 H. VIII. c. 10) is, in a few states, re-enacted. Thus (A), in express terms, that if any person is seized of land to the use of another, the person entitled to the use is seized of the land and of the like estate therein as he has in the use; and the estate of the person so seized to the use shall be deemed to be in him that has the use, after such quality, form, manner, and condition as he had before in the use: Ill. 30,3; Mo. 3938; S.C. 1958-1960.

(B) In other states, all estates and interests in land are deemed a legal right, except as in §§ 1701,1703 specified; and every disposition of land must be made directly to the person in whom the right to possession and profits is intended to be vested: N.Y. 2,1,2,49 and 45; Mich. 5567,5563; Wis. 2071,2075; Minn. 43,1 and 5; Dak. Civ. C. 277.

(C) And in New Jersey, every person to whom the use of land has been or may be conveyed shall be deemed to be in as full possession of such land for all purposes as if he were possessed thereof by livery of seisin and possession: N.J. *Conveyances*, 66.

(D) So, in Delaware, the legal estate accompanies the use and passes with it: Del. 83,1.

(E) And the right to possess the land and receive the rents, in law or equity, makes legal ownership of the same quality as such beneficial interest: N.Y. 2,1,2,47; Mich. 5565; Wis. 2073; Minn. 43,3; Dak. Civ. C. 275; Ala.

(F) Every estate which is now held as a use, executed under the laws of the State as they formerly existed, is confirmed as a legal estate: N.Y. 2,1,2,46; Mich. 5564; Wis. 2072; Minn. 43,2; Dak. Civ. C. 274.

(G) And a disposition of land to one or more for the mere benefit of another, or in trust for such other without limitation, vests no estate, legal or equitable, in the trustee: N.Y. 2,1,2,49; Ind. 2981; Mich. 5567; Wis. 2075; Minn. 43,5; Kan. 114,13; Dak. Civ. C. 277; Ala. 2185.

E and G do not apply in the case of the trustees in an active existing trust: N.Y. 2,1,2,48; Mich. 5566; Wis. 2074; Minn. 43,4; Dak. Civ. C. 276,278.

(H) So, in an executed trust for the benefit of a person capable of taking and managing the property in his own right, the legal title is merged immediately into the equitable interest, and the perfect title vests in the beneficiary according to the terms and limitations of the trust: Ga. 2314.

**1703. Express Trusts.** In a few states, it is declared that express trusts may be created (by deed or devise) (1) to sell lands ( $\alpha$ ) for the benefit of creditors: N.Y. 2,1,2,55; 1841,261; Mich. 5573; Wis. 2081, Amt.; Minn. 43,11; ( $\beta$ ) to sell them and apply or dispose of the proceeds in accordance with the creating instrument: Cal. 5857; Dak. Civ. C. 282.

(2) To sell, mortgage, or lease lands for the benefit of legatees, or to satisfy any charge thereon: N.Y., Mich., Wis., Minn., Cal., Dak.

(3) To receive the rents and profits and apply them to the use of a person for his life, or a shorter time: N.Y.; Mich.; Wis.; Minn.; N.C. 1335; Cal.; Dak. Cf. § 1443.

(4) To accumulate rents and profits for the time by law allowed: N.Y. *ib.*; 1846,74; 1855,432; Mich.; Wis.; Minn.; Cal.; Dak. Cf. § 1443.

(5) For the benefit ( $\alpha$ ) of females: Ga. 2306; ( $\beta$ ) of minors: Ga.; ( $\gamma$ ) of insane persons: Ga.; ( $\delta$ ) of married women: Pa. *Trustees*, 57; Wis.

(6) Any person competent by law to execute a will or deed may by such instrument duly executed create a trust for any male person of age who is, on account of mental weakness, intemperate, wasteful, or profligate habits, unfit to be intrusted with the right and management of property; if at any time these grounds of trust cease, the beneficiary is legally and fully possessed of the trust estate (and any person interested may file a petition to terminate the trust): Ga. 2306.

(7) For the benefit of any person or persons, when such trust is fully expressed and clearly defined in the instrument, subject to the ordinary limitations of the laws against perpetuities (Art. 144): Mich., Wis.

(8) To receive and take charge of personal property and invest the same for the benefit of an express trust: Minn. (9) And also, real or personal property may be granted in trust (a) to any literary incorporation or college: N.Y. 1840,318,1; seminaries, colleges, universities: Ky. 13,1. Or (β) to the corporation of any city or town: N.Y. 1840,318,2. Or (γ) to common schools: N.Y. 1840,318,3. Or (δ) to historical societies: N.Y. 1879,203,1. Or (ε) to any "schools of learning:" Ct. 18,6,2; Ky. Or (ζ) "for the maintenance of the ministry of the gospel:" Ct.; for the use of churches: Ky. Or (η) "for the relief of the poor:" Ct., Ky.; of sick and maimed soldiers and mariners: Ky. (θ) For perpetually keeping in repair and preserving any tomb, or gravestone, or cemetery, to an amount not exceeding \$2,000: Wis. (ι) For the benefit of navigation: Ky.; (κ) of bridges: Ky.; (λ) ports: Ky. (μ) causeways: Ky.; public highways: Ky.; (ν) houses of correction: Ky.: (ο) hospitals: Ky.; asylums: Ky.; of idiots and lunatics: Ky.; deaf and dumb: Ky.; blind: Ky.; (π) in aid of young tradesmen: Ky.; (ρ) orphans; Ky.; (σ) redemption of prisoners and captives: Ky.; setting out of soldiers: Ky.

Or (10) "for any other public or charitable use:" Ct. (11) In Vermont, the court may so appoint trustees, when the use of real or personal property descends to a person for life or a term of years, and it has the same power in relation to such trust as in the case of guardians of minor children: Vt. 2293.

Generally, express trusts not above authorized vest no estate in the trustees, but may be valid as a power (§ 1727), subject to the provisions of Chap. V.: N.Y. 2,1,2,48; Mich. 5576; Wis. 2084; Minn. 43,14; Dak. Civ. C. 285.

And nothing in this article prevents the creation of a power in trust for any of the purposes above specified: Dak. Civ. C. 286.

§ 1704. **Receivers.** In most states, receivers appointed by a court exercising chancery jurisdiction may take and hold real estate upon such trusts and for such purposes as the court may direct. See Part IV.

§ 1705. **For Persons Disappearing,** see Art. 251, and in Probate Code, Part IV.

§ 1706. **Implied Trusts: Consideration.** No use or trust results to the person paying the consideration, but the title vests in the person named as alienee: N.Y. 2,1,2,51; Ind. 2974; Mich. 5569; Wis. 2077; Minn. 43,7; Kan. 114,6; Ky. 63,1,19.

*Except*, that such conveyance is *prima facie* fraudulent as against the creditors of the person paying the consideration: N.Y. 2,1,2,52; Ind. 2975; Mich. 5570; Wis. 2078; Minn. 43,8; Kan. 114,7; Ky. 63,1,20. And, if not disproved, a trust results in favor of creditors to the extent of their just demands: N.Y., Ind., Mich., Wis., Minn., Kan.

As where an alienee has taken an absolute conveyance in his name without consent of the person paying the consideration: N.Y. 2,1,2,53; Ind. 2976; Mich. 5571; Wis. 2079; Minn. 43,9; Kan. 114,8; Ky. 63,1,19. Or where an alienee, in violation of some trust, purchased the land with moneys not his own: N.Y., Ind., Mich., Wis., Minn., Kan., Ky.

Or where, by agreement and without fraudulent intent, the person to whom the conveyance was made was to hold the land or some interest therein in trust for the person paying the consideration or some part thereof: Ind., Kan.

But in one state, a trust is implied whenever the legal title is in one, but the beneficial interest, either from the payment of the purchase-money or other circumstances, wholly or partially in another: Ga. 2316.

So when a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of such other person: Cal. 5853; Dak. Civ. C. 280.

### § 1707. **Resulting Trusts.**

When an express trust is created, every estate and interest not embraced in the trust or otherwise disposed of reverts to the creator or his heirs as a legal estate: N.Y. 2,1,2,62; Mich. 5580; Wis. 2088; Minn. 43,18; Cal. 5866; Dak. Civ. C. 291; Ga. 2316.

### § 1708. Miscellaneous Cases.

A trust is also implied (1) where, from any fraud, one person obtains the title to property which rightly belongs to another: Ga. 2316. (2) Where, from the nature of the transaction, it is manifest that it was the intention of the parties that the person taking the legal title should have no beneficial interest: Ga.

It is provided that in all cases where a trust is sought to be implied, the court may hear parol evidence of the nature of the transaction, or the circumstances or conduct of the parties, either to imply or rebut a trust: Ga. 2317.

§ 1709. **Cy-Pres Doctrine.** In Pennsylvania, no disposition of property made for any religious, charitable, literary, or scientific use shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or ceasing or depending upon the discretion of a lost trustee, or being given in perpetuity or in excess of the annual value limited by law; but it is the duty of the court to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity: Pa. *Charities*, 18. And so also, when any estate, real or personal, is vested in trustees for the benefit of a class of persons which has become extinct, if there are no heirs to claim the fund, the trustees may petition the court for authority to apply it to the benefit of some other class of persons similarly situated: Pa. Ann. Dig. *Charities*, 2.

See also in Part III., *Charities*, and Part IV., *Equity*.

## Art. 171. Creation of Trusts.

§ 1710. **Form.** (A) Except such trusts as may arise by implication or operation of law, no trust concerning lands can, in nearly all states, be created or declared except by will or deed executed like other deeds (Art. 156) by the party making or creating the trust or his attorney: N.H. 135,13; Mass. 141,1; Me. 73,11; Vt. 1933; N.Y. 2,7,1,6; N.J. *Frauds*, etc. 3; Pa. *Frauds*, etc. 3; Ind. 2969, 4907; Ill. 59,9; Mich. 6180; Wis. 2302; Io. 1934; Minn. 41,10; Kan. 22,8; 114,1; Neb. 1,32,3-4; Mo. 2511-2; Ark. 3382-3; Cal.<sup>a</sup> 5852; Ore. Civ. C. 771-2; Nev. 283-4; Col. 1515-6; Dak. Civ. C. 279; Ida. Civ. C. 935; Uta. C. Civ. P. 1206-7; S.C. 1961-2; Ga. 2310; Ala. 2199; Miss. 1296; Fla. 32,2; Ariz. 2119; Mon. G. L. 160-1. See Statute of Frauds; compare §§ 1471,1551.

(B) So also, all grants or assignments of existing trusts must be in writing (whether they apply to real or personal property, in New York and New Jersey), and subscribed by the party making the same or his agent lawfully authorized, or they shall be void: N.Y. 2,7,3,2; N.J. *Frauds*, 4; Pa.; Ind. 4906; Mich. 6204; Wis. 2321; Minn. 41,9; Neb.; Mo.; Ark.; Ore. 6,52; Nev. 298; Col. 1527; Ida.; S.C. 1963; Miss. 1297; Fla. 32,3; Ariz.

NOTE. — <sup>a</sup> Such party declaring the trust may of course be the trustee himself, and it is so specified in California.

§ 1711. **Record.** Generally, the provisions for recording deeds apply to instruments creating a trust: Mass. 141,2-3; Me. 73,12; Ct. 18,6,1,13; Ind. 2970-1; S.C. 1969; Miss. 1296-7. The same would result, in other states, from the provisions of § 1710, A. And cf. § 1624.

So, in many, "no implied or resulting trust shall defeat the title of a purchaser or incumbrancer for value without notice:" Mass. 141,3; Me. 73,12; N.Y. 2,1,2,54; Ind. 2970; Mich. 5572; Wis. 2080; Minn. 43,10; Kan. 114,2; Cal. 5856; Dak. Civ. C. 281; S.C. 1968; Ala. 2200. And so, in several, no express trust unrecorded: Mass., Me., Ind., Kan.

But record of the instrument from which the trust is created or implied is notice: Ind. 2971; Kan. 114,3; Ala. 2201.



So, in South Carolina, but a trust instrument must be recorded under the provisions for the record of *mortgages* (§§ 1615,1859).

Any one of the beneficiaries has a process to compel the trustee to record the creating instrument : Pa. *Trustees*, 71.

In New Jersey, deeds of personal property are to be recorded by the county clerks : N.J. *Conveyances*, App. 1.

In Georgia, trusts for male persons of full age, on grounds mentioned in § 1703 (6), must be recorded where the beneficiary resides within three months of execution, or they are void : Ga. 2306.

**§ 1712. Words Necessary.** It is especially enacted that no formal words are necessary to create a trust estate : Ga. 2305.

And that whenever a manifest intention is exhibited that another person shall have the benefit of the property, the grantee shall be declared a trustee : Ga. No words of separate use are necessary to create a trust estate for the wife ; the appointment of a trustee, or any words sufficient to create a trust, operate to create a separate estate : Ga. 2307.

It is provided that precatory or recommendatory words will create a trust if they are sufficiently imperative to show that it is not left discretionary with the party to act or not, and if the subject-matter of the trust is defined with sufficient certainty, and if the object is also certainly defined, and the mode in which the trust is to be executed : Ga. 2318. Cf. § 1732.

**§ 1713. Louisiana Civil Law.** Usufruct may be established by all sorts of titles,—by a deed of sale, by a marriage contract, by donation, compromise, exchange, last will, and even by operation of law.

Thus the usufruct to which a father is entitled on the estate of his children during the marriage is a legal usufruct.

Usufruct may be established on every description of estates, movable or immovable, corporeal and incorporeal.

Usufruct may be established simply, or to take place at a certain day, or under condition ; in a word, under all such modifications as the person who gives such a right may be pleased to annex to it.

It may be granted to all such as may be possessed of an estate, even to communities or corporations : La. 540-543.

## **Art. 172. Rights of Parties.**

**§ 1720. Rights of Beneficiaries.** (A) Every valid express trust vests the whole estate in the trustees, in law and equity, subject only to the execution of the trust : N.Y. 2,1,2,60 ; Mich. 5578 ; Wis. 2086 ; Minn. 43,16 ; Cal. 5863 ; Dak. Civ. C. 288 ; Ala. 2186.

(B) And the beneficiaries take no estate or interest in the land, but may enforce the performance of the trust : N.Y., Mich., Wis., Minn., Cal., Dak., Ala. But this shall not prevent any person creating a trust from declaring to whom the land to which the trust relates shall belong, in the event of the failure or determination of the trust, nor shall it prevent him from granting or devising such lands, subject to the execution of the trust ; and every such grantee shall have a legal estate in the land as against all persons except the trustees and those lawfully claiming under them : N.Y. 2,1,2,61 ; Mich. 5579 ; Wis. 2087 ; Minn. 43,17 ; Cal. 5864-5 ; Dak. Civ. C. 289-90.

**§ 1721. Rights of Creditors.** Where there is no valid direction for accumulation, in a trust to receive the rents and profits of lands, the surplus beyond what is necessary for the education and support of the beneficiary is liable (in equity usually) to the claims of his creditors : N.Y. 2,1,2,57 ; Mich. 5575 ; Wis. 2083 ; Minn. 43,13 ; Cal. 5859 ; Dak. Civ. C. 284.

Any person may convey real estate to his children and their issue, during their lives, whether begotten or to be begotten, and in such conveyance may inhibit the alienation of such estate



during their lives; and the estate vests accordingly, and is not liable for the grantor's debts incurred after such conveyance: Ariz. 2287.

All estates, either real or personal, possessed in trust are liable for the debts, and subject to the charges, of the beneficiary, as if he held the legal title: Va. 112,16; W.Va. 82,16; Miss. 1204.

But property conveyed in trust under § 1703 (3) for the maintenance of a relation of the settlor is not liable for the debts of such relation, provided the clear annual income of the property at the time of the creation of the trust does not exceed \$500: N.C. 1335.

A beneficiary may contract debts for the protection or preservation of the trust estate, or for his own support and maintenance, when he has possession of the estate, or when the trustee refuses to provide for such expenses, which debts will be binding upon the trust estate: Ga. 2336.

A beneficiary may, if of full age and sound mind, voluntarily sell and convey any portion of her interest in such estate to any person, except her husband or her trustee; and, upon application to the court, such sale may be confirmed by the court in its discretion, and the proceeds reinvested under its order: Ga. 2337.

**§ 1722. Proceedings applicable to Trust Estates generally.** They are liable to any person for any labor or service rendered under a contract with the acting executor, administrator, or other trustee thereof, when such executor, etc., has died, become insolvent, or been removed, and the amount thereof is a charge on the estate (but this is not to apply to an executor *de son tort*): Ala. 3747.

**§ 1723. Rights of Third Parties.** In many states, no person who actually in good faith pays money to a trustee, which the trustee as such is authorized to receive, is responsible for the application of the money, nor shall his right and title so derived be prejudiced by reason of a misapplication thereof: N.Y.<sup>a</sup> 2,1,2,66; Ind. 2977; Mich.<sup>a</sup> 5584; Wis. 2092; Minn.<sup>a</sup> 43,22; Kan. 114,9; Mo. 3937; Cal. 7244; Dak.<sup>a</sup> Civ. C. 1311; Ga. 2329; Ala. 2197.

So, in Kentucky, where lands are devised to be sold on special or general trusts, or are conveyed or devised to trustees or executors in trust to be sold generally or for any special purpose, the purchaser shall not be bound to look to the application of the purchase-money, unless so expressly required by the conveyance or devise: Ky. 113,23.

So, in two others, the receipt by an executor, or any trustee, whether under a will or other instrument, for any money payable to him in the execution of his trust, shall discharge the person paying it from any liability to see to the application of said money, unless otherwise expressly provided in the instrument which creates: N.J. 1884,9; Miss. 1985.

But in two, the purchaser from a trustee, with actual or constructive notice of the trust, holds as trustee for the beneficiaries: Ga., Ala.

So, in California, other persons than as in A specified must at their peril see to the proper application of money or other property delivered by them.

NOTE. — <sup>a</sup> Applies also to powers in trust. See § 1651.

**§ 1724. Assignment.** In several states, the beneficiary of a trust for the receipt of rents or profits in lands cannot assign or dispose of his interest; otherwise if the trust be for the payment of a sum in gross: N.Y. 2,1,2,63; Ind. 2972; Mich. 5581; Wis. 2089; Minn. 43,19; Kan. 114,4.

But in two states, the beneficiary of a trust for the receipt of rents and profits or for an annuity arising therefrom may be restrained from disposing of his interest during his life or for a certain term of years [only] by express provision in the creating instrument: Cal. 5867; Dak. Civ. C. 292.

**§ 1725. Rights of Purchasers.** In a few states, when an [express] trust is expressed in the creating instrument, every sale, conveyance, or other act of the trustees in contravention of the trust, is absolutely void: N.Y. 2,1,2,65; Ind. 2973; Mich. 5583; Wis. 2091; Minn. 43,21; Kan. 114,5; Cal. 5870; Dak. Civ. C. 294.

So of any trust: Ind., Kan. And in Kentucky, no sale of real estate by a trustee by virtue of a deed of trust or pledge to secure debts is valid, nor does the conveyance by such trustee

pass the title, unless made under a judgment of court, or the maker of such deed or pledge join in a writing evidencing the sale: Ky. 63,1,22.

But where the trust is not contained in the instrument, though in fact created, the conveyance of the trustees is deemed absolute as in favor of (1) purchasers from them for value, without notice · N.Y. 2,1,2,64-65 ; Mich. 5582 ; Wis. 2090 ; Minn. 43,20 ; Cal. 5869 ; Dak. Civ. C. 293 ; or (2) as against the subsequent creditors of the trustee : N.Y., Mich., Wis., Minn., Cal.

#### § 1726. Testamentary Trusts.

The executors of any will to whom is given thereby a naked authority only to sell any real estate, shall hold the same, and have the same powers and authorities over it as if it had been devised to them to be sold : Pa.<sup>a</sup> *Decedents*, 71.

In North Carolina, a statute provides that property may be given or devised in trust to pay the profits annually or oftener for the support of a relation of the settlor, for the life of such relation with remainder ; and the property so conveyed is not liable in any way for the debts of such relation, whether contracted before or after the creation of the trust : N.C. 1335. But this provision applies only to trusts of which the clear income at the time of creation does not exceed \$500 : N.C.

Estates of any kind held in trust for another are subject to the like debts and charges of the person for whose benefit they are held as they would have been subject to if the person had owned the like interest in the thing holden as in the trust (whether trust be fully executed or not ; and it may be sold under execution so as to pass whatever interest the cestui may have, in Mississippi) : Miss. 1204 ; Ky. 63,1,21.

NOTE. — <sup>a</sup> The testator may, however, direct otherwise.

§ 1727. **Trusts valid as a Power.** When trusts are valid as a power the lands shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power : N.Y. 2,1,2,56 and 59 ; Mich. 5577 ; Wis. 2085 ; Minn. 43,15 ; Dak. Civ. C. 287.

A devise of land to executors or other trustees to be sold or mortgaged, where such trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees ; but the trust shall be valid as a power, and the lands shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power : N.Y. 2,1,2,56 ; Mich. 5574 ; Wis. 2082 ; Minn. 43,12 ; Dak. Civ. C. 283.

§ 1728. **Determination.** When the purposes for which an express trust has been created have ceased, the estate of the trustees ceases : N.Y.<sup>a</sup> 2,1,2,67 ; Mich.<sup>a</sup> 5585 ; 5619 ; Wis.<sup>a</sup> 2093 ; Minn.<sup>a</sup> 43,23 ; Cal. 5871 ; Dak.<sup>a</sup> Civ. C. 295.

In New York, if an estate is conveyed to trustees for the benefit of creditors without any other limitation, it is deemed discharged at the end of twenty-five years, and the remainder of the estate so conveyed reverts to the grantor.

NOTE. — <sup>a</sup> See § 1723, note <sup>a</sup>.

§ 1729. **Louisiana Civil Law.** All kinds of fruits, natural, cultivated, or civil, produced during the existence of the usufruct by the things subject to it, belong to the usufructuary.

Natural fruits are such as are the spontaneous product of the earth ; the product and increase of cattle are likewise natural fruits.

The fruits which result from industry bestowed on a piece of ground are those which are obtained by cultivation.

Civil fruits are rents of real property, the interest of money, and annuities.

All other kinds of revenue or income derived from property by the operation of the law or private agreement, are civil fruits.

The natural fruits, or such as are the product of industry, hanging by branches or by roots at the time when the usufruct is open, belong to the usufructuary.

Fruits in the same state, at the moment when the usufruct is at an end, belong to the owner, without being obliged to compensate the other for either work or seeds.

Rents and income of property, interest of money, and annuities, and other civil fruits, are supposed to be obtained day by day, and they belong to the usufructuary, in proportion to the duration of his usufruct, and are due to him, though they may not be collected at the expiration of his usufruct.

The usufruct of a house carries with it the enjoyment of the house, of the profits which it may bring, and indeed of such furniture as is permanently fixed therein, even should the title by which the usufruct is established make no mention of the same.

If the usufruct includes things which cannot be used without being expended or consumed, or without their substance being changed, the usufructuary has the right to dispose of them at his pleasure, but under the obligation of returning the same quantity, quality, and value to the owner, or their estimated price, at the expiration of the usufruct.

If the usufruct comprehends things which, though not consumed at once, are gradually impaired by wear and decay, — such as furniture, — the usufructuary has, in like manner, a right to make use of them for the purposes for which they are intended, and at the expiration of the usufruct he is obliged only to restore them in the state in which they may be, provided they have not been impaired through his fault or neglect.

And even should any of these things be entirely worn out by use at the expiration of the usufruct, the usufructuary is not bound to make good the same.

The usufructuary has a right to draw all the profits which are usually produced by the thing subject to the usufruct.

Accordingly, he may cut trees on land of which he has the usufruct, take from it earth, stones, sand, and other materials, but for his use only, and for the amelioration and cultivation of the land, provided he act in that respect as a prudent administrator, and without abusing this right.

The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened.

The usufructuary enjoys the increase brought by alluvion to the land of which he has the usufruct, but has no right to islands formed in a stream not navigable opposite the land; they belong to the riparian proprietors.

In like manner he has no right, not even the right of enjoyment, to the treasure which may be discovered in the land of which he has the usufruct, unless he himself has discovered it, in which case he shall only enjoy the right granted by law to such persons as find a treasure in a piece of land the property of another person.

The usufructuary enjoys the rights of servitudes, ways, or others due to the inheritance of which he has the usufruct; and if this inheritance is inclosed within the other lands of him who has established such usufruct, a way must be gratuitously furnished to the usufructuary by the owner of the land or by his heirs.

The usufructuary may enjoy by himself or lease to another, or even sell or give away his right; but all the contracts or agreements which he makes in this respect, whatever duration he may have intended to give them, cease of right at the expiration of the usufruct.

The usufructuary can maintain all actions against the owner and third persons which may be necessary to insure him the possession, enjoyment, and preservation of his right: *La.* 544–556.

**Of the Obligations of the Usufructuary.** The usufructuary takes things in the state in which they are; but he cannot obtain possession of the things subject to the usufruct without having caused to be made in presence of the owner, or after the owner has been duly summoned, if he be within the state, an inventory with the estimated value of the estate, both movable and immovable, subject to the usufruct, by a notary public duly authorized by the judge to that effect, and in the presence of two witnesses.

If the owner be absent from the state, and is not represented by any person therein, the judge shall appoint a counsel for him to assist at the inventory.

The usufructuary must give security that he will use, as a prudent administrator would do, the movables and immovables subject to the usufruct, and that he will faithfully fulfil all the obligations imposed on him by law and by the title under which his usufruct is established.

The amount of this security shall be the estimated value of the movables subject to the usufruct, according to the inventory, and such further sum as shall be fixed by the judge according to the nature of the immovable property subject to the usufruct, to answer for the damages which the usufructuary or those for whom he is responsible may commit thereon.



This security may be dispensed with, in favor of the usufructuary, by the act by which the usufruct is established.

Neither the father nor mother having the legal usufruct of the estate of their children, nor the seller nor the donor under the reservation of the usufruct, is required to give this security.

If the usufructuary sell, give away, or lease his right, he, as well as his security, is responsible for the abuse which the person to whom he has assigned his rights makes of the things subject to the usufruct, and the damage he may commit on them.

The usufructuary may, for the security required of him by law, give a special mortgage on immovable property of sufficient value and unincumbered lying within the State.

If the usufructuary does not give security or a special mortgage, as is prescribed in the preceding article, the immovables subject to the usufruct shall be leased at public auction.

Sums of money, the usufruct of which has been given, shall be put out at interest on good security, with the consent of the owner, and if he refuse, by the authority of the judge.

Movables subject to the same usufruct shall be sold at public auction, and the proceeds of the sale shall be put out at interest in the manner above prescribed.

The interest of such sums, the amount of the rent of the immovable and the products of the sequestered property shall, in such case, belong to the usufructuary.

In case the usufructuary does not give security, the owner has a right to insist that such furniture as grows worse by use be sold, that the proceeds may be placed at interest, as well as that of merchandise; and in that case the usufructuary enjoys the interest during the usufruct. Nevertheless, the usufructuary may claim, and the judge may order, according to circumstances, that a part of the furniture necessary for his use be left to him, under the simple obligation of returning the same at the expiration of the usufruct.

The usufructuary is bound to suffer the servitude which existed on the land of which he has the usufruct at the time his right commenced.

A delay to give security does not deprive the usufructuary of the profits to which he may have a right; they are due to him from the moment that the usufruct accrued.

It is the duty of the usufructuary to keep the things of which he has the usufruct, and to take the same care of them as a prudent owner does of what belongs to him.

He is accordingly answerable for such losses as proceed from his fraud, default, or neglect.

The usufructuary has a right to make useful and necessary improvements and repairs on the estate subject to the usufruct, and even to make such as are not necessary, but only to suit his own convenience, provided he do not injure the estate, or change its condition. But as to buildings existing on the land at the commencement of the usufruct, he must preserve them such as they have been transmitted to him, nor can he alter their form, distribution, or destination, even to improve it, without the consent of the owner.

He has, however, the right to make openings for windows and doors in the house in which he lives and of which he has the usufruct.

The usufructuary cannot finish buildings commenced by the owner, nor erect new buildings upon the land of which he has the usufruct, unless these buildings are necessary for working the land or for getting in the crops; he, however, may rebuild edifices and other works which have been destroyed or thrown down by time or accident.

The usufructuary cannot demolish or destroy what he has once built or constructed, nor take away the materials; he must abandon the whole to the owner at the end of his usufruct, without being able to claim any indemnity therefor.

It is understood that all these restrictions on the rights of the usufructuary, and others mentioned in this title of the Code, only take place, when there is no provision to the contrary in the act establishing the usufruct.

The usufructuary is liable to all the necessary expenses for the preservation and working of the estates subject to the usufruct.

The usufructuary is bound to make such repairs only as are indispensably necessary for keeping the estate subject to the usufruct in good order.

Repairs extraordinary are to be made by the owner himself, unless such repairs have become necessary in consequence of the usufructuary's neglect to make the repairs for keeping the property in good order since the usufruct has been acquired by him, in which case the usufructuary is bound to make such extraordinary repairs.

Extraordinary repairs are those of the principal walls and vaults, and the replacing of beams and roofs *in toto*, and the reconstruction of a levee entirely destroyed or carried away.

All others are ordinary repairs.



The usufructuary can be compelled to make, during the time of his usufruct, the repairs which he is bound to make, the same to be determined by experts, and under the penalty of being responsible to the owner for all damages caused by his default.

If between the time the usufruct commences and the time the usufructuary is put in possession, the owner makes any necessary repairs which the usufructuary would have been bound to make, the former has the right to claim of the usufructuary the price thereof, and may retain the possession of the things subject to the usufruct until the price is reimbursed.

The usufructuary can release himself from the repairs which he is bound to make, and even from the other charges of the usufruct, by abandoning it, even when the owner has instituted suit against him to compel him to make them or bear the expenses of them, and though the usufructuary be condemned in such suit.

But the abandonment will not have the effect of releasing the usufructuary from the charges of the enjoyment which he has already had of the usufruct, nor from the accountability for the damages which he, or persons for whom he is responsible, may have caused to it.

The usufructuary has no action against the owner to compel him to make the extraordinary repairs which the latter is bound to make. The usufructuary, on the refusal of the owner to make them, may advance the money necessary to complete them, and shall be reimbursed by the owner or his heirs at the expiration of the usufruct, they not being included in the improvements which he is obliged to abandon to the owner.

Neither the owner nor the usufructuary is bound to build again what has fallen to ruin owing to its antiquity, or has been destroyed by chance, when the ruin is total and entire; if it be only partial it forms the subject of ordinary repairs.

Nevertheless, if the owner wishes to rebuild what has been destroyed, or to make the extraordinary repairs for which he is bound, the usufructuary is bound to permit him, but in the manner the least inconvenient and onerous to himself, and he may prescribe to the owner a reasonable delay for the performance of the work.

The usufructuary is liable, during his enjoyment, to all the annual charges to which the things subject to the usufruct may be liable.

He is obliged to pay all taxes and contributions imposed on the property subject to the usufruct, as well as all ground-rents which may have been charged upon the property, previous to the commencement of the usufruct.

The usufructuary is also bound, during his enjoyment, to cause to be made and repaired the roads, bridges, ditches, levees, and the like, for which the estate of which he has the usufruct may be liable.

With respect to extraordinary or temporary charges, which may be imposed on things subject to the usufruct during its pendency, the usufructuary is bound to support them, unless they are of a nature to augment the value of the property subject to the usufruct.

In this last case the usufructuary is bound to pay them, and shall be reimbursed by the owner at the termination of the usufruct, for the capital expended only.

The legacy of an annuity or alimony left by a testator is to be wholly acquitted by the universal heir or legatee of the usufruct, and must be acquitted by the heir or legatee on a universal title, in proportion to his enjoyment, without any claim whatever to reimbursement on their part.

The particular legatee of a usufruct is not bound to pay the debts for which the estate is mortgaged: if he be compelled to pay them, he has action against the owner, subject to the provisions contained in the title: *Of donations inter vivos and mortis causa.* (Title VI.)

The universal usufructuary, or usufructuary under an universal title, whose usufruct has been constituted by an act *inter vivos*, in good faith and at a time not suspicious, is not bound for the debts of the owner, nor can he be sued for them, unless some part of the property subject to the usufruct be mortgaged for the payment of these debts, because with reference to the owner the usufructuary acquires under a particular title.

The universal usufructuary, or usufructuary under an universal title, whose usufruct has been constituted by an act or last will, is not directly bound for the debts of the testator; that is to say, the creditors of the succession have no action against him to force him to discharge the debts out of his own estate, saving their rights to cause to be seized the effects of the succession, and to proceed against the heir of the testator to obtain payment.

The heir of the testator who has bequeathed away the usufruct of his property, whether universally or under an universal title, can, when the creditors of the succession sue him, sell a part of the property subject to the usufruct sufficient to yield the sum necessary for the

discharge of the debts, in proportion to the sum for which the property subject to the usufruct is bound, if the usufructuary will not make an advance of this sum, as is mentioned in the following article.

If the legacy of the usufruct includes all the property of the testator, and the universal usufructuary will advance the sum necessary to discharge the debts of the succession, the capital shall be returned to him at the expiration of the usufruct without interest; but if he will not make this advance, the heir has the choice of making the necessary advance himself, for which the usufructuary shall allow him interest for the period of the usufruct, or to sell a part of the property subject to the usufruct, as stated in the preceding article.

If, on the contrary, the legacy includes only a certain proportion of the property of the testator, or the whole of a certain kind of property, the usufructuary under an universal title is bound only to contribute with the heir to the payment of the debts of the succession.

To establish this contribution, the value of the property subject to the usufruct, and that of the property remaining to the heir, is estimated, and the sum which they are each bound to contribute to the payment of the debts is fixed in proportion to this valuation.

After which, if the usufructuary will make an advance of the sum which he is bound to contribute, the capital must be returned to him without interest at the termination of the usufruct; but if he will not, the heir has the choice, either to pay this sum, in which case the usufructuary must pay him interest during the period of the usufruct, or to sell a part of the property subject to the usufruct, sufficient to meet the sum which the usufructuary is bound to contribute.

Usufructuaries, with the exception of fathers and mothers, as is hereafter provided, are bound only for such costs as result from law-suits concerning the enjoyment of the property subject to their usufruct, and for judgments which may have been given in such suits.

Nevertheless, in suits instituted for the recovery of the thing subject to the usufruct against the owner, the expenses must be divided between the usufructuary and him.

Fathers and mothers who enjoy the legal usufruct of the property of their children, are bound to support the expenses of all suits concerning that property, in the same manner as if they were the owners of it.

The usufructuary who loses, by non-usage on his part, a servitude belonging to the property subject to his usufruct, is responsible for it to the owner. He is also responsible to the owner if he permits a servitude to be acquired on the property by prescription.

If, during the period of the usufruct, a third person makes encroachments on the estates, or violates, in any other way, the rights of the owner, it is the duty of the usufructuary to give information of the same to the owner, and if he fails to do it, he shall be answerable for all damages which may result to the owner, as he would be for injuries committed by himself.

If the usufruct consists of only one head of cattle, which dies without any neglect on the part of the usufructuary, he is not bound to return another, or to pay the estimated value of the same.

If a whole herd of cattle subject to the usufruct dies owing to some accident or disease, without any neglect on the part of the usufructuary, he is bound only to return the owner the hides of such cattle, or the value of such hides.

If the whole herd does not die, the usufructuary is bound to make good the number of dead out of the new-born cattle, as far as they go.

At the expiration of the usufruct, the usufructuary has no right to claim any compensation for the improvements which he contends he has made, although the value of the thing may have increased by such improvements.

The usufructuary is bound at the expiration of his usufruct, to abandon, without compensation, not only the buildings and other works which he may have constructed upon the property, whether they have or have not foundation in the soil, but all other movable things which he may have attached to it permanently.

Nevertheless, he or his heirs may take away the looking-glasses, pictures, statues, and other ornaments, which he may have placed there, and which are fastened by plaster, lime, or cement, but under the obligation of re-establishing the premises in their former situation.

The usufructuary may set off against the damages which have been caused to the property of which he has the usufruct, the improvements which he has been obliged to abandon to the owner, provided the latter be of the description of those which by law he was authorized to make.

The undertaker or workman who has made, at the instance of the usufructuary, any build-

ing, work, or improvement on the property, and who is unpaid at the expiration of the usufruct, preserves his privilege on the same, and can enforce it against the owner under the modifications prescribed in the following paragraphs.

If the works consisted in repairs which the usufructuary was bound to make, or in buildings which he was authorized by law to make, the owner shall be obliged to pay what remains due to the workman, reserving always his recourse against the usufructuary or his heirs.

If, on the contrary, the works consisted of extraordinary repairs, which the owner was bound to make, he is obliged to pay the price to the workman, without any recourse against the usufructuary or his heirs.

If the works performed were not of the description of those which the usufructuary was authorized by law to make, the owner may retain them on paying the price of them to the workman, or he may oblige the usufructuary, or his heirs, to remove them at their expense, and in that case the workman will have recourse only against the usufructuary and his heirs, for the payment of the price of his work : La. 557-598.

**Of the Obligations of the Owner.** The owner of the thing subject to the usufruct is bound to deliver it to the usufructuary, or to suffer him to take possession of the same.

He must neither interrupt nor in any way impede the usufructuary in the enjoyment of the usufruct, or in any manner impair his rights.

He is not at liberty, either before or after the delivery of the thing, to make any alteration on the premises of things subject to the usufruct, whereby the condition of the usufructuary may become worse, although the estate itself may be bettered by them.

Hence he cannot raise an existing building, nor cause one to be erected in a place where there was none, unless it be with the consent of the usufructuary. He may still less cut down any trees of a wood, demolish a building, or make any other alteration to the injury of the usufructuary ; and if he does, he shall be bound to make good the losses and damages which may result.

The owner of an estate subject to the usufruct cannot create any new servitude thereon, unless it be done in such a manner as to be of no injury to the usufructuary.

If the usufructuary cannot have the enjoyment, because of some obstacle which the owner is bound to remove, the latter shall make good the losses and damages which are sustained by the non-enjoyment, as if there be an eviction or any other disturbance against which the owner is bound to warrant, or if he refuses the usufructuary any necessary servitude which he is bound to let him enjoy.

The owner is not bound to rebuild or repair that which happens to be demolished or damaged at the time that the usufruct is acquired, unless it happened by his fraud, or unless he was obliged by the title of the usufruct to put the property in good order.

The owner may mortgage, sell or alienate the thing subject to the usufruct, without the consent of the usufructuary, but he is prohibited from doing it in such circumstances, and under such conditions as may be injurious to the enjoyment of the usufructuary : La. 599-605.

**How Usufruct Expires.** The right of the usufruct expires at the death of the usufructuary.

The legacy made to any one of the revenues of a property is a kind of usufruct, which also ceases and becomes extinguished by the death of the legatee, if the contrary has not been expressly stipulated.

It is the same with all annual legacies as pensions of alimony and the like.

If the title of the usufruct has limited the right to it to commence or determine at a certain time, or in the event of a certain condition, the right does not commence or determine till the condition happens or the time elapses.

If the usufructuary is charged to restore the usufruct to another person, his right to the usufruct expires whenever the time for making such restitution arrives.

The usufruct granted until a third person shall arrive at a certain age lasts until that time, although the third person should die before the age fixed on.

The usufruct left to a surviving wife until her dowry be refunded, continues until the whole of it, capital and interest, is paid, unless the default of payment proceeds from her act.

If there be several heirs of the husband, and one of them has paid what he owes of the dowry, the usufruct terminates for his portion.

The usufruct which is granted to corporations, congregations, or other companies, which are deemed perpetual, lasts only thirty years.



If these corporations, congregations, or other companies are suppressed, abolished, or terminate in any other manner, the usufruct ceases and becomes united with the ownership.

The usufruct expires before the death of the usufructuary, by the loss, extinction, or destruction of the thing subject to the usufruct.

Thus the usufruct which is established upon a building expires, if the building is destroyed by fire or any other accident, or if it falls down through the decay of years.

In this case the usufructuary would not even have the usufruct of the materials of the building, nor of the place in which it stood; for the usufruct is to be restrained to what is specified in the title. But if the usufruct be assigned upon an estate of which the building is a part, the usufructuary shall enjoy both the soil and the materials.

If it happens that a part of the house be destroyed and that another part of it remains, the usufruct will be preserved of that part of the house which remains, and of the place on which the part of the house which is destroyed, stood, for such place makes a part of the house, and is an accessory to the part of it that remains.

The thing subject to the usufruct is considered as lost, when it undergoes from accident such a change in its form that it can no longer be applied to the use for which it was originally destined. Therefore the usufruct of a field or lot is extinguished, if one or the other be so covered with water by inundation that it becomes changed into a pond or swamp. But the usufruct revives if the inundation ceases, and the waters, on retiring, leave the land uncovered and in its former condition.

The changes made by the testator in the thing, the usufruct of which he has bequeathed, after having so disposed of it, do not produce the extinction of the usufruct, unless the legacy by which the usufruct is established is considered as revoked, according to the rules prescribed on this subject, in the title: *Of donations inter vivos and mortis causa.* (Title VI.)

Although the thing subject to the usufruct may be sold by the owner, or by his creditors upon an order of seizure, this sale makes no alteration in the right of the usufructuary, who continues to enjoy the same, unless he has formally renounced it. But if the thing subject to the usufruct was mortgaged by the person who granted such usufruct, before he granted it, the usufructuary may be evicted of his right in consequence of the claim of the mortgage creditors; but in that case the usufructuary has his action against the proprietor of the thing upon which the usufruct was assigned, as is provided in the third section of the present title. In the same manner, the usufructuary may be deprived of his usufruct by the seizure and sale which may be made of the same by his own creditors.

The usufruct may be forfeited likewise by the non-usage of this right by the usufructuary or by any person in his name during ten years, whether the usufruct be constituted on an entire estate, or only on a divided or undivided part of an estate.

The usufruct is extinguished by the usufruct and the ownership being vested in one and the same person; that is, when the owner acquires the usufruct, or when the usufructuary acquires the naked ownership. The reason is that no servitudes can be due by a thing to the owner of such thing.

If the usufructuary acquires the naked ownership, the usufruct is thereby so extinguished, that if afterwards he loses the ownership the entire ownership is lost to him, and the usufruct does not revive unless the title by which he acquired the ownership be annulled for some previously existing defect or some vice inherent in the act; for, in that case, the usufructuary never having been the owner, no consolidation has taken place, and the usufruct continues.

The usufruct may cease by the abuse which the usufructuary makes in his enjoyment, either in committing waste on the estate or in suffering it to go to decay for want of repairs, or in abusing in any other manner the things subject to the usufruct.

In such cases the judge may, according to the circumstances, decree the absolute extinction of the usufruct, or order that the owner shall re-enter into the enjoyment of the property subject to the usufruct, on condition that he shall pay annually to the usufructuary or his representatives until the usufruct expires a sum which shall be fixed on by the judge in proportion to the value of the property subject to the usufruct.

The usufructuary may prevent the re-entry of the owner, in case of damage committed by the former on the property subject to the usufruct, by offering to make the necessary repairs, and giving a sufficient security that he will make them within a certain fixed time.

The creditors of the usufructuary may intervene in all suits which arise between him and the owner on this subject, for the preservation of their rights, and may prevent the expulsion of the usufructuary by offering to repair the damages committed, and give security for the future.



The creditors of the usufructuary can cause to be annulled any renunciation which he may have made of his right to their prejudice, whether it be accompanied with fraud or not, and they are permitted to exercise all the rights of their debtor in this respect.

In all cases the renunciation of the usufructuary cannot be inferred from circumstances; it must be express.

When the usufruct has expired, it returns to and becomes again incorporated with the ownership; and from that time the person who had only the naked ownership begins to enter into a full and entire ownership of the thing.

Nevertheless, the usufructuary or his heirs have the right to retain possession of the thing subject to the usufruct, until they have been fully repaid for all expenses and advances, for which they have, by law, recourse against the owner or his heirs: La. 606-625.

**Of Use and Habitation.** Use is the right given to any one to make a gratuitous use of a thing belonging to another, or to exact such a portion of the fruits it produces as is necessary for his personal wants and those of his family.

The right of habitation is the right of dwelling gratuitously in a house the property of another person.

The rights of use and habitation are established and extinguished in the same manner as the usufruct.

The person having the use, if he be in possession of the thing affected with his right, as is said hereafter, and he who enjoys the right of habitation, are bound to furnish security and to make an inventory, in the same manner as the usufructuary, and under the rules, exceptions, and restrictions established on this subject in the chapter: *Of usufruct*.

But the person having the use is not bound to give security nor to make an inventory, if the thing remains in the possession of the owner, and his right is confined to exacting out of the fruits produced by the thing what is necessary for his personal wants and those of his family; for in relation to these fruits he is not bound to make any restitution.

The rights to use and habitation are regulated by the title which has established them, and receive accordingly a more or less extensive sense; it being well understood that these conventions do not exceed the limits of the laws on use and habitation; for if they do, they create other rights.

Thus a right to receive the fruits of a property and to sell and dispose of them freely would be a right of usufruct, and all the laws concerning usufruct would be applicable to it.

If the title be silent with respect to the extent of the right, the rights to use and habitation shall be determined by the following rules:—

That which distinguishes the usufruct of a property from the use of it is this, that the enjoyment of the usufructuary is not confined to what is necessary for his consumption, but he takes all the fruits, and can dispose of them as he pleases.

The person, on the other hand, who has only the use of an estate has a right only to such fruits as may be necessary for his daily wants and those of his family.

But he may claim so much of those fruits as may be necessary to supply the wants of the woman he has married, and of his children born since the use has been granted to him.

He who has the use of the fruits of an estate cannot go upon the estate to exercise his rights, still less is he permitted to live there, unless he have thereon a right of habitation; he has only an action against the owner to obtain from him such of the fruits as may be necessary for his daily wants and those of his family.

He who has the use may, therefore, cause to be fixed by the judge, from time to time, the proportion of fruits which he has a right to exact from the owner of the property; and this must be determined according to the condition of him who has the use, and the fortune of him who conferred the right, if the title be not explicit on this subject, and according to the increase or diminution of the family of him who has the use.

The right of use of a house and that of habitation being alike, are subject to the same rules.

He who has the use of a herd of cattle cannot make any other use of the same than by taking the milk necessary for his daily use and that of his family.

He who has the use of such things as cannot be used without being expended or consumed, — as money, provisions, or liquors, — has a right to use such things as the usufructuary may, and on the same terms.

Movables which, although not consumed entirely, are gradually worn out by use, — such as linen, furniture, ships, or boats, — are governed by the same rule.

There is this difference between the person who has the use and the usufructuary, that the person who has the use can neither transfer, let, nor give his right to another.

The right of the person who has the use is not only for one or more years, but it lasts during the life of such person, if the title upon which this right is grounded does not otherwise provide.

He who has a right to habitation in a house may reside there with his family, though he may not have been married at the time this right was granted to him.

The right of habitation is confined to what is necessary for the habitation of the person and of the family of the person to whom the right of use or habitation is granted.

But nothing prevents him who enjoys the right of habitation from receiving in the house, or the part of it which has been assigned to him, friends, guests, or even boarders, provided he inhabits it himself.

The right of habitation can neither be transferred, let, nor given to any one else ; it is, as well as the use, exclusively a personal right.

He who has the use, and he to whom the right of habitation has been granted, are bound to use those things of which they have the possession and enjoyment as prudent administrators would do, and to restore them to the owners at the expiration of their terms in the condition they received them, and not injured by their neglect or fraud.

If the person who has the use consumes all the fruits of the estate for his wants, or if he occupies the whole house, he is bound to defray the expenses of cultivation and plantation work ; he is liable to the ordinary repairs, to the payment of taxes, and to the other annual charges, in the same manner as the usufructuary is.

But if he receives only a part of the fruits of the estate, or if he occupies only a part of the house, he contributes his share of said expenses in proportion to what he enjoys : La. 626-645.

## Art. 173. Trusts in General.

§ 1730. **Definitions.** (A) The California Code divides trusts into (1) voluntary ; (2) involuntary trusts : Cal. 7215 ; Dak. Civ. C. 1288.

A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another ; an involuntary trust is created by operation of law : Cal. 7216-7 ; Dak. Civ. C. 1289-90.

The person whose confidence creates a trust is called the trustor ; the person in whom the confidence is reposed, the trustee ; and the person for whose benefit the trust is created, the beneficiary : Cal. 7218 ; Dak. Civ. C. 1291.

(B) So, an *executed* trust is one where everything has been done by the trustee required to secure the property or render certain the interest of the beneficiaries ; an *executory* trust, where some such thing remains to be done : Ga. 2313.

§ 1731. **Purposes.** A trust may be created for any purpose for which a contract may lawfully be made, except as in Art. 170 otherwise prescribed : Cal. 7220 ; Dak. Civ. C. 1293.

§ 1732. **Creation.** Subject to the provisions of Art. 171, a voluntary trust is created (A) as to the trustor and beneficiary, by any words or acts of the trustor indicating with reasonable certainty (1) an intention to create a trust, and (2) the subject, purpose, and beneficiary : Cal. 7221 ; Dak. Civ. C. 1294.

(B) As to the trustee, by any words or acts of his indicating with reasonable certainty (1) his acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence and (2) the subject, purpose, and beneficiary of it : Cal. 7222 ; Dak. Civ. C. 1295. Compare also § 1712.

§ 1733. **Obligations of Third Persons.** (For those of *trustees*, see Part IV., Division I.) Every one to whom property is transferred in violation of a trust holds it as an involuntary trustee under such trust, unless he purchased it in good faith and for value : Cal. 7243 ; Dak. Civ. C. 1310.

§ 1722, A, applies to all cases of trust : Cal. 7244 ; Dak. Civ. C. 1311.

**Art. 174. Trustees in General.**

§ 1740. **General Provisions.** (A) Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this article and Article 173, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information, which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control: Cal. 7219; Dak. Civ. C. 1292.

So, in Maine, a person placing property for any purpose in the hands of a trustee may petition court to have the appointment confirmed, and thereupon such trustee must give bond, account, and pay over estate at termination to the persons entitled, and he may be removed, as in other court trusts (Part IV., Division I.): Me. 68,15-17.

(B) One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner: Cal. 7223; Dak. Civ. C. 1296.

So, (C) one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is an involuntary trustee for the benefit of the person who would otherwise have had it, unless such possessor has some other and better right to it: Cal. 7224; Dak. Civ. C. 1297.

And (D) every one to whom property is transferred in violation of a trust is an involuntary trustee. See § 1733.

§ 1741. **Duties of the Trustee.** Any trustee, whether by voluntary or involuntary trust, is bound (A) to act in the highest good faith towards his beneficiary in all matters connected with the trust: Cal. 7228; Dak. Civ. C. 1298. He may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind: Cal., Dak.

(B) A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust in any manner: Cal. 7229; Dak. Civ. C. 1299; Ga. 2332.

The beneficiary may follow the trust-funds wherever they can be traced, and at his option affirm or reject an unauthorized investment by the trustee: Ga. 2333.

(C) Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except (1) when the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. (2) When the beneficiary not having capacity to contract, the proper court, upon the like information of the facts, grants the like permission; or (3) when some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above prescribed: Cal. 7230; Dak. Civ. C. 1300.

(D) A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary: Cal. 7231; Dak. Civ. C. 1301.

(E) No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust without the consent of the latter: Cal. 7232; Dak. Civ. C. 1302.

(F) If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary, in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed: Cal. 7233; Dak. Civ. C. 1303.

(G) Every violation of the provisions of this section is a fraud against the beneficiary of the trust: Cal. 7234; Dak. Civ. C. 1304.

§ 1742. **Presumption against Trustees.** All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence: Cal. 7235; Dak. Civ. C. 1305.



§ 1743. **Mingling Property.** A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events: Cal. 7236; Dak. Civ. C. 1306.

§ 1744. **Accounting.** A trustee using or disposing of the trust property for his own profit or for purposes unconnected with the trust (§ 1741, B) may, at the option of the beneficiary, be required to account for all profits so made (Cal.; Dak.; Ga. 2332), or to pay the value of its use; and if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest: Cal. 7237; Dak. Civ. C. 1307.

If, however, he use the property in a manner unauthorized by the trust, but in good faith and with intent to serve the interests of the beneficiary, he is liable only to make good whatever is lost to the beneficiary by his error: Cal. 7238; Dak. Civ. C. 1308.

§ 1745. **Co-Trustees.** A trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enabled the latter to commit; but for no others: Cal. 7239; Dak. Civ. C. 1309.

§ 1746. **Liability of Trustees.** In Georgia, the estate of a trustee dying chargeable with trust funds in hand shall be appropriated, first, to the payment of such indebtedness, after the funeral expenses, in preference to all other liens or claims whatever: Ga. 2338.

Any trustee or person acting in a fiduciary capacity who makes payments or delivers estate under order of court of competent jurisdiction, in good faith, and before an appeal is taken from such order, is not liable therefor, though the order be afterwards reversed: Ct.<sup>a</sup> 1875,28.

NOTE. — <sup>a</sup> Applies also to executors and administrators.

## CHAPTER VII. — EXPRESS TRUSTS.

§ 1750. **Note.** In California, these provisions apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including those of executors, administrators, and guardians as such: Cal. 7250; Dak. Civ. C. 1312. In Maine, the provisions of this chapter apply to executors who by provisions of the will become trustees by operation of law without express appointment: Me. 68,14.

### Art. 175. General Principles.

§ 1751. **Creation.** The mutual consent of a trustor and trustee creates a trust, of which the beneficiary may take advantage at any time prior to its rescission: Cal. 7251. When a trustee is appointed by a court or public officer, as such, such court or officer is the trustor, within the meaning of the last section: Cal. 7252.

So, in Georgia, it is declared that the acceptance of a trust is necessary to constitute a person trustee: the acceptance may be evidenced by acts as well as words; and after acceptance, no disclaimer will remove the character of trustee: Ga. 2339.

§ 1752. **Declaration.** The nature, extent, and object of a trust are expressed in the declaration of trust: Cal. 7253; Dak. Civ. C. 1315.

All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees or any of them, are to be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein: Cal. 7254; Dak. Civ. C. 1316.

§ 1753. **Extinction.** A trust is extinguished by the entire fulfilment of its object or by such object becoming impossible or unlawful: Cal. 7279; Dak. Civ. C. 1329.

§ 1754. **Revocation.** A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the benefi-



ciaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued: Cal. 7280; Dak. Civ. C. 1330.

For other provisions relating to trusts, see in Probate Code, Part IV., Division I.; as trusts are, in most states, treated together with the laws of executors, guardians, etc.

**Art. 176. Appointment of Trustees.** See Probate Code, in Part IV.

**Art. 177. Powers and Duties of Trustees.** See Probate Code, in Part IV.

**Art. 178. Inventory and Accounts.** See Probate Code, in Part IV.

**Art. 179. Removal and Resignation of Trustees.** See Probate Code, in Part IV.

**Art. 180. Foreign and Inter-State Cases.** See Probate Code, in Part IV.

**Art. 181. Sales by Trustees.** See Probate Code, in Part IV.

## CHAPTER VIII.—MORTGAGES, TRUST-DEEDS, AND LIENS.

### **Art. 185. General Principles.**

§ 1850. **Definitions.** In several states, every conveyance made to secure the payment of money or the performance of any other thing in the condition thereof stated, is held a mortgage: N.H. 136,1; Cal.\*<sup>a</sup> 7924; Dak.\*<sup>a</sup> Civ. C. 1724; Fla. 153,1.

So, in Florida, whether such conveyance be made by the debtor to the creditor directly, or to a third person, in trust for the creditor.

So, in several others, every deed conveying real estate which shall appear by any other instrument in writing to have been intended only as a security in the nature of a mortgage, though an absolute conveyance in terms, shall be considered as a mortgage: N.Y. 2,3,3; N.J. *Mortgages*, 21; Ill. 95,12; Neb. 1,73,25; Md. 66,42.

In the California Code a mortgage is defined to be a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession: Cal.\* 7920; Dak.\* Civ. C. 1722.

A "mortgage," as here used, includes both those made by a common deed of mortgage and those made by conveyance with a separate deed of defeasance: Mass. 181,44; Me. 90,1.

A mortgage is a "real obligation" (§ 1460): La. 2016.

And consequently all such conveyances are subject to the rules of foreclosure and other restrictions of law as mortgages: Fla.

NOTE.—<sup>a</sup> Except when, in the case of personal property, it is accompanied by transfer of possession; this being a *pledge*. (See Title VI.)

### § 1851. Louisiana Civil Law.

**General Provisions.** *Mortgage* is a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment.

*Mortgage* is a species of pledge, the thing mortgaged being bound for the payment of the debt or fulfilment of the obligation.

It resembles the pledge :

1. In that both are granted to the creditor for the security of his debt.
2. In that both bind the thing subjected to them, and that the same thing cannot be engaged to a second creditor to the prejudice of the first.

Mortgage differs from pledge in this : —

1. That mortgage exists only on immovables, ships, steamboats, and other vessels, or such other rights as shall be hereafter described, and that the pledge has for its object only movables, corporeal, or incorporeal.

2. That, in pledge, the movables and effects subjected to it, are put into the possession of the creditor, or of a third person agreed upon by the parties, while the mortgage only subjects to the rights of the creditor the property on which it is imposed, without it being necessary that he should have actual possession.

The mortgage is a real right on the property bound for the discharge of the obligation.

It is in its nature indivisible, and prevails over all the immovables subjected to it, and over each and every portion.

It follows then into whatever hands they pass.

The mortgage only takes place in such instances as are authorized by law.

The mortgage is accessory to a principal obligation which it is designed to strengthen, and of which it is to secure the execution.

Consequently, it is essentially necessary to the existence of a mortgage that there shall be a principal debt to serve as a foundation for it.

Hence it happens, that in all cases where the principal debt is extinguished, the mortgage disappears with it.

Hence also it happens that, when the principal obligation is void, the mortgage is likewise so ; this, however, is to be understood with certain restrictions which are established hereafter.

Mortgage is conventional, legal, or judicial.

*Conventional* mortgage is that which depends on covenants.

*Legal* mortgage is that which is created by operation of law.

*Judicial* mortgage is that which results from judgments.

Mortgage, with respect to the manner in which it binds property, is divided into general mortgage and special mortgage.

*General* mortgage is that which binds all the property, present and future, of the debtor.

*Special* mortgage is that which binds only certain specified property.

The following objects alone are susceptible of mortgage : —

1. Immovables subject to alienation, and their accessories considered likewise as immovables.

2. The usufruct of the same description of property, with its accessories, during the time of its duration.

3. Ships and other vessels : La. 3278-3289.

**Of Conventional Mortgages.** The *conventional* mortgage is a contract by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession.

A mortgage may be stipulated for the fulfilment of any obligation whatever, even for the performance of an act.

A mortgage may be given for an obligation which has not yet risen into existence ; as when a man grants a mortgage by way of security for indorsement, which another promises to make for him.

But the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it. The fulfilment of the promise, however, shall impart to the mortgage a retrospective effect to the time of the contract.

A mortgage may be given for a part only of the principal obligation.

It is not necessary that the mortgage should be given by the person contracting the principal obligation ; it may be given for the contract of a third person.

When a person has given a mortgage on his property for the obligation of a third party, it is necessary to inquire whether he only gave the mortgage, or whether he bound himself personally for the fulfilment of the obligation.

In the former case, that is, if he has only mortgaged his property, to secure the fulfilment of an obligation by a third person, no right of action exists against him personally, but merely an action of mortgage against the thing, to have it seized and sold, so that if it perishes, he who mortgaged it shall be released from every species of obligation.

On the other hand, if the person who has given a mortgage for another has bound himself personally for the fulfilment of the obligation, independently of the mortgage, there shall exist against him a right of personal action, and he shall not be released, even if the thing mortgaged should perish.

Although the nullity of the principal obligation includes that of the mortgage, this is to be understood, with respect to a person giving a mortgage for another, only in so far as the principal obligation is rescinded by an absolute nullity; for if the principal debtor has only obtained a rescission by a plea merely personal, such as minority or coverture, the mortgage given for him by a third person is not less valid, and shall have its full and entire effect.

Conventional mortgages can only be agreed to by those who have the power of alienating the property which they subject to them.

Such as only have a right that is suspended by a condition, and may be extinguished in certain cases, can only agree to a mortgage, subject to the same conditions and liable to the same extinction.

The property of minors, of persons under interdiction, of absentees and corporations, cannot be mortgaged by contract, in any other form and manner than that directed by law.

An attorney can only hypothecate the property of his principal, so far as he has a special power for that purpose.

Nevertheless, if the attorney, on effecting a loan for his principal, had granted a mortgage, and the latter had received the money for the loan, or if it had been usefully employed for his benefit, the principal would be bound to ratify the mortgage, and might be compelled to execute it.

If a person contracting an obligation towards another grants a mortgage on property of which he is not then owner, this mortgage shall be valid, if the debtor should ever after acquire the ownership of the property, by whatever right.

A conventional mortgage can only be contracted by an act passed in presence of a notary and two witnesses, or by an act under private signature. No proof can be admitted of a verbal mortgage.

Hypothecations of ships and other vessels are made according to the laws and usages of commerce.

To render a conventional mortgage valid, it is necessary that the act establishing it shall state precisely the nature and situation of each of the immovables on which the mortgage is granted.

A debtor may mortgage his whole present property or only a specific part; but in either case it ought to be expressly enumerated, as is said in the preceding article.

Future property can never be the subject of conventional mortgage.

To render a conventional mortgage valid, it is necessary that the exact sum for which it is given shall be declared in the act.

The conventional mortgage, when once established on an immovable, includes all the improvements which it may afterwards receive: La. 3290-3310.

**Of Legal Mortgages.** The law alone in certain cases gives to the creditor a mortgage on the property of his debtor, without it being requisite that the parties should stipulate it; this is called *legal mortgage*.

It is called also *tacit mortgage*, because it is established by the law without the aid of any agreement.

No legal mortgage shall exist, except in the cases determined by the present Code.

The rights and credits on which legal mortgage is founded are those enumerated in the following articles:—

Minors, persons interdicted, and absentees have a legal mortgage on the property of their tutors and curators, as a security for their administration, from the day of their appointment until the liquidation and settlement of their final account.

And the tutors and curators of such persons have a like mortgage on their property, as a security for the advances which they may have made.

There is a legal mortgage on the property of persons who, without having been appointed tutors of minors or curators of interdicted or absent persons, interfere in the administration of their property, reckoning from the day on which the first act of interference was done.



The children of a previous marriage, where the mother has married again without convoking a family meeting to determine whether or not they shall remain under her tutelage, have a legal mortgage on the property of the new husband for the acts of the tutorship thus unlawfully kept by the mother, reckoning from the day on which the new marriage took place.

When either of the parents of a minor shall cause to be adjudicated to him the property which he possessed in common with the minor, the property thus adjudged remains specially mortgaged in the minor's favor for the payment of the price of adjudication and interest, reckoning from the day on which it was adjudged.

There is legal mortgage, reckoning from the closing of the inventory, on the property of the surviving husband or wife, or heirs, who have been invested by the inventory with the care of the property of the community or succession, until they are relieved from their care or a partition has been made.

The wife has a legal mortgage on the property of her husband in the following cases : —

1. For the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and which she brought in marriage, reckoning from the celebration of the marriage.

2. For the restitution or reinvestment of dotal property which came to her after the marriage, either by succession or donation, from the day the succession was opened, or the donation perfected.

3. For the restitution or reimbursement of her paraphernal property.

The creditor who has a legal mortgage, except in the case where certain specific property is subjected to it, may exercise his right on all the immovables belonging to his debtor, and on such as may subsequently belong to him : La. 3311-3320.

**Of Judicial Mortgages.** The *judicial* mortgage is that resulting from judgments (whether these be rendered on contested cases or by default, or whether they be final or provisional) in favor of the person obtaining them.

The judicial mortgage takes effect from the day on which the judgment is recorded in the manner hereafter directed.

If there be an appeal from the judgment, and it is confirmed, the mortgage relates back to the day when the judgment was recorded.

When on the appeal the judgment has only been reversed in part, the mortgage still exists for that part which has not been altered or reversed.

The awards of arbitrators give rise to a mortgage only from the day that the homologation has been recorded.

Mortgages result from the judgment rendered in other states of the Union or in foreign countries, only in so far as the execution has been ordered by a tribunal of this state, in the manner prescribed by law.

Judgments obtained against a person deceased only bear a mortgage on the personal property of the heir from the day on which execution shall have issued against the heir by virtue of such judgments.

The judicial mortgage may be enforced against all the immovables which the debtor actually owns, or may subsequently acquire : La. 3321-3328.

**Of the Rank in which Mortgages stand with Respect to Each Other.** Among creditors, the mortgage, whether conventional, legal, or judicial, has force only from the time of recording it in the manner hereafter directed.

The tutors of minors, and the curators of interdicted and absent persons, as well as husbands, are bound to render public the legal mortgages with which their property is burdened, and for this purpose to require that the acts on which these mortgages are founded shall be recorded without delay in the office provided for that purpose.

The undertutors of minors shall be bound personally, and under the penalty of damages, to see that the records are made without delay of the mortgages incurred by the tutors of those minors for the fidelity of their administration.

In case of neglect on the part of husbands, tutors, undertutors, and curators, in causing to be made the recording ordained herein, it may be demanded by the relations of the husband or of the wife, and by the relations of the minor, interdicted or absent persons, or in default of relations, by their friends.

It may even be demanded by minors and married women, without any need on the part of the latter of authority from husbands or judges.

When, by the marriage contract, the parties, being of age, shall agree that the recording shall exist only on one or more immovables belonging to the husband, the immovables and



other property not included shall remain free and released from mortgage for the wife's dowry; but it cannot be stipulated that no recording shall be made.

The case shall be the same with respect to the immovable property of the tutor of the minor, or that of the curator of the interdicted or absent person, when the judge shall have authorized them in the manner prescribed by law to hypothecate a specific portion of their property by way of security for their administration, as is provided in the title: *Of Minors, their Tutorship and Emancipation*.

In the cases specified in the two preceding paragraphs, the husband, tutor, curator, and undertutor need only demand that the inscription on record shall be made for the immovables specially mortgaged.

If the mortgage has not been restricted at the time of appointing the tutor or curator, and if it be notorious that it exceeds the amount in which it is necessary for him to give security, it shall, at his request, be restricted to certain immovables which he shall point out, provided they are thought sufficient to afford a complete guarantee.

This request shall be made as in opposition to the undertutor of a minor, the undercurator of an interdicted person, or curator *ad hoc* appointed by the court for the absent person, and the judge shall receive the special mortgage offered if he thinks it sufficient, and with the advice of the family meeting in the case of a minor or person under interdiction.

The husband also, with the consent of his wife, if she be of age, may demand that the general mortgage on all his immovables on account of the dowry and other claims enjoying the same right, shall be restricted to the immovables which he shall indicate, and which he shall offer to mortgage specially for the preservation of his wife's right.

The judge to whom this demand is made may authorize the husband to give this special mortgage, if he thinks it sufficient, with the assent of five of the nearest relations of the wife, assembled in family meeting.

If the wife be a minor, the judge may still grant the authority, provided it be with the assent of a family meeting composed as in the preceding paragraph, and of a curator *ad hoc* appointed to the wife.

In all cases where the judge restricts the mortgage to certain immovables, the records or inscriptions made on the other property shall be erased: La. 3329-3341.

**Of Inscriptions of Mortgages — Of the Mode and Effect of Recording Mortgages.** Conventional mortgage is acquired only by consent of the parties, and judicial and legal mortgages only by the effect of a judgment or by operation of law.

But these mortgages are only allowed to prejudice third persons when they have been publicly inscribed on records kept for that purpose and in the manner hereafter directed.

By the words *third persons* used in the foregoing paragraph, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded.

Consequently, neither the contracting parties nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulated, can take advantage of the non-inscription of the mortgage.

All mortgages, whether conventional, legal, or judicial, are required to be recorded in the manner hereafter provided.

The inscription of mortgages only binds the property of the debtor, when it has been made in the office of mortgages for the parish where the property lies.

If the debtor has immovable property lying in more than one parish, the inscription ought to be made in the office of mortgages for each of them.

No mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated.

Any person entitled to a mortgage or privilege on the property of another person must cause the evidence of such mortgage or privilege to be recorded in the mortgage-book of the parish where the property is situated.

If the instrument on which the mortgage or privilege is based be an authentic act, a copy thereof shall be recorded; if it be an act under private signature, promissory note, or other written instrument, it must be proved up and recorded in the manner required for acts under private signature.

If there be no written instrument, the person claiming the mortgage or privilege, his agent, or some person having knowledge of the facts, must make affidavit of all the facts on which such mortgage or privilege is based, including the amount of the debt secured by the mortgage or privilege; and this affidavit must be recorded in the mortgage-book.

In all cases of special privileges the property subject to such privileges must also be described.

To preserve the legal mortgage or privilege existing in favor of a married woman, it shall be the duty of such married woman, or any person for her, to cause to be recorded in the mortgage-book of the parish where the property is situated the evidence of her mortgage or privilege. If such evidence be in writing, it shall be recorded in the manner required by law; if it be not in writing, then a written statement under oath, made by the married woman, her husband, or any other person having knowledge of the facts, setting forth the amount due to the wife, and detailing all the facts and circumstances on which her claim is based, shall be recorded.

Before fathers and mothers, who by law are entitled to the usufruct of property belonging to their minor children, shall be allowed to take possession of such property and enjoy the fruits and revenues thereof, they shall cause an inventory and appraisement to be made of such property, and cause the same to be recorded in the mortgage-book of every parish in the state where they or either of them have immovable property.

Whenever any person shall apply to be recognized, confirmed, or appointed as tutor, or shall have been recommended by a family meeting, the judge shall order, and it shall be the duty of such applicant to cause, a true and faithful inventory to be made of the movable and immovable property, credits, deeds, and papers belonging to the minor, and to cause the said property to be valued by two appraisers, appointed by the judge and duly sworn.

This inventory shall include the property situated out of the parish as well as that within the parish where the appointment is to be made.

After the inventory has been completed, the judge shall fix the amount of the bond which the tutor is bound to give.

This bond must be recorded in the mortgage-book of the parish in which the tutor resides, and a certificate to that effect, signed by the recorder of mortgages, must be presented to the judge before he can make the appointment, or authorize letters of tutorship to be issued.

In the several cases in which the tutor is not required by law to give bond, it shall be the duty of the clerk of the district court of the parish in which the appointment is to be made, to furnish a certificate of the amount of the minor's property, according to the inventory on file in his office. This certificate must be recorded in the mortgage-book of the parish in which the tutor resides, and a certificate to that effect, signed by the recorder of mortgages, must be presented to the judge before he can make the appointment, or authorize letters of tutorship to be issued.

The recording of the bond, or certificate of the clerk, as herein provided, shall operate as a legal mortgage in favor of the minor for the amount therein stated on all the immovable property of the tutor.

The tutor shall, within thirty days after his appointment, cause such bond or certificate to be inscribed in the mortgage-book of every other parish in the state in which he owns immovable property.

It shall be the duty of the undertutor to see that these inscriptions are made according to law.

The tutor's bond, or the clerk's certificate, as the case may be, recorded as provided in the preceding article, to preserve the mortgage against the natural tutrix, shall operate as a mortgage on the property, present and future, of the new husband in favor of the minor children of a previous marriage, when his wife has not been continued in the tutorship.

When immovable property has been adjudicated to the father or mother of a minor, the act of adjudication must be recorded in the mortgage-book of the parish where the property is situated.

Before any person shall be appointed curator of a person interdicted or absent, the bond required to be given in order to obtain the appointment must be recorded in the manner required for tutor's bonds above, and a relation or friend of such person may cause such bond to be recorded.

To preserve the legal mortgage against a person who, without having been appointed tutor of a minor, or curator of an interdicted or absent person, interferes in the administration of the property of such minor, interdicted, or absent person, it shall be lawful for any person to record in the mortgage-book of the parish where such intermeddler resides, and also in any parish where he has immovable property, the inventory, if there be any, of the property belonging to such minor, interdicted, or absent person, or other written evidence of

such property; and if there be no written evidence thereof, a statement under oath of its value. In all cases the person making the above record must state on oath the name of the intermeddler, and that he has actually interfered in the administration of the property belonging to such minor, interdicted, or absent person. All expenses incurred shall be paid by such minor, interdicted, or absent person.

To preserve the legal mortgage against the surviving husband or wife, or heirs, who have been invested by the inventory with the care of the property belonging to the community or succession, a certificate from the clerk of the court having jurisdiction, setting forth the amount of the inventory, shall be recorded in the mortgage-book of the parish in which such party invested with the care of the property is domiciled. The clerk who grants the certificate must have it recorded. Any person may legally cause such record to be made.

The recording of the instruments mentioned in the nine preceding paragraphs shall have the effect of preserving the mortgage or privilege; but they shall in no manner be evidence of the validity of the debt or claim other than the law may award to acts of the kind when unrecorded.

The creditors whose inscriptions have been made on the same day, possess a concurrent mortgage, and no distinction is made between the inscription made in the morning and that made in the evening, even although the recording officer may have noted the difference.

Mortgages given and inscribed within three months previous to the failure of the debtor shall be declared null, as presumed to be given in fraud of other creditors, unless the person in whose favor the mortgage was granted shall prove that he paid, in obtaining it, a real and effective value at the moment of the contract.

The word *fraud* used in the foregoing article means any unfair preference which the debtor may give to one of his creditors over the others, by selling or mortgaging to him a portion of his property for a debt existing before the contract.

The inscription of a judgment obtained against a debtor within ten days preceding his failure shall have no effect against the other creditors of the debtor, if it appears, from the time at which the suit was commenced and the manner in which it was conducted, that the debtor intended to favor the plaintiff, either by consenting that judgment should be rendered against him without the usual delays, or by not making a defence, or by confessing judgment when the cause admitted of contest.

An inscription made after the failure or on the day preceding it shall have no effect whatever against other creditors.

If a succession, which is administered by a curator or beneficiary heir, is not sufficient to satisfy the creditors, an inscription made by one of them after it is opened shall have no effect against the others.

Every notary who shall pass an act of sale, mortgage, or donation of an immovable, shall be bound to obtain from the office of mortgages of the place where the immovable is situated a certificate declaring the privileges or mortgages which may be inscribed on the object of the contract, and to mention them in his act, under penalty of damages towards the party who may suffer by his neglect in that respect.

If a person who has given a mortgage on his property takes advantage of the neglect to register the mortgage, and engages the same property afterwards to another person without informing him of the first mortgage, he shall be considered guilty of fraud, and shall be subject to such damages towards the party suffering thereby as the nature of the case may require.

To obtain an inscription of a public act or judgment, the creditor, either in person or by an agent, shall present an authentic copy of the act or judgment to be recorded to the register of mortgages of the place where the inscription is to be made.

If it be an act under private signature bearing a mortgage, the creditor can only have it registered when it has been acknowledged by the mortgagor, or proved by the oath of one of the subscribing witnesses, unless the register be acquainted with the signature of the parties, and shall agree, on his own responsibility, to make the inscription on the original act being presented to him.

The inscription of acts on which privileges are founded when they are subjected to this formality, as also donations, shall be made in the same manner as that of mortgages.

The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made.



But this rule does not obtain with regard to the mortgages to which husbands are subjected for the dowry and other claims of wives, and tutors, and curators towards minors, interdicted and absent persons, whose estates they administer.

The reinscription of mortgages is also dispensed with in certain cases provided for by special laws.

It shall be the duty of notaries, and other public officers acting as such, to cause to be recorded without delay all acts creating mortgages which shall be executed by them, whether such mortgages be conventional or legal. It shall also be the duty of judges to cause to be recorded all legal mortgages resulting from appointments made by them of tutors of minors or of curators of interdicted persons or absentees; and in default thereof such notaries or judges shall be liable to an action in damages, and even to be removed from office, as the case may be: La. 3342-3371.

He who shall have subscribed in favor of another an act bearing a mortgage or privilege to secure the payment of a debt or the execution of an obligation, may, on the payment of the debt or performance of the obligation, require of the creditor a release of the mortgage or privilege, provided he will defray the expense of the act which it may be necessary to prepare for this purpose; and if the creditor refuse to grant this release, the other party shall have an action to compel him to grant it, and he shall be condemned to pay the costs.

If the debt for which a mortgage has been granted, or for which there exists a privilege, is payable at several terms, the debtor may, on the payment of each instalment, require a release from the creditor of the mortgage or privilege, in relation to the instalments thus paid, on the terms prescribed in the foregoing article.

But in the case supposed in the preceding article, and in all others where partial releases are given, the mortgage or privilege shall only be finally erased on payment of the last instalment of the debt, to insure which payment the whole property burdened shall always remain bound, until the complete discharge of the debt, together with the interest and costs that may have accrued.

If a debtor who had given a mortgage to his creditor on a certain portion of his property, or who had subscribed in his favor an act importing a privilege, has neglected, on paying the debt which gave rise to the privilege or mortgage, to obtain the release of it, and if the creditor should afterwards absent himself from the State, leaving behind no representative or attorney, he may obtain a decree for his release from any competent judge of the creditor's last place of residence, by proving to the judge, either by testimony in writing or by sufficient oral testimony, according to the nature and amount of the debt, that it has been fully discharged.

When such a demand shall be made before a judge of the last place of residence of the absent creditor, he shall direct that such creditor be cited by notices posted up at the usual places, and shall appoint a person to represent the absent creditor in the case.

When a person who has obtained a judgment on which an appeal lies, has had it recorded, if this judgment is afterwards reversed or confirmed in part only, the party against whom the inscription had been made may, on motion before the judge who rendered the judgment, after due notice to the other party, obtain an order for the erasure or reduction of inscription, as the case may require; and if it be a case for erasure, it shall be made at the expense of the party making the inscription.

If a debtor who has granted a mortgage or signed an act from which there results a privilege has given notes payable to order, and duly paraphed as hereafter directed, each holder of such notes may, on their being paid, raise the mortgage or release the privilege to the amount of the note or notes thus paid, of which he was the bearer.

Even the drawer of these notes may, if he has paid any of them in bank or in the holder's hands, obtain from the notary who paraphed them as hereafter directed, a certificate by which the said notary shall declare that the note or notes were secured by an act importing a mortgage or privilege, which was passed before him, mentioning the date of the act, the name of the contracting parties, and the objects which were subjected to the mortgage or privilege; and the register of mortgages shall, on the presentation of this certificate, raise the mortgages, according to the amount of the notes mentioned in the certificate, either partially, or entirely, as hereafter directed.

Every notary before whom an act shall have been passed by which notes to order have been given for the payment of a debt bearing a privilege or mortgage, shall attest each of the notes by putting his name on them, mentioning the date of the act from which the privilege or mortgage is derived, under the penalty of damages.



The recorder, to whom partial releases shall be presented resulting from payments made on a debt bearing a privilege or mortgage, shall make mention of these partial releases on the margin of the record of the act by which the privilege or mortgage is secured, but he shall not erase it entirely until the whole debt for which it was given shall have been discharged: La. 3376-3385.

**Of Mortgages — Of the Office of Mortgages and of the Duties of Recorders.**

There is established in each parish an office for the recording of mortgages, privileges, and donations.

This office is kept in the parish of Orleans by a particular officer, called the recorder of mortgages.

Out of the parish of Orleans the duties of this recorder are performed by the different parish recorders, within the limits of their respective parishes.

The recorder of mortgages for the parish of Orleans has his office in the city of New Orleans, and must keep two registers:—

The first to record all acts from which there results a conventional, judicial, or legal mortgage or privilege.

And the second to record all donations which have to undergo that formality.

These registers shall be numbered at each page, and signed *ne varietur* on the first and last page by one of the judges or a justice of the peace for the parish of Orleans.

The parish recorders must keep the same number of registers as the recorder of mortgages for the parish of Orleans, and shall number their pages, and have them signed *ne varietur* on the first and last page by the parish judge of their parish, or two justices of the peace for their parish.

Besides the registers above mentioned, the recorder of mortgages, and the parish recorders performing the same duties in the different parishes, shall keep a separate register, in which they shall set down from day to day, and according to their date, the title of the different acts transmitted to them to be recorded, for the purpose of establishing with exactness the time of such transmission.

This register shall be open to the inspection of all persons who may wish to examine it during the hours at which the office is kept open, but it cannot be removed.

In no case can the recorder of mortgages and the parish recorders fulfilling the same duties refuse or delay the recording of the acts which are presented to them for that purpose, or the delivery of the certificates which are required of them, as hereafter stated.

These officers shall record on their register the acts which are presented to them, in the order of their date, and without leaving any intervals or blank space between them; and they are bound also to deliver to all persons who may demand them a certificate of the mortgages, privileges, or donations which they may have thus recorded; if there be none, their certificate shall declare that fact.

The register of mortgages and the parish recorders performing the same duty are answerable for injury resulting,—

1. From omitting to record such acts as are directed to be recorded in their office.

2. From omitting to mention in their certificates one or several acts existing on their registers, unless in this latter case the error proceeds from a want of exactness in the description, which cannot be imputed to them.

The register of mortgages for the parish of Orleans shall furnish to the governor of the state one or more sureties to the amount of forty thousand dollars, for the faithful execution of the duties required of him by law, and for the payment of such damages as may be sustained by his failure to discharge such duties.

The fees to which the register of mortgages and the parish recorders performing the same duty are entitled for recording acts delivered to them and giving certificates, are regulated by special laws: La. 3386-3396.

**Of the Effects of Mortgages and Privileges with Regard to the Debtor.** The mortgage has the following effects:—

1. That the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor.

2. That if the mortgaged thing goes out of the debtor's hands, the creditor may follow it in whatever hands it may have passed, inasmuch that the third possessor of it is obliged either to pay the debt for which the thing is mortgaged or to relinquish it to be sold, that the creditor may be paid out of the proceeds thereof.

3. That the mortgagee has the benefit of being preferred to the mere chirographic or personal creditors, and even to the other mortgagees who are posterior to him in the date of the registry of their mortgages.

The mode of proceeding when the thing mortgaged is in the debtor's possession, and also when it is in the hands of a third person, is prescribed in the Code of Practice: La. 3397-8.

**Of the Effect of Mortgages against third Possessors, and of the Hypothecary Action.** The creditors who have either a privilege or mortgage on immovables may pursue their claims on them into whatever hands they may happen to pass, to be paid out of their proceeds according to their rank, provided that their titles have been registered according to law.

The third possessor of the immovable property mortgaged is bound either to discharge the principal, together with all the interest of the debt for which the property was mortgaged, to whatever sum they may amount, or to relinquish the property without any reservation.

In case the third possessor fails to comply with either of these obligations, every mortgage or privileged creditor is entitled to cause the immovable mortgaged or subject to privilege to be sold, if, thirty days after amicable demand of payment from the debtor, the debt has not been discharged.

The creditor who shall institute this action against a third possessor must make oath, at the foot of his petition, that the debt for which he prays the seizure of the thing on which he has a mortgage or privilege is really due to him, and that he has demanded payment of it without success thirty days before he presents his petition.

The third possessor, who is not personally liable for the debt, may, notwithstanding, within ten days from his being served with an order of seizure, oppose the sale of the property mortgaged which is in his possession, if he has good cause to show in support of such opposition, — as that the mortgage has not been registered, or other plea, or if there is other property mortgaged for the same debt within the possession of the principal debtor or debtors, in which last case the possessor may demand that his property be previously discussed in the form directed under the title, *Of Suretyship* [Division II.], and during the discussion the sale of the property mortgaged and in the possession of the third person shall be suspended.

The plea of discussion cannot be opposed to the creditors, who have either a privilege or a special mortgage on the property found in the possession of a third person.

The third possessor who wishes to avoid the action of mortgage may, before or after the order of seizure, declare that he relinquishes the property affected by the mortgage, and of which he has possession.

This relinquishment may be made by all third possessors, who are not personally bound for the debt, and who are capable of alienating; and it does not deprive them before the sale of the right of retaking the property mortgaged, which was in their possession, on discharging the debt, together with the interest and costs.

The act of relinquishment shall be executed before a notary public in the presence of two witnesses, and notified to the creditor or creditors who have brought the hypothecary action.

On the petition of the first of the interested persons who sues, a curator is appointed to the property relinquished, and under him the sale of the property is conducted in the manner prescribed by law.

The deteriorations which proceed from the deed or neglect of the third possessor, to the prejudice of the creditors who have a privilege or a mortgage, give rise against the former to an action of indemnification; but he can claim for his expenses and improvements only to the amount of the increased value which is the result of the improvements made.

The fruits or income of the property mortgaged are due by the third possessor, only from the time when the notification of the order of seizure was served on him: and in case of the discontinuance of the suit during one year, only from the day when a new notification of the order of seizure shall be served on him.

The servitudes and incorporeal rights which the third possessor held on the property before his possession of it, are renewed after his relinquishment, or after the sale under execution made upon him. His own creditors, after those who held their titles under the preceding proprietors, exercise their rights of mortgage in their order on the property relinquished or sold at auction.

The third possessor who has either discharged the mortgage debt or relinquished the

property mortgaged or suffered it to be sold under execution, has, according to law, an action of warranty against the principal debtor: La. 3399-3410.

**How Mortgages Expire or are Extinguished.** Mortgages are extinguished, —

1. By the extinction of the thing mortgaged.
2. By the creditor acquiring the ownership of the thing mortgaged.
3. By the extinction of the mortgagor's right.
4. By the extinction of the debt for which the mortgage was given.
5. By the creditor renouncing the mortgage.
6. By prescription: La. 3411.

§ 1852. **Nature.** In Georgia, it is declared that a mortgage is only security for a debt, and passes no title: Ga. 1954.

So, in others, the mortgagor is deemed owner of the land, and the mortgagee merely owner of the debt: Neb. 1,73,55; S.C. 2299; Miss. 1204. And so also, in Mississippi, the grantor in a trust-deed.

*Except* as against the mortgagor (or the grantor in a trust-deed) after breach of condition of the mortgage: Miss. Compare also § 1882.

The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession: Cal.\* 7923; Dak.\* Civ. C. 1723.

§ 1853. **What may be Mortgaged.** In Georgia, the statutes declare that a mortgage may embrace property in possession or to which the mortgagor has right of possession at the time, or it may cover a stock of goods or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches on the purchases made to supply their place: Ga. 1954.

So, in two states, a mortgage may be created upon property held adversely to the mortgagor (and see also § 1401): Cal.\* 7921; Dak.\* Civ. C. 1728.

In one a mortgage may be made of a growing crop or crops, to be grown within fifteen months of the mortgage: Miss. 1359. But such mortgage cannot be prior to the lien of the landlord (§ 2034), or person making advances to employers.

Mortgages upon crops planted or to be planted may be made of the same force and effect as of property already in being: Ark. 4749; Nev. 294.

Generally, any interest in real property which is capable of being transferred may be mortgaged: Cal. 7947; Dak. Civ. C. 1727.

Leases for years may be mortgaged like other estates: Pa. *Deeds, etc.* 140-1.

A mortgage of property held adversely to the mortgagor takes effect from the time when he or any one for him obtains possession; but has precedence over every lien upon his interest created after the record of such mortgage: Dak.\* Civ. C. 1728.

Mining claims and settlers' rights may be mortgaged, as real estate: Nev. 304. Compare also § § 1300, 1301, 1550. And see also § 4436.

§ 1854. **What may not be Mortgaged.** In two states, any mortgage, trust-deed, or other writing made by a husband or parent to give a lien on property which is exempt from distress or levy is void as to such property: Va. 112,6; 1877,222; W.Va. 82,6. See also *Homestead*, in Part IV.

§ 1855. **Extent of the Lien.** The mortgage is a lien upon everything that would pass by a grant of the property: Cal.\* 7926; Dak.\* Civ. C. 1731.

And title acquired by the mortgagor subsequently to the mortgage inures to the benefit of the mortgagee: Cal.\* 7930; Dak.\* Civ. C. 1727.

§ 1856. **Creation.** In one state, no conveyance in writing of real estate can be defeated, nor any estate incumbered, by any agreement not inserted in the condition of the conveyance and made part thereof: N.H. 136,2. And it must also state the sum of money to be secured or other thing to be performed.

A conveyance or other writing absolute on its face where the maker parts with the possession of the property conveyed by it, shall not be proved, at the instance of any of the parties, by parol evidence, to be a mortgage only, unless fraud in its procurement is the issue to be tried: Miss. 1299; Ga.\* 3309.

But in others, the fact that the transfer was made subject to a defeasance on condition may



for the purpose of showing it to be a mortgage be proved, except as against a subsequent purchaser for value without notice, though the fact does not appear by the terms of the instrument : Cal.\* 7925 ; Dak.\* Civ. C. 1726.

§ 1857. **Form.** For statutory forms, see §§ 1484-5.

In Georgia, the statute provides that no particular form is necessary to constitute a mortgage; but it must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect: Ga. 1955.

§ 1858. **Execution.** A mortgage is generally considered a deed and its execution governed by the same laws and formalities, as to execution and record, except in a few states as to time of record; see §§ 1551, 1615, 1624. This is expressly enacted in N.J. *Mortgages*, 20; O. 4133; Ind. 2931; Md. 44, 34; Ark.\* 4742; Cal.\* 7922, 7952; Dak. Civ. C. 1722 and 1738-9; Ga. 1956.

But in some states, there are special provisions; thus (1) a mortgage must be executed in the presence of and attested by, or proved before, a notary public, justice of any court, or clerk of the Superior Court, and also attested by one other witness, and recorded within thirty days from its date: Ga. 1955.

(2) Mortgages are only recorded in brief, unless the mortgagee request a record in full and pay the fees therefor: N.J. *Mortgages*, 17-18. But the record has effect as evidence like a record of deeds only when recorded in full.

In Georgia, it is provided that mortgages duly executed and recorded shall be admitted in evidence under the same rules as recorded deeds: Ga. 1958. [The same would follow in other states from § 1625.]

A mortgage is a lien on the mortgaged property from the time it is filed for record: <sup>a</sup> Ark.\* 4743. Such filing is notice to all the world: <sup>a</sup> Ark.\* See also § 1617.

In Georgia, a mortgage recorded in an improper office, or without due attestation or probate, or so defectively recorded as not to give notice to a prudent inquirer, shall not be held notice to subsequent *bona-fide* purchasers or younger liens; but a mere formal mistake in the record does not vitiate it: Ga. 1959. The due record of a mortgage, though not made in the time prescribed, is notice from the time of record to all the world: Ga.\* 1960.

The recorder must indorse on the mortgage the precise time of such filing: Ark.\* <sup>b</sup> 4744.

In Georgia, all the rules prescribed for the probate of deeds to land, where the witnesses are dead, insane, or removed from the State, or for the acknowledgment before or attestation by consuls or commissioners, apply to the probate of mortgages: Ga. 1961.

NOTES. — <sup>a</sup> For other states, see § 1617. <sup>b</sup> See § 1618.

§ 1859. **Unrecorded Mortgages.** An old statute of South Carolina provides that if there be more than one mortgage at the same time, of the same lands, the several mortgagees which have not recorded their mortgages may redeem any former recorded mortgage upon payment of the principal, interest, and costs of suit, to the prior mortgagee: S.C. 1781.

If not recorded, they are invalid as against the mortgagor, but are postponed to all other liens created or purchases made prior to their actual record, unless the party contracting or the purchaser have actual notice of the mortgage: Dak. Civ. C. 1732; Ga.\* 1957.

In New Jersey they are valid as between parties and their heirs, but void as against a subsequent judgment creditor, or *bona-fide* purchaser: N.J. *Mortgages*, 22.

See also § 1611.

§ 1860. **The Defeasance.**<sup>a</sup> In many states where a conveyance of real estate is made which by another instrument or writing shall be made defeasible, or shown to be by way of mortgage, such other instrument must be recorded therewith, or (A) the grantee takes nothing under the principal conveyance: N.Y. 2, 3, 3; N.J. *Mortgages*, 21; Neb. 1, 73, 25; Md. 66, 42; Del. 83, 18; Dak. Civ. C. 1740. (B) In others, however, unless the defeasance be recorded, the first conveyance passes an absolute title, except as against the maker of the instrument, his heirs, and devisees: Mass. 120, 23; Me. 73, 9; Pa. 1881, 91; Ind. 2932; Mich.



5686 ; Wis. 2243 ; Minn. 40,23 ; Kan. 68,2 ; Cal. 7950 ; Ore. 6,28 ; Dak. Civ. C. 1741 ; Wy. 1882,1,18 ; Ala. 2168.

And except as against persons having actual notice of the instrument of defeasance : Mass., Ind., Mich., Wis., Minn., Kan., Cal., Ore., Dak., Wy., Ala.

(C) And the first conveyance inures as an absolute title in the hands of a purchaser in good faith and without notice of the bond, etc. : R.I. 176,1-2.

Mortgaged property may, however, be sold under other process subject to the lien ; and if the mortgagee have foreclosed, he may authorize the unincumbered title to be sold and claim the proceeds according to the date of his lien : Ga. 1967.

NOTE. — <sup>a</sup> See also § 1856.

§ 1861. **Affidavit.** In Maryland, no mortgage shall be valid, except as between the parties, unless there is indorsed thereon the oath of the mortgagee that the consideration in said mortgage is *bona fide* and true as therein set forth : Md. 44,35.

This affidavit is to be made at any time before record, before any one authorized to take acknowledgments, and shall be recorded with the mortgage : Md. It may be made by one of several mortgagees : Md. 44,36. Or by an agent : Md.

§ 1862. **Priority of Mortgage Lien.** In Pennsylvania, when a mortgage is prior to all other liens on the property except other mortgages, ground rents, or sums due the State, it is not destroyed or in any way affected by (1) sale under *venditioni exponas* : Pa. *Deeds*, 104 ; (2) or by sale under *levari facias* in a suit on a subsequent mortgage : Pa. *ib.* 105 ; (3) or by *levari facias* on a *prior* lien for taxes : Pa. *ib.* 106 (in Philadelphia) ; (4) or by sale under any process of execution or judicial sale, except by decree of Orphan's Court : Pa. *ib.* 107 and 111-112. See also § 1864.

§ 1863. **The Condition.** In Georgia, it is expressly enacted that a mortgage may be made to sureties and guaranties to indemnify them against loss : Ga. 1963. The mortgagor is expressly authorized to covenant for the payment of all taxes and public dues that may be assessed upon the property : Md. 66,46.

In many states, mortgages can be given in lieu of official bonds.

**Attorney's Fees.** It is unlawful for any person to contract for payment of attorney's fees in any note, bill, bond, or mortgage, and such contract is void : Kan. 68,8a. So, in California, the attorney's fee in case of foreclosure shall be fixed by the court, any stipulation to the contrary in the mortgage notwithstanding : Cal. 10728, March 27, 1874. And in Minnesota, the amount of such fees which may be contracted for is limited by statute ; see Minn. 81,44. So, in Kansas, a fixed amount (five to eight per cent) is allowed by statute.

§ 1864. **To Secure Purchase-Money.** In several states, when lands are conveyed and a mortgage given by the purchaser at the same time to secure the purchase-money, such mortgage of such land is preferred (1) to any previous judgment or attachment obtained against the purchaser : N.Y. Civ. C. 1254 ; N.J. *Conveyances*, 77 ; Ind. 1089 ; Kan. 68,4 ; Md. 66,45 ; Miss. 1205.

(2) To all other liens created against the purchaser not first recorded : Cal. 7898 ; Dak. Civ. C. 1712.

In many states, such mortgage is valid against the wife of the purchaser, although she do not sign. See Art. 320. See also in Part IV., *Executions*.

§ 1865. **Mortgage Debt.** Premiums on fire insurance paid by the mortgagee are in Connecticut deemed a part of the mortgage debt, and must consequently be refunded by the mortgagor before a release can be required : Ct. 18,7,1.

No mortgage is a lien or charge upon the property for any other sum than as appears on the face of the mortgage : Md. 66,43 ; 1882,471.

No mortgage is a lien or charge for sums to be loaned or advanced after its execution, except from the time such loans, etc., are actually made : Md.<sup>a</sup>

No such mortgage is valid unless the amount of such loans, etc., and times when they are to be made, is specifically stated in the mortgage : Md.<sup>a</sup>

But this section does not apply (1) to mortgages of indemnity, to secure an indorser, etc. : Md. (2) Nor to mortgages by brewers and maltsters to secure debts for malt, etc. : Md.<sup>a</sup>

NOTE. — <sup>a</sup> Does not apply in Baltimore and Prince Georges Counties : Md. 66,44.

§ 1866. **Subsequent Conditions.** In New Hampshire, no estate conveyed in mortgage can be holden by the mortgagee for the payment of any sum of money or the performance of any condition which arises *after* the execution and delivery of such mortgage : N.H. 136,3.

§ 1867. **Covenants in Mortgages.** In several states, no mortgage implies a personal covenant for the payment of the sum secured, or other performance of the condition : N.Y. 2,1,2,139 ; Ind. 1087 ; Mich. 5656 ; Wis. 2204 ; Cal.\* 7928 ; Ore. 6,7 ; Dak.\* Civ. C. 1727 ; Wy. 1882,1,6.

There may, of course, be an express covenant to that effect : Cal., Dak.\*

And where there is no express covenant for such payment in the mortgage, and no bond or separate instrument to secure such payment, the mortgagee's remedies are confined to the land : N.Y. ; Ind. 1096 ; Mich. ; Wis. ; Ore. ; Wash. 610 ; Wy.

§ 1868. **Duration.** In South Carolina, no mortgage, judgment, decree, or other lien upon real estate shall constitute a lien upon any real estate after the lapse of twenty years from the date of creation of the same : S.C. 1831. But it may be continued if the mortgagee or holder file with the record a note of some payment on account, or some written acknowledgment of the debt secured thereby, for another twenty years : S.C.

§ 1869. **Assignment.** All mortgages, with the covenants, etc., therein, are assignable : N.J. *Mortgages*, 31 ; Fla. 153,4 ; by writing without a seal : N.J. The full estate of the assignor passes thereby : N.J., Fla. And the assignee may sue in his own name : N.J., Fla.

In such suit, set-offs are allowed which existed before notice of the assignment : N.J.

A married woman holding a mortgage in her own right may make such assignment without her husband : N.J.

§ 1870. **Form of.** An assignment must be signed and sealed : Md. 44,37. Compare §§ 1485,1551.

It may be made by entry on the margin of the record, signed by the mortgagee : Ind. 1093 ; Ky. 1876,850,2 ; Wy. 1882,1,27 ; and attested by the recorder : Ind.

A reference on the margin of the record of the mortgage must be made to the record of the assignment : Pa. Ann. Dig. 1875-6, *Deeds, etc.* 5 ; Ind. It is recorded in a blank left upon the record after the mortgage : Md. (For record of the assignment itself, see § 1624.)

The record of an assignment is notice of the assignment from the time it is duly filed or recorded : N.J. *Mortgages*, 32 ; Ind. 1094 ; Cal. 7934 ; Dak. Civ. C. 1735.

The assignment may be proved before a justice of the supreme court, if the witness is dead, insane, or out of the State, by proving his handwriting, as in the case of deeds : N.J. *Mortgages*, 35.

If the assignment be not recorded, the assignee is bound by a foreclosure against any previous holder : N.J. ; Ind. 1094. And he is also bound by a judicial sale ; and the vendee at such sale, if he had no actual notice, may hold the premises free of the mortgage lien, except that he may redeem like any other creditor within a year of such sale : Ind. 1094.

In several states, the record of the assignment of a mortgage is not notice to the mortgagor or his heirs so as to invalidate any payment made by them to the mortgagee : N.Y. 2,3,41 ; Mich. 5687 ; Wis. 2244 ; Minn. 40,24 ; Kan. 68,3 ; Neb. 1,73,39 ; Cal. 7935 ; Ore. 6,29 ; Dak. Civ. C. 1735 ; Wy. 1882,1,19.

But in New Jersey, so only when the assignment is not recorded, and the payment is made in good faith, and without actual notice : N.J. *Mortgages*, 34.

§ 1871. **Effect.** The assignment of a debt secured by mortgage carries with it the security : Cal.\* 7936 ; Dak.\* Civ. C. 1727.

So, in many, when a power of sale is given to the mortgagee or grantee in any conveyance to secure money, it is part of the security, and passes to any assignee of the mortgage or debt : N.Y. 2,1,2,133 ; N.J. *Conveyances*, 31 ; Ind. 2986 ; Mich.

5649; Wis. 2156; Minn. 44,59; Kan. 114,18; Md. 66,47; Cal. 5858; Ala. 2198.

Even to the assignee of a part only; *i. e.*, such power is divisible: Md.

And so, in several, as to all covenants and stipulations in the mortgage contained: N.J. *Mortgages*, 31; Fla. 153,4.

§ 1872. **The Assignment of the Estate Mortgaged**, subject to the mortgage, if there be a provision that the grantee shall assume and pay it, gives the holder of the mortgage a right to sue in his own name upon such promise, without obtaining an assignment from the grantor: Ct. 1881,97. But in Pennsylvania no grantee of real estate which is subject to a ground-rent mortgage, or other incumbrance, is personally liable therefor, unless he expressly assume such liability by agreement in writing, or there are express words in the deed or conveyance stating that the grant is made on condition of his assuming such liability, and the words "under and subject to the payment" of such ground-rent, etc., are not alone sufficient: Pa. Ann. Dig. 1877-8, *Real Estate*, 5. And the right to enforce such liability does not inure to any person other than the one with whom the agreement is made; nor does it continue after said grantee has *bona fide* parted with the property, unless he expressly assumed such continuing liability: Pa. *ib.* 6.

§ 1873. **Antichresis**. The antichresis shall be reduced to writing.

The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt.

The creditor is bound, unless the contrary be agreed on, to pay the taxes, as well as the annual charges, of the property which has been given to him in pledge.

He is likewise bound, under penalty of damages, to provide for the keeping and useful and necessary repairs of the pledged estate, saving himself the right of levying on their fruits and revenues all the expenses respecting such charges.

The debtor cannot before the full payment of the debt, claim the enjoyment of the immovables which he has given in pledge.

But the creditor who wishes to free himself from the obligations mentioned in the preceding articles, may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables.

The creditor does not become owner of the pledged immovable by failure of payment at the stated time; any clause to the contrary is null, and in this case it is only lawful for him to sue his debtor before the court in order to obtain a sentence against him, and to cause the objects which have been put in his hands in pledge to be seized and sold.

When the parties have agreed that the fruits or revenues shall be compensated with the interest, either in whole or only to a certain amount, this covenant is performed as every other which is not prohibited by law.

Every provision which is contained in the present title with respect to the antichresis cannot prejudice the rights which third persons may have on the immovable, given in pledge by way of antichresis, such as a privilege or mortgage.

The creditor, who is in possession by way of antichresis, cannot have any right of preference on the other creditors; but if he has by any other title some privilege or mortgage lawfully established or preserved thereon, he will come in his rank as any other creditor: La. 3176-3181.

## Art. 188. Of the Parties.

§ 1880. **Of the Mortgagor**. (For Louisiana, see § 1851.)

§ 1881. **Of the Mortgagee**. (For Louisiana, see § 1851.)

§ 1882. **Right of Possession**. Before breach a mortgage does not, in many states, entitle the mortgagee to the possession of the property (compare also § 1852); but the mortgagor has such right: Vt. 1258; Ind. 1086; Io. 1938; Kan. 68,1; Neb. 1,73,55; Cal.\* 7927; Dak.\* Civ. C. 1733.



*Except* by special stipulation in the mortgage: Vt., Ind., Io., Neb., Kan., Cal., Dak.

So, a mortgage of real property is not deemed a conveyance so as to enable the mortgagee to get possession without foreclosure: Minn. 75,29; Cal. 10744; Ore. Civ. C. 323; Nev. 1323; Wash. 546; Dak. Civ. C. 482; Mon. Civ. C. 359; Uta. C. Civ. P. 626; Fla. 153,2-3; Ariz. 2698. See also in Part IV., *Ejectment*.

And so, the mortgagor may, after execution, agree to such change of possession without a new consideration: Cal., Dak.

**§ 1883. Entry before Breach.** But in two states, any mortgagee or person claiming under him may enter on the premises or recover possession thereof, before a breach of condition, when there is no agreement to the contrary: Mass. 181,10; Me. 90,2.

But if the mortgagee so enter before a breach, in case the debt is afterwards paid or the mortgage redeemed, the amount of clear rent and profits from the time of the entry shall be accounted for and deducted from the amount due on the mortgage: Mass., Me.

In several, the mortgagor, in case of entry before breach, may deduct from the debt the rents and profits the mortgagee may have received over and above taxes and assessments paid out, and suitable repairs, insurance, and improvement, and all necessary expenses in the care and management of the estate: N.H. 136,8 and 10 and 13; Mass. 181,23; Me. 90,14 and 22; R.I. 176,3.

So, if the entry be after condition broken: N.H.

So, whenever a mortgagee has been in possession: Mass. 181,23; Me.; R.I.

Action may be brought against the mortgagee to recover excess of rents and profits received by him if no suit for redemption is brought against him: Mass. 181,43. And if such rents and profits do not amount to such expense, the excess is added to, and made part of, the debt: Mass.

**§ 1884. Waste.** No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security: Cal.\* 7929; Dak.\* Civ. C. 1733.

It is, in many states, made a penal offence (see Part V.) for the mortgagor or other person in possession to waste the property or injure it.

**§ 1885. Tacking.** It is enacted in Georgia, that no tacking of mortgages shall be allowed: Ga. 1962.

## **Art. 189. Trust-Deeds, etc.**

**§ 1890. Special Cases of Mortgage.** In Pennsylvania, there is special legislation concerning mortgages of mining rights: Pa. *Deeds*, 131-141. So in most of the Territories.

**§ 1891. Conditional Sales.** By the laws of Georgia, conditional sales, as distinct from mortgages, are expressly recognized: Ga. 1969.

Thus, where any person conveys real property by deed to secure any debt to any person loaning or advancing said vendor any money, and shall take a bond for titles back to said vendor upon the payment of such debt, such conveyance passes the title to the vendee till the debt have been fully paid, and is held an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt, and not a mortgage: Ga. 1969. But the consent of the wife must have been first obtained: Ga.

The debt is a lien upon the land prior to any other judgment against, or incumbrance of, the defendant: Ga. 1970. The rights of the vendee are enforced by sale of land: Ga.

The vendor's right to a reconveyance of such property is not affected by any liens or incumbrances made or suffered by the vendee: Ga. 1971.

**§ 1892. Trust-Deeds.** The law of mortgages generally applies to "trust-deeds" when it would not be repugnant; and cases where a special exemption of trust-deeds has been made have been indicated.



In Missouri, trust-deeds may, at the option of the creditor, be foreclosed and sold in like manner as mortgages: Mo. 3298.

If not so foreclosed, all trust-deeds where the property is sold by the trustee and bid in by the creditor or any one for him, are subject to redemption by the grantor within one year of sale, on payment of the debt, interest, and legal charges, and a deed will not be delivered until then, but only a certificate of sale: Mo. 3298.

§ 1893. **Removal of Trustee.** Where the trustee of a trust-deed has died or left the state or become incompetent to execute the trust, the court has power to appoint a trustee with all the powers of the original trustee: N.C. 1276.

See generally in Probate Code, Part IV.

§ 1894. **Sale by Trustee.** The trustee in such deed, whenever required by the beneficiary or any creditor or surety secured by such deed, after the debt is due and default made, shall sell the property at public auction (1) for cash, after reasonable notice of the sale: Va. 113,6; Ky.<sup>a</sup> 1873, Apr. 24, § 1; Wy. 1877, p. 95, §§ 2-3. (2) For one third cash, and the other thirds in one and two years, with interest, taking notes with good security and retaining the legal title as further security: W.Va. 64,6; 1882,140. He is to apply the proceeds (1) to the expenses and his commission of two per cent or one per cent; (2) to the payment of the debts secured or the indemnity of the sureties, etc.; (3) the surplus to the grantor or his heirs: Va.; W.Va.; Ky.<sup>a</sup> 1873, Apr. 24, § 4; Wy.

His commission may not exceed two per cent on the first \$1,000, one per cent on the excess from \$1,000 to \$15,000, and one half per cent on the excess over \$15,000: Mo. 3318.

But if a different provision as to terms of sale was inserted in the deed, upon such terms as are there mentioned, notice being, however, always given as below required: W.Va.

Such notice of sale must show the time and place of sale, names of parties, date and record of the deed, and the description of the land: W.Va., Wy.

It must be published once a week for four weeks, and posted, and a copy served on the grantor of the deed or his agent, etc., at least twenty days before the sale: W.Va. 64,7; 1882,140.

Thirty days, posting and publication: Wy.

NOTE. — <sup>a</sup> Applies only in cities having 75,000 inhabitants.

## Art. 190. Performance and Discharge.

§ 1900. **Effect of Performance.** In New Hampshire, upon the performance of the acts stated in the condition of any mortgage and the payment or tender of all damages and costs arising by reason of the non-performance of such condition according to the terms thereof, the mortgage is void: N.H. 136,4.

In others, payment of the money secured by a mortgage or trust-deed shall extinguish it, and revest the title in the mortgagor as effectually as a reconveyance would: Ala. 1885,6; Miss. 1207.

In Rhode Island, all real estate conveyed or pledged by mortgage or deed with defeasance shall be redeemable by the mortgagor or vendor, his heirs, etc., on paying the moneys borrowed thereon, with interest, etc., as in § 1883, or performing the condition: R.I. 176,3.

§ 1901. **Discharge by the Mortgagee.** And in most states, when the mortgage is satisfied, before or after breach at any time before foreclosure, the mortgagee is bound, upon request of the mortgagor and at his expense, to execute and acknowledge a sufficient re-conveyance, or enter satisfaction in the proper office: N.H. 136,5; Mass. 120,25; Vt. 1952; R.I. 176,6; Ct. 18, C. 21; Pa.\* *Deeds, etc.* 116; Ind. 1090; Ill. 95,8; Mich. 5704; Wis. 2256; Io. 3327; Minn. 40,37; Kan. 68,8; Neb. 1,73,29; Del. 83,22; Mo. 3311; Ark.\* 4745; Cal.\* 7941; Ore. 6,33; Nev. 266; Dak.\* Civ. C. 1735; Ida. 1874-5, *Conveyances*, 40; Mon. Ct. L. 216; Wy. 1882,1,29; Uta. 1884,42; S.C. 1791; Ala. 2222; Miss. 1206; Fla. 153,14; Ariz. 2284.

So, when it is paid in part: Ala. 1879,162.

The mortgagee is bound to execute such discharge (1) within seven days after such request: Mass.; Mich.; Wis. 2256, Amt.; Neb.; Nev.; Ida.; Mon.; Wy.; Ariz.; (2) immediately thereupon; Kan., Cal., Dak.\*; (3) within ten days thereafter: Vt., R.I., Minn., Ore.; (4) within thirty days: Ct.; Ill. 95,10; Mo. 33,12; (5) within sixty days: Io.; Del.; Ark.\* 4746; Fla.; (6) within three months: Pa.; S.C.; Ala. 2223; 1881,35; Miss. 1206.

§ 1902. **Penalty.** If the mortgagee fails to execute a proper discharge as required by § 1901, he is liable (A) for all actual damages sustained by the mortgagor: Mass. 120,25; Vt.; R.I. (and triple costs); Pa.\*; Mich.; Wis.; Minn.; Neb.; Del. 83,24; Cal.; Ida.

(B) And he is liable to the mortgagor for a penalty (1) not exceeding the mortgage debt: Pa.,\* Ark.,\* Miss.; (2) not exceeding half the mortgage debt: S.C. 1792; (3) not exceeding 10 per cent on the mortgage debt, *plus* actual damages: Mo.; (4) of from \$10 to \$500 besides actual damages: Del.; (5) of \$200: Ala.; (6) \$100 *plus* actual damages: Mich., Wis., Neb., Cal., Ore., Nev., Dak., Ida., Mon., Wy., Ariz.; (7) of \$100: Kan.; (8) of \$50: Ill.; (9) of \$5 a week: Ct.; (10) of \$25: Io.; (11) double the actual damages: Uta. 1884,42.

(C) In several, he has a petition or action to enforce redemption, or proper discharge in court, (1) within one year after payment or tender: N.H. 136,5-6 and 12; (2) at any time after the mortgage has been satisfied: Mich.; Va. 1884,527,6; W.Va. 1882,49,6; Uta.; S.C. 1793-4; (3) by payment into court of the sum due: Pa. *Deeds, etc.* 118; (4) within six months after payment to the mortgagee of the sum due: Pa. 1879,149. So, he has "further relief in chancery:" Vt.

The mortgagee is bound, upon request of the mortgagor, to make out and render a just account of all his demands secured by mortgage, damages and costs, and of all rents and profits by him received: N.H. 136,8; Mass. 181,29; Me. 90,14.

If he do not so, he is liable for costs upon suit for redemption by the mortgagor: Mass.

§ 1903. **Release of Part by Mortgagee.** In two states, the mortgagee may release part of the estate mortgaged and still have his lien on the rest: Pa.\* *Deeds, etc.* 113; Del. V. 11,612,1. So, of course, in all states.

§ 1904. **Payment by Instalments.** In Pennsylvania, where a mortgage is paid or payable by instalments, payments are to be entered on the record, and will discharge the lien *pro tanto*: Pa. *Deeds, etc.* 114.

§ 1905. **Mode of Release.** (A) A mortgage or trust-deed may, in most states, be discharged and released by entry upon the margin of the record: Mass. 120, 24; Me. 90,28; Vt. 1950; R.I. 176,6; Pa.\* *Deeds, etc.* 115; O. 4135-6; Ind. 1090; Ill. 95,8; Mich. 5701; Wis. 2247; Io. 3327; Minn. 40,36; Kan. 68,5; Neb. 1, 73,26; 1885,41; Md. 44,40; Del. 83,22; N.C. 1271; Ky. 24,12; Tenn. 2839; Mo. 3311; Ark.\* 4745; Cal.\* 7938; Ore. 6,30; Nev. 1881,12; Col. 234; Dak.\* Civ. C. 1735; Ida. 1874-5, *Conveyances*, 37; Mon. G. L. 213; Wy. 1882,1,27; Uta. 648; Ala. 2222; Miss. 1206; Fla. 153,14; Ariz. 2281.

To have such record made, it is necessary that the mortgagee, his or her legal representative, or the attorney duly authorized, should (1) acknowledge satisfaction in presence of the Register of Deeds: Vt., Mich., Kan., Neb., N.C., Ark.,\* Cal.,\* Ore., Nev., Dak.,\* Ida., Mon., Wy., Uta., Fla., Ariz.; (2) sign (and, in Rhode Island, seal) the entry in the record: Mass., Me., Vt., R.I., Pa., O., Ind., Mich., Wis., Minn., Kan., Neb., Md., Del., N.C., Ky., Tenn., Cal.,\* Ore., Col., Nev., Dak.,\* Ida., Mon., Wy., Uta., Miss., Fla., Ariz.; (3) the entry must be attested by the register: Mich., Wis., Kan., Neb., Md., N.C., Ky., Tenn., Cal.,\* Ore., Nev., Dak.,\* Ida., Mon., Wy., Uta., Fla., Ariz.

(B) Or, in many, by a certificate of the mortgagee, acknowledged or proved like a deed and recorded: N.Y. 2,3,28-9; N.J. *Mortgages*, 23 and 25; Ind. 1091; Mich. 5702-3; Wis.; Io.; Minn.; Kan. 68,6-7; Neb. 1,73,27; 1885,41; Tenn. 2839; Cal. 7939; Ore. 6,31-2; Nev. 264-5; Dak.\*; Ida. *ib.* 39; Mon. G. L. 214, 215; Wy. 1882,1,28; Uta. 649; Fla.; Ariz. 2282.

By a notary's certificate: La. D. 2401. Such record need not be at full length: Dak.\*

But a reference must be made (1) to it, and a minute of discharge entered, upon the record of the mortgage: N.Y.; N.J.; Mich.; Wis. 2253; Minn.; Kan.; Neb. *ib.* 28; Cal. 7940; Ore.; Nev.; Dak.\*; Ida.; Mon.; Wy.; Uta. 650; Ariz. 2283; (2) from it to the mortgage: Ind.; Neb. 1,73,28; Cal.; Dak.\*

(C) By a simple receipt indorsed on the mortgage and signed by the mortgagee: Vt. 1951; R.I.; N.J. *Mortgages*, 26; Pa. *Deeds, etc.* 119; O.; Kan. 68,5; Md. 44, 41; Col.

Such receipt must be under seal: Vt., R.I. It must be made in the presence of one witness: Vt.; of two witnesses: Pa. It must be recorded on the record of the mortgage: Vt., R.I., Pa., O., Kan., Md.

(D) Or, in many, by a separate deed of release executed and recorded like other deeds: N.H. 136,5; Mass. 120,24 and 26; Me.; Vt. 1952; R.I.; N.J. 1880,45,1; Mich.; Ill. 95,9; Del. 83,25; Va. 1876,124; 1884,527,1; W.Va. 1882,49,1; Mo.; Wy.

Reference must in such case be made by the recorder from the original record to such release: Ct. 3,3,3,6; Va. *ib.* 5; W.Va. *ib.* 5.

Or, (E) by copy of the decree of court recorded (see §§ 1902, C, 1907,1934): N.H. 136,7; N.J. *Mortgages*, 24; Mich. 5702; Minn.

§ 1906. **Form and Effect.** In New Jersey, when a deed of release is not recorded, or when the intention to operate as a release is not plainly manifest in the deed, any payment made in good faith and without actual notice of such release to the holder of the mortgage, and any assignment of such mortgage, is valid as if the release had not been made; and the lands so released will nevertheless be bound by any sale under the mortgage: N.J. 1880,45,3.

The entry on the record, or deed of release, required by this section may be made by one of two or more joint holders: Mass. 120,26.

Every discharge of a mortgage shall be entered by the register in the general index, and be subject to all the provisions of law as the other entries in such index: Wis. 2253; Neb. See also § 1624. It may be made by any assignee of record: Ind. 1093.

Such discharge may be executed by the attorney in fact to whom the money due on the mortgage or trust-deed is paid: Me. 90,29; Mo. 3313; Miss. 1207. In such case the power of attorney must be first recorded: Me. The trustee of the trust-deed need not join in the release: Mo. 3311; 1881, p. 172. It is valid if executed either by the trustee or the beneficiary of a trust-deed: Miss. 1203. An executor or administrator appointed in any other state or country, on the estate of any deceased non-resident, if no administrator has been appointed in the State, may execute such discharge upon filing a certified copy of his appointment, in the same manner as an administrator appointed in the State might do: Wis. 22,43. See in Part IV., Division I. Any heir or legatee of such deceased person residing within or without the State, upon recording proper proof of his ownership of such mortgage, may in like manner and with like effect satisfy and release such mortgage: Wis. 22,49.

**Effect.** Any form of release prescribed in this article in the several states respectively has effect to release the mortgage and bar all actions brought thereon, and revest all title in the mortgagor or his representatives: N.H.; Mass.; Me.; Vt.; R.I.; Ind.; Ill.; Mich.; Wis.; Minn.; Neb.; Md. 44,43; Del. 83,23; N.C.; Ky.; Tenn.; Ark.\* 4747; Ore.; Nev.; Col.; Wy.; Uta.; Ala.; Miss.; Ariz.

But such prescribed forms do not invalidate any other discharge, otherwise legal: R.I. 176,8.

For forms of release, see § 1485.

### § 1907. **Mortgagee Deceased.**

In a few states, there is a process for the discharge on the record of mortgages (1) which are paid (or presumed to be paid from lapse of time, in New York and Pennsylvania), when the mortgagee is dead or has left the State, or was a corporation now dissolved: N.Y. 1862,365,1-5; 1884,326; Pa. *Deeds, etc.* 117,120; 1881,105.

So, (2) when it can be proved to the satisfaction of the court that the mortgage has been fully paid or satisfied (and that the mortgagee or his assignee is a non-resident of the county



where such mortgage is recorded), or is deceased, and in such case that there is no administrator on his estate under authority of this state: Mich. 5705; Wis. 2252.

So, (3) the executor or administrator of any mortgagee or creditor of trust-deed, if the debt was paid to deceased in his lifetime, shall, upon request, acknowledge satisfaction on the record or deliver a deed of release; and upon failure, as in § 1902, be liable (if satisfactory proof is made to him) to damages as there provided: Mo. 3315-6.

So, (4) when the mortgagor has been in uninterrupted possession for twenty years after the expiration of the time limited in the mortgage for performance, and (a) there has been no payment or other act recognizing its existence as a valid mortgage within such time: Mass. 1882, 237. (β) Where the condition was not to secure the payment of money, but to secure the mortgagee against some contingent liability, and it appears that such liability has ceased to exist: Mass. 1885, 283.

So, (5) when the mortgagee is dead, and there is no executor or administrator, the mortgagor has a process for having one appointed for the purpose of receiving the debt and making discharge: Me. 90, 7. So, (6) when the mortgagee has left the State, the mortgagor has a process of redemption by payment into court of the sum due: Pa. 1883, 125.

**§ 1908. Of the Erasure of Mortgages.** Inscriptions of mortgages and privileges are erased by the consent of the parties interested and having capacity for that purpose; this consent to be evidenced by a release, or by a receipt given on the records of the court rendering the judgment on which the mortgage is founded.

Inscriptions of mortgages and privileges may be also erased by virtue of a judgment ordering such erasure, in one of the cases hereafter enumerated.

This erasure shall be made on a presentation of the acts, receipts, and judgments which operate a release of the mortgages and privileges to be erased, in the same manner as directed for their inscription.

The recorder of mortgages for the parish of Orleans, and the parish recorders of the several parishes of the state, are authorized and required to cancel from their records any mortgage for which a release may have been granted by an authentic act, upon the mere presentation of the certificate of the notary public before whom such act was executed, or of his successor in office, stating by said act a release was granted and the erasure allowed; this certificate shall be filed in the office of the recorder of mortgages where such cancelling is asked for.

If the release has been given by an act under private signature, the erasure shall only take place when it has been acknowledged by the mortgagor or proved by the oath of one of the subscribing witnesses, unless the register be acquainted with the signature of the party who has subscribed the act, and shall agree, on his own responsibility, to make the erasure on the presentation of the original: La. 3371-3375.

## **Art. 192. Foreclosure.**

**§ 1920. Methods.** We may distinguish five kinds of foreclosure: (1) by simple entry; (2) by advertisement without possession; (3) by power of sale; (4) by judgment; (5) by the old process of bill in equity.

**Foreclosure by entry** exists in a few New England states: N.H., Mass., Me., R.I.

**Foreclosure by advertisement, or publication**, in the same: N.H., Mass., Me.

**Foreclosure by power of sale**, in many: Mass., R.I., N.Y., Ill., Mich., Wis., Minn., Md.,\* Mo., Cal., Dak., Wy., Miss. See, however, § 1924. In a few, this method is absolutely abolished: Ind., Ill., Io., Kan. Where the laws are silent, it presumably exists. For citations, see below.

**Foreclosure by action, or judgment**, in nearly all states: Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Wis., Io., Minn., Kan., Neb., Md., Del., Ky., Mo., Ark., Tex., Cal., Ore., Col., Wash., Dak., Ida., Mon., Wy., Uta.,\* Ga., Ala., Fla., Ariz., Nev.\*

**The old equity bill** would seem to lie still in a few: Mass. 151, 2; R.I.\* 176, 14; N.J. *Chancery*, 71; Ill. 95, 16; Minn.; Ga.



And in Michigan, there is a process of foreclosure by bill in equity specially provided: Mich. 6700.

But in others, "there is no process of foreclosure proper; no mortgagee can maintain any possessory action for the estate even after breach; and the mortgagee's only remedy is by sale:" S.C. 2299. So, in effect, in other states: Ky. Civ. C. 375; and see § 1925, C.

And in Utah, a bill in equity or suit in ejectment is the only method of foreclosure: Uta. 760.

A release, however, of the equity of redemption will be valid: S.C.

Generally, no mortgagee can maintain an action of ejectment for recovery of the premises: Wis. 3095. See also in Part IV.

The provisions for foreclosing mortgages apply to mortgages of personal property: Wash. 618. So in the starred states; see note to Title.

§ 1921. **By Entry.** Foreclosure by entry is made (A) by a simple entry on the part of the mortgagee, and made with the mortgagor's written consent, and followed by three years' possession: Me. 90,3-4; (B) So, in other states, by a peaceable entry, followed by three years' possession after such entry: Mass. 181,1; Me.; R.I. 176,4; or (C) followed by one year's actual possession: N.H. 136,14.

The entry (except where made by written consent, as in A) must be made in the presence of two witnesses: Mass. 181,2; Me.; R.I. In New Hampshire, there must be publication three successive weeks six months before such time of absolute foreclosure.

A memorandum of such entry must be made on the mortgage deed, and signed by the mortgagor or the person claiming under him; or a certificate of the witnesses to prove the entry shall be made and sworn to before a justice of the peace; and such memorandum or certificate must, within thirty days after the entry, be recorded in the proper registry of deeds, with a note of reference from each record to the other, if the mortgage is recorded in the same registry. Otherwise, no such entry is effectual: Mass. 181,2. So, in Maine, either the written consent referred to in A, or a certificate as above must be recorded in the same way: Me. 90,3. In Rhode Island, both a certificate by the witnesses and an acknowledgment of peaceable entry by the mortgagor or other person delivering possession must be so recorded: R.I. 176,5.

§ 1922. **By Advertisement.** In Maine, foreclosure may be made without entry by simple publication in a newspaper, or by personal notice to the mortgagor, with a record of either in the registry of deeds and lapse of three years: Me. 90,5-6. *Provided*, that the mortgagor and mortgagee may agree upon a shorter time, not less than one year, in which the mortgage shall be foreclosed; and such agreement, if inserted in the mortgage, is binding: Me. 90,6.

§ 1923. **By Mortgagees in Possession.** Foreclosure may be made (1) by publication three successive weeks of a notice that, after a certain specified day, not more than four months after last day of publication, such possession will be held for purposes of foreclosure; and by retaining actual peaceable possession for one year after said day: N.H. 136,14.

When an entry has been made before breach (§ 1883) the time limited for redemption does not run until after condition broken, nor until after a written notice given by the mortgagee to the mortgagor that he will thereafter hold the premises for purpose of foreclosure: Mass. 181,11.

Or in such case, instead of giving such notice, the mortgagee may make a new formal entry for breach of condition, or bring action for foreclosure, as in ordinary cases: Mass. 181,12.

Such notice of intention or new entry is not effectual, unless a certificate to prove the same is recorded, as in § 1921: Mass. 181,13.

§ 1924. **Power of Sale.** (A) Foreclosure may be made as directed by a power contained in the mortgage: Mass. 181,14; R.I.\* 176,15; Ill.\* 95,11; Minn. 81, 1; 1879,21,1; Md.\* 66,47; Mo. 3310; Cal. 7932; Dak.\* Civ. C. 1729; Wy. 1882, 72,16; Miss. 1237.

So, it would seem, in other states, where there is no law prohibiting powers of sale.

Such sale will be valid ; and the foreclosure is absolute immediately upon the sale : Mass. 181,21 ; Mo. See § 1944.

And it bars dower, if the wife joined in the mortgage, or had no dower at the time it was made : Mass. 181,19. See Art. 321.

It is always necessary (1) that some default shall have occurred : N.Y. Civ. C. 2387 ; Mich. 8497 ; Wis. 3523-4 ; Minn. 81,2 ; Dak. C. Civ. P. 597 ; Wy. 1882,72,1-2 ; (2) "that a conditional judgment have been entered:" Mass. ; and (3) sale may not be made if an action has been begun to recover the debt unless it has been discontinued, or the execution returned unsatisfied in whole or part : N.Y. ; Mich. 8498 ; Wis. ; Minn. ; Dak. C. Civ. P. 598 ; Wy. 1882,72,2.

And (4) the mortgage and all assignments must have been duly recorded : N.Y., Mich., Wis., Minn., Dak., Wy.

If the power is silent as to the manner of sale, sale may be made, after condition broken, for cash, upon such notice as is required for sheriff's sales of like property : Miss. 1237.

If sold by decree of court, the mortgagee must, within ten days after the sale, make a report to the court, and the same may be confirmed or set aside, and a new sale ordered : Mass. 181,15. Any person interested may appear and be heard : Mass.

If the tenant in the action is not seized in fee of the whole equity of redemption, no decree for a sale can be made until all parties interested, including married women having a right or possibility of dower, have been summoned to appear and be heard : Mass. 181,16.

No sale or transfer by the mortgagor shall impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the property as agent of the mortgagor : Mass. 181,20.

(B) Or, where a power of sale is contained in the mortgage, the sale may also be made, if the mortgagee prefer, (1) under decree of court : Mass. 181,17 ; (2) by statute process, as prescribed in E : Wy. 1882,72,16.

(C) If the mortgagor or grantor of a trust-deed, or other owner of the equity, die, no sale can be made under the power ; but the mortgage must be foreclosed in the usual (§ 1925) way : Ill. 95,13.

(D) In others, powers of sale are absolutely prohibited in mortgages and trust-deeds ; and no real estate can be sold under such power, or in any way except by judgment or decree of court, as in mortgages without a power : Ind. 1088 ; Ill. 95,22 ; Io. 3319 ; Kan. 80,399.

(E) In many states, even where there is a power of sale, a special process is by law provided. Thus, besides the process required by the power, notice must be given by three weeks' publication, once a week, in some newspaper published in the town where the land lies, if any ; if none, in the county, the first publication to be twenty-one days before the sale : Mass. 181,17 ; 1882,75. In New York, notice by twelve weeks' publication in such newspaper, by posting for the same period of time, and by service upon the mortgagor or other parties interested : N.Y. Civ. C. 2388-9. In Michigan, notice by such twelve weeks' publication only : Mich. 8499. In others, notice by such publication for six weeks : Wis. 3526 ; Minn. 81,5 (and by service on the person in possession) ; Dak. C. Civ. P. 600 ; Wy. 1882,72,3-4. In Illinois, by four weeks' publication : Ill. 95,14.

Such notice must, generally, contain the names of the mortgagor and mortgagee or assignee, the date of the mortgage and when recorded, the amount claimed to be due, a description of the premises, and the time and place of sale : N.Y. C. Civ. 2391 ; Mich. 8500 ; Wis. 3527 ; Minn. 81,6 ; Dak. C. Civ. P. 601 ; Wy.

In Maryland, the mortgagee, or other person authorized to make the sale, must first give bond to the State : Md. 66,48. He must give notice as directed in the mortgage ; if there be no such direction, by twenty days' notice by advertisement and by posting : Md. 66,49.

The sale must be at public auction, made by some person named for that purpose in the mortgage, or by the sheriff : N.Y. Civ. C. 2393 ; Mich. 8501 ; Wis. 3528 ; Minn. 81,7 (by the sheriff) ; Dak. C. Civ. P. 602 ; Wy. 1882, 72,5. The mortgagee or his assigns may fairly and in good faith purchase at the sale : R.I.\* 176,15 ; N.Y. Civ. C.

2394; Mich. 8504; Wis. 3531; Minn. 81,10; Md.\* 66,55; Dak. C. Civ. P. 605; Wy. *ib.* 8. *Provided*, that he give the mortgagor written notice of such intention: R.I.

If the mortgaged premises consist of distinct tracts or lots, they must be sold separately; and no more shall be sold than is necessary to satisfy the amount due on the mortgage, with interest and costs: Mich. 8503; Wis. 3530; Minn. 81,9; Dak. C. Civ. P. 604; Wy. *ib.* 7.

The officer or person making the sale must forthwith execute and deliver a deed to the purchaser of the premises bid off by him: Mich. 8505; Md.\* 66,54; Wy. *ib.* 9. In other states, a deed is not necessary, but the purchaser takes title without it at the end of the period of redemption: N.Y. Civ. C. 2400; Minn. 81,12. In several, such officer, etc., gives a certificate of sale setting forth the premises sold, the sum paid, and the time after which the purchaser will be entitled to a deed, if not redeemed: Wis. 3532; Minn. 81,11; Dak. C. Civ. P. 606. The officer making the sale is to execute a deed only when the time for redemption (§ 1943) has elapsed: Wis. 3534; Dak. C. Civ. P. 609.

The surplus, if any, is paid to the mortgagor: Mich. 8510; Wis. 3535; Minn. 81,18; Wy. *ib.* 11. It is paid into court: N.Y. Civ. C. 2404.

But if, before the surplus is thus paid to the mortgagor, any person who has a subsequent mortgage or lien files an affidavit stating the amount, the surplus is paid into court for his benefit: Mich.

The sale must be reported to court and confirmed as in case of sales by trustees appointed by court: Md. 66,50.

It must always be made in the county where the land lies, or some part of it lies: Md. 66,56; Wy. So, probably, in all states.

Evidence of such sale may be perpetuated by recording in the registry of deeds affidavits (1) of the publication of notice, by the publisher or printer of the newspaper: N.Y. Civ. C. 2396-7; Wy. *ib.* 12 and 14; (2) of the fact of the sale by the person making it, with price bid, time and place, name of purchaser, etc.: N.Y., Wy.; (3) of his acts in the premises, fully and particularly, with a copy of the notice of the sale: Mass. 181,18; R.I. 173,11; (4) The deed must be recorded within twenty days after the sale: Mich. So, the certificate is recorded within ten days of the sale: Wis. Such affidavit must be recorded within thirty days after the sale: Mass.

The affidavit above mentioned, or a certified copy, is evidence that the power of sale was duly executed, if it appear in it that the mortgagee has complied with such power and with the law: Mass. It is *prima facie* evidence of the truth of the matters therein stated: R.I.; N.Y. Civ. C. 2398.

If the mortgagor has a legal counter-claim, or other defence, he may obtain an injunction suspending proceedings under this section: Dak. See § 1941.

§ 1925. **By Action.** (A) Foreclosure by action is made (1) in a court of law: Mass. 181,3; Me. 90,4; Vt. 1253; R.I. 176,4; Ct. 19,17,5,2; N.Y. Civ. C. 1626; N.J.<sup>a</sup> *Mortgages*, 4; Pa.<sup>a</sup> *Deeds*, 122; O. 5316; Ind. 1095; Ill.<sup>a</sup> 95,17; Wis. 3154; Minn. 81,27; Kan. 80,399; Del.<sup>a</sup> 111,55; Mo. 3927; Ark.\* 5168; Tex. 1340; Cal.\* 10726; Ore.\* Civ. C. 410; Nev.\* 1309; Col. Civ. C. 229; Wash.\* 609,618; Dak.\* C. Civ. P. 616; Ida.\* Civ. C. 468; Mon.\* Civ. C. 346; Uta.\* C. Civ. P. 606; Ga. 3962; Ala. 1885,39; Fla.\* 153,5; Ariz.\* 2684; (2) in equity: N.J.<sup>c</sup> *Chancery*, 71; Io. 3221; Neb. 2,845; Md. 66,65; (3) by entry under legal process and continued actual possession for one year: N.H. 136,14.

(B) The judgment is (1) for the debt and interest: Tex., Fla.; (2) for "the amount due:" Ind. 1097; Ill. 95,19; Wis. 3162; Io.; Minn. 81,29; Kan.; Cal.\*; Dak. C. Civ. P. 617; Wy.\* Civ. C. 381; Ga. 3968; Ala.; Ariz.\*; Nev.\*

But the judgment draws interest from its date to the time of the sale or payment, at ten per cent: Wis. 3164.

(C) Execution is (1) by sale, in most states: N.Y.; N.J.;<sup>a</sup> Pa.;<sup>b</sup> O. 5316; Ind.; Ill. 95,21; Wis.; Io.; Minn.; Kan.; Neb. 2,846; Md.; Del.<sup>b</sup> 111,57; Ky. Civ. C.



374; Mo. 3297,3307; Ark.\* 5169; Tex.; Cal.\*; Ore.\*; Col.; Wash. 611; Dak.\*; Ida.\*; Mon.\*; Wy.\*; Uta.\*; Ga. 1967; Ariz.\*; Nev.\*

(2) By writ of possession, or by conditional judgment, on motion of the mortgagee, mortgagor, or his assignee, that the plaintiff have possession, unless the judgment for the amount due be satisfied within two months: Mass. 181,3-6; Me. 90, 8-9; R.I. 216,7; Ala. (one month).

(3) Execution may, however, be satisfied by levy: Mass. 181,7.

Possession obtained by such action, and continued peaceably for three years, forever bars the right of redemption: Mass. 181,1; Me. 90,4.

Except when a shorter time was stipulated for in the mortgage (see § 1922): Me. 90,6.

(4) In all cases, by conditional judgment for the sum due and costs, that if the mortgagor do not pay such judgment within a time therein limited (not exceeding one year, in Vermont), the plaintiff shall have a writ of possession: Vt. 1254,1257; Ct. 1882,61; 1875,54.

(D) If no one bids at the sale, the estate is delivered to the plaintiff discharged of all equity of redemption and of prior incumbrances by the mortgagor: Pa.

(E) It is always necessary to foreclosure that a default has occurred: Pa., Wash.

(F) Notice of the action must have been given the mortgagor (1) as in chancery practice: Ill. 95,18; (2) by service and publication as in § 1924: Minn. 81,28.

No person holding a conveyance from or under the mortgagor, or having a lien on the property mortgaged, which conveyance or lien is not recorded, need be made a party to the action; but the judgment and proceedings are, nevertheless, conclusive as against such person: Uta.\*

(G) Notice of the sale must be given by twenty days' written notice to the mortgagor: R.I. 176,15.

No such sale can be made until one year after the judgment or order of sale: Wis.\* 3162. There must always, however, be notice by three successive weeks' advertisement in the town (or county) where the land lies: Mass.

(H) The sale is frequently to be made as in the case of sales on execution: N.J.; Ind. 1100; Wis. 3168; Minn. 81,29; Kan.; Del. 111,58; Tex.; Wash. 613; Dak. C. Civ. P. 622; Ga.

It must be in the county where the land lies.

It is made by the sheriff of the county: Ind.; Kan.; Neb. 2,852; Tex.; Dak.

The mortgagee or his representatives may fairly and in good faith purchase at the sale: Minn. 81,31. Such sale must be confirmed by the court: Minn. 81,32.

(I) **Process of Sale.** If a trust-deed or mortgage, with power of sale, is silent as to place and terms of sale and mode of advertising, a sale may be made after condition broken, for cash, upon notice as required for sheriff's sales of like property, at any suitable place and time after the required notice: Miss. 1237.

(J) All the land may be sold under order of court, if necessary or beneficial: N.Y. Civ. C. 1637; Minn. 81,41; Neb. 2,860; Cal. 10728; Uta.\*

But generally only so much shall be sold as is necessary to satisfy the mortgage, interest, and costs: Ind. 1100; Wis. 3154; Io. 3321,3326; Minn. 81,9 and 35; Neb. 2,858; Wash.; Dak. C. Civ. P. 628; Ida.; Mon.; Uta.; Nev.\*

(K) The sale must be on a credit as follows: (1) three to six months: Ark.\* 5171; (2) it may not be on credit, unless the mortgagee consent: Md. Or. besides the above, it may be on instalments equivalent to not more than four months' credit on the whole: Ark.\*

(L) Security must be given by the purchaser as follows: by bond, with surety approved by the person making the sale: Ark.\* Besides this, the mortgagee retains a lien on the estate sold for the price: Ark.

(M) The property cannot be sold for less than two thirds the appraised value: Ark.\* 4759. *Provided*, that if no bids be made to the amounts respectively above provided, it may be offered again a year thereafter, and sold to the highest bidder without regard to price: Ark.\* The mortgagor, or grantor, in a trust-deed may, however, where the sole consideration is money loaned, waive this right of sale and appraisement: Ark. 4763.

(N) The appraisal mentioned above is made before the sale by three disinterested appraisers appointed by a justice of the peace: Ark. 4760.

(O) The officer or person making the sale is to execute and deliver a deed to the purchaser when the terms of the sale are fully complied with: Wis. 3169; Del. But in others, he delivers a certificate as in § 1924: Minn. 81,11 and 35; Dak. C. Civ. P. 623.



NOTES. — <sup>a</sup> By *scire facias*. <sup>b</sup> By *levari facias*. <sup>c</sup> By *feri facias*. <sup>d</sup> This foreclosure by action in a court of law is allowed only when no person but the mortgagors and mortgagees are interested, and there is but one mortgage on the land. <sup>e</sup> This provision does not apply to cases of railroad mortgages. <sup>f</sup> Applies also to trust-deeds.

§ 1926. The Proceeds of the sale (§§ 1924, 1925) are generally to be applied to the satisfaction of the debt: Wis.<sup>a</sup> 3155; Tex.; Ore.; Col. Civ. C. 229; Dak.\* C. Civ. P. 610,624; Ida.\* Civ. C. 469; Mon.\*; Uta.\* C. Civ. P. 606; Ga. 3969; Ariz.\* If there be a surplus, it is to be paid to the mortgagor: Pa. *Deeds, etc.* 123; Ind. 1104; Io. 3324; Minn. 81,37; Neb. 2,854-5; Md.\* 66,53; Del. 111, 60; Cal.\* 10727; Col. Civ. C. 230; Wash. 617; Dak.\*; <sup>b</sup> Ida.\*; Mon. Civ. C. 347; Uta.\* C. Civ. P. 607; Ga.; Ariz.\* 2685; Nev.\* 1309.

It is paid into court for the benefit of the persons entitled: N.Y. Civ. C. 1633; N. J. *Mortgages*, 4; *Chancery*, 72; Wis.<sup>a</sup> 3155; Ore. Civ. C. 415; Dak.<sup>a</sup>; Nev.\* 1310.

If there is no bid, the plaintiff has a writ of *liberari facias*: Del. 111,58.

If the proceeds of a sale under power or otherwise are not sufficient to cover the amount, execution (or a decree) issues in most states, for the residue against other property of the mortgagor: N.Y. Civ. C. 1627; Ind.<sup>c</sup> 1099; Wis.<sup>a</sup> 3156, 3162; Io. 3322; Minn.<sup>a</sup> 81,33; Neb.<sup>c</sup> 2,847; Md.<sup>a,c</sup> 66,65; Ky. Civ. C. 376; Mo.<sup>d</sup> 3305-6; Ark.\* 5170,5172; Tex.; Cal.\* 10726; Ore.\*<sup>c</sup> Civ. C. 410,413; Col.; Wash.<sup>c</sup> 612; Dak.<sup>a,c</sup> C. Civ. P. 136,617; Ida.\*; Mon.\*; Wy.\* Civ. C. 381; Uta.\*; Ariz.; Nev.\* Compare also §§ 1867, 1932.

But in New Jersey, no decree may be made for payment of such residue in case of a chancery suit: N.J. 1880,170,1. A suit for such residue may be maintained on the mortgage bond: N.J. 1880,170,2.

NOTES. — <sup>a</sup> Of sales under foreclosure *by action*; § 1925. <sup>b</sup> Under power of sale. <sup>c</sup> Only when there is an express written agreement, either in the mortgage or in a separate written instrument, for the payment of the mortgage debt. See § 1867. <sup>d</sup> Only when the mortgagor, etc., appeared, or was notified by personal service.

§ 1927. Effect. (A) The purchaser of a sale under either §§ 1924 or 1925 takes only (1) the estate or interest of the mortgagor at the time of executing the mortgage: N.J. *Chancery*, 72; *Mortgages*, 5; Pa. *Deeds, etc.* 124; Mich. 8506; Wis. 3169,3539; Minn. 81,12; Md.<sup>a</sup> 66,52; Del. 111,59; Dak. C. Civ. P. 614,623. (2) He takes the same estate as would have vested in the mortgagee had the mortgage been foreclosed: N.Y. Civ. C. 1632; (3) His conveyance is valid as against the mortgagor, mortgagee, parties to the action, and their privies: N.Y. Civ. C. 2395; Wis.; Neb. 2,853; Mo. 3308; Dak.

But in several states, the mortgagor may retain possession until the purchaser's title becomes absolute, under § 1943: Wis.<sup>a</sup> 3533; Dak. C. Civ. P. 617.

If the judgment is reversed, the sale, etc., is not avoided, but restitution is made of the money or price: Pa. *Deeds, etc.* 125.

No person having a valid subsisting lien created before the mortgage is prejudiced by such foreclosure sale: Mich.

All purchasers under the sale have the same rights and remedies against the tenants of the mortgagor as he had; and *vice versa*, the tenants against the purchaser, except that no lease made after the mortgage is valid against the purchaser: Md. 66,61.

(B) The deed or the recitals therein is *prima facie* evidence (1) that due notice was given: Mo. 1881, p. 171; (2) of the default: Mo.; (3) of the receipt of the purchase-money: Mo.; (4) of all other essential facts: Mo.

The sheriff's certificate of sale under a mortgage power is *prima facie* evidence that all requirements of law have been complied with: Minn. 1883,112,1; and of title in fee in the purchaser after time of redemption has expired: Minn.

If the foreclosure was by writ of possession, such writ must have been recorded in the registry of deeds: Me. 90,3.

NOTE. — <sup>a</sup> Applies to sales under a power only (§ 1924).

§ 1928. **Time of Foreclosure.** (A) Generally, any proceeding in foreclosure may be commenced immediately after breach : Ind. 1095 ; Mich. 8497 ; Del. 111,55.

But only twelve months after breach, in Pennsylvania. [*Deeds*, 122.]

If the mortgagor have died, no sale can be had under a power until nine months after his death : Mo. 145.

(B) Proceedings for foreclosure under a power may be commenced (1) at any time within fifteen years after maturity of the note : Minn. 81,1 ; 1879,21 ; (2) within ten years after the breach, or after the last payment on the mortgage : N.C. 152. For other states, see in Part. IV., Statute of Limitations.

In Georgia, it is provided that when a mortgage is given to secure several debts falling due at different times, the mortgagee may foreclose when the first becomes due : Ga. 1965. And that the court will control the surplus so as to protect the lien created for the debts not due : Ga.

§ 1929. **For Instalments Due.** Generally, a mortgage may be foreclosed in the same manner for any instalment due whether (1) of the principal : Vt. 1255 ; N.Y. Civ. C. 1634 ; N.J.<sup>a</sup> *Chancery*, 74 ; Ind. 1102 ; Mich.<sup>b</sup> 8498,6711 ; Wis. 3157 and 3525 ; Minn. 81,3 and 35 ; Neb. 2,857 ; Cal.\* 10728 ; Ore.\* Civ. C. 417 ; Wash. 615 ; Dak. C. Civ. P. 599 ; Ida.\* Civ. C. 470 ; Mon.\* Civ. C. 348 ; Uta.\* C. Civ. P. 608 ; Ga. 1965 ; Ariz.\* 2686 ; Nev.\* 1311.

(2) Or of the interest : N.J. ;<sup>a</sup> Mich. ; Minn. ; Neb. ; Ore.\* ; Col. Civ. C. 231 ; Wash. ; Dak.

But in Illinois, only when the last instalment has become due : Ill. 95,18.

In such case the court may either decree a sale to satisfy the whole debt, including instalments not yet due, or a sale to satisfy only the instalments then due : N.Y. Civ. C. 1636-7 ; N.J.<sup>a</sup> ; Ind. 1103-4 ; Wis. 3158 ; Minn. 81,4 ; Neb. 2,858 and 860 ; Cal.\* ; Ore. ; Col. ; Wash. 616,617 ; Dak. C. Civ. P. 628-630 ; Ida.\* ; Mon.\* ; Uta. ; Ariz.\* ; Nev.\*

If the former, future instalments may be paid with the rebate of interest : N.Y. ; N.J. ;<sup>a</sup> Ind. ; Wis. 3160 ; Minn. ; Neb. 2,861 ; Cal.\* ; Ore.\* Civ. C. 418 ; Col. ; Wash. ; Dak. C. Civ. P. 631 ; Ida.\* ; Mon.\* ; Uta.\* ; Ari.\* ; Nev.\*

Or it may order the instalments to be paid accordingly, and redemption or writ of possession not more than one year after the last one falls due : Vt. 1255. So, in other states, the court may direct the proceeds to be invested and paid to the mortgagee as the principal or interest falls due : Wis. ; Neb. ; Ga. 3970.

If the latter, order of sale may be made summarily upon the decree for default of any future instalment when due : N.Y. Civ. C. 1635 ; Ind. 1102 ; Mich.<sup>a</sup> 6712 ; Wis.<sup>d</sup> 3157,3159 ; Minn. 81,40 ; Neb. 2,857 and 859 ; Cal.\* ; Ore. ; Col. ; Dak. ; Ida.\* ; Mon.\* ; Uta.\* ; Ariz.\* ; Nev.\*

NOTES. — <sup>a</sup> In case of foreclosure in a court of equity only. <sup>b</sup> Applies also to foreclosure by bill in equity (§ 1930). <sup>c</sup> If the mortgagee is willing to receive the same. <sup>d</sup> In cases of foreclosure by action only (§ 1925).

§ 1930. **Foreclosure by Bill.** Any person may bring a bill to foreclose, according to equity practice, in the county where the land lies : Mass. 151,2 ; R.I. 176,14 ; Mich. 6701 ; Ga.\* 3979a,3968. So, it seems, in New Jersey and Illinois. See § 1920. "Strict foreclosure may be decreed in an action to foreclose when proper." Minn. 81,43. But not until one year after the judgment finding the amount due : Minn.

In Vermont, the mortgagee brings his bill or petition, and the decree finds the amount due, and provides that unless it be paid, with interest, the mortgagor shall be foreclosed ; and if payment or performance is not made as provided by such decree, a writ of possession issues : Vt. 760-1,767.

In Michigan, the court decrees a sale of the premises, or so much as is necessary, but not within a year from the date of the bill ; and may also decree that the mortgagor shall pay any balance due after the sale. Pending such bill no proceedings can be had at law for the recovery of the debt unless authorized by the court : Mich. 6701-6703.

Such sale is made by court commissioner: Mich. 6707; at public auction: Mich.

Only a part may be sold if it can be sold in parcels without injury to the rest: Mich. 6713 and 6715.

If all is sold, the proceeds are applied to the whole sum due, with rebate of interest; or the court may direct the surplus proceeds to be put at interest for the benefit of the mortgagee, to be paid according to the terms of the mortgage: Mich. 6716.

The deed vests in the purchaser only such estate as would have vested in the mortgagee had the mortgage been foreclosed: Mich. 6708. It is a bar to all parties to the suit and their heirs or persons claiming under them: Mich.

The proceeds of the sale are applied to pay the debt and costs, and any surplus is paid into court for the defendant or other persons entitled: Mich. 6709.

In Illinois, a decree may be rendered for the balance due the complainant over and above the proceeds of the sale, and execution rendered therefor, the same as when the decree is solely for the payment of money. And such decree may be rendered conditionally, or after the sale and ascertainment of the balance due; *provided* that such execution may issue only in cases where personal service has been had upon the defendant or defendants personally liable for the mortgage debt, unless their appearance has been entered in the suit: Ill. 95,16.

§ 1931. **Pending Foreclosure.** (A) The court may, for cause shown, grant a writ of estrepement or an injunction restraining waste or injury by the person in possession: Mass. 179,12; Pa. *Waste*, 6 and 18; Wis. 3164,3177; Dak. Civ. C. 483; Ida. Civ. C. 483; Mon. Civ. C. 360; Uta. C. Civ. P. 627; Ariz. 2699.

§ 1932. **Concurrent Remedies.** (A) In two states, the foreclosure of a mortgage does not preclude the mortgagee creditor from recovering so much of the claim to secure which the mortgage was given as the property mortgaged will not satisfy: Ct. 18,7,2 (see below); N.J. 1880,170,2; 1881,147,1.

And an action brought to recover such balance does not, in Connecticut, open the foreclosure.

The action to foreclose must, however, be brought first, and the suit on the bond after the foreclosure sale: N.J. 1881,147.

But, if after foreclosure the person entitled to the debt recovers it, or any part of it, on the ground that the value of the mortgaged premises is less than the sum due, such recovery opens the foreclosure, and the person entitled may still redeem one year thereafter (or six months, in New Jersey): Mass. 181,42; N.J. *ib.* 3.

In this case the value of the property mortgaged is to be estimated by appraisers at the time at which the right of redemption expires: Ct. 1878,129,2.

(B) But during an action at law pending for recovery of the debt, a suit for foreclosure cannot be maintained, nor thereafter, unless judgment in such action is given for the plaintiff, and execution returned unsatisfied in whole or part: N.Y. Civ. C. 1629-1630; Ind. 1101; Mich.<sup>a</sup> 6706; Neb. 2,851; Ore.\* Civ. C. 416; Wash. 614; Dak. C. Civ. P. 621.

(C) Such foreclosure does, however, bar any action upon the mortgage debt, unless the person liable for payment thereof was made a party to the foreclosure: Ct. 1878,129,1. See also § 1926.

(D) And *vice versa*, while an action of foreclosure is pending no action on the debt can be brought (unless by leave of court): N.Y. Civ. C. 1628; Ind.; Mich. 6703; Neb. 2,848; Wash.; Dak. C. Civ. P. 618.

(E) The judgment debtor's equity of redemption cannot be sold under an execution issued upon a judgment in an ordinary suit for the mortgage debt, or any part of it: N.Y. Civ. C. 1432; Ind. 1105.

NOTE. — *a i. e.*, no equity bill for foreclosure can be maintained.

§ 1933. **Foreclosure by Assignee of Debt.** In Connecticut, when any mortgage is foreclosed by the person entitled to collect and receive the money secured thereby, but to whom the legal title to the premises has never been conveyed, the title shall, upon the expiration of the time limited for redemption and failure to redeem, vest in him in the same manner as in



the mortgagee if he had foreclosed, *provided* the person so foreclosing forthwith record the deed of foreclosure: Ct. 18,7,5.

An entry for breach of condition and an action for possession (§§ 1921, 1925) may be made or brought by the assignee of the mortgage, whether such assignment is by deed or by operation of law, in the same manner as by the original mortgagee: Mass. 181,8.

The assignee of a mortgage may sue in his own name: Pa. *Deeds*, etc. 130. See § 1871.

**§ 1934. Record of.** (A) When any mortgage has been foreclosed, and the time limited for redemption has passed and the title become absolute in the mortgagee, he shall cause <sup>a</sup> a certificate describing the premises, deed of mortgage on which foreclosure was had, liber and folio, and time when such title became absolute, which certificate shall be recorded: Ct. 1882,61.

(B) In two others, the officer delivers certificate of sale to the purchaser, which is acknowledged, executed, and recorded like a deed, within twenty days of sale, and becomes an absolute conveyance after expiration of time of redemption: Mich. 8505; Minn. 81,11-12. See § 1943.

(C) The affidavit of the party making entry under § 1921, and of the witnesses thereto as to the time, manner, and purposes of such entry, and a copy of the published notice verified by affidavit as to the time, place, and mode of publication, may be recorded in the registry of deeds for the county in which the lands lie, and shall be evidence of the entry and publication: N.H. 136,16. See also § 1921.

(D) The decree of foreclosure must be recorded when the time for redemption has expired, or the foreclosure will not be valid as against purchasers, mortgagees, or attaching creditors prior to such record; and such purchasers, etc., may redeem as though the time had not expired: Vt. 768-9.

(E) So, in others, an affidavit of the sale as above by the person making it, and of the notice given by the printer, etc., may be so recorded: Mich. 8511; Wis. 3536; Minn. 81,19-20; Dak. C. Civ. P. 611-612.

(F) Affidavit of the time and manner of sale, the bids and purchasers, and of the various notices required, in case of sale under a power or by action (§§ 1924-5), may be recorded in the same manner: N.Y. Civ. C. 2396-8. And they are presumptive evidence of the facts therein stated: N.Y. Civ. C. 2398. The register of deeds must make a reference to such affidavits upon the margin of the record of the mortgage: N.Y. Civ. C. 2399.

(G) The clerk of court, when a mortgage has been satisfied by foreclosure and sale, and the whole debt has been paid, is to enter satisfaction in the recorder's office: Ind. 1098; Kan. 1885,145. See also § 1905.

(H) So, in Michigan, the mortgagor may enter such clerk's certificate of foreclosure and satisfaction: Mich. 5702.

NOTE. — <sup>a</sup> Under penalty of \$5 a month to any person suing, for neglect. Ct. 18,7,4.

**§ 1935. Foreclosure against Assignees.** Actions of foreclosure may be brought against the person who is in possession of the mortgaged premises, and the mortgagor may be joined as a party: Mass. 181,9; Me. 90,13.

**§ 1936. Parties.** Mortgagees or lien-holders of record must be made parties, or they are not bound by the foreclosure; otherwise, if their mortgages, etc., are not recorded: N.J. *Chancery*, 78; Cal. 10726; Col. Civ. C. 229; Ida.\* Civ. C. 468; Mon.\* Civ. C. 346; Uta. C. Civ. P. 606.

## Art. 194. Redemption.

**§ 1940. Opening Foreclosure.** Even in states where there is no redemption allowed after sale or absolute foreclosure, the decree may yet be reopened under this article. No such sale shall be set aside as invalid, by reason of any defect in notice or publication, or proceedings, unless within five years of sale: Minn. 1883,112,1. Persons under disability have five years after removal of such disability: Minn.



§ 1941. **Redemption Pending Foreclosure.** In many states, the proceedings in foreclosure may be stopped at any time before the decree (or, in New York, Indiana, Michigan, Wisconsin, Missouri, Oregon, at any time before actual sale), if the amount due with interest and costs is brought into court, or paid to the officer or to the mortgagee: Mass.<sup>a</sup> 181,21-2; Me. 90,6; Ct. 19,17,5,2; N.Y. Civ. C. 1634-5; N.J. *Chancery*, 77; *Mortgages*, 1-2; Ind. 1097; Mich.<sup>b</sup> 6711,6712; Wis.<sup>c</sup> 3165; Minn. 81,39; Neb. 2,856; Mo. 3314; Ark.\* 4748; Ore. Civ. C. 418; Wash. 611; Dak.<sup>c</sup> C. Civ. P. 627. See also § 1925, F(2).

At any time before sale persons having junior liens may pay mortgagee the debt, interest, and costs, and have his whole interest assigned: Io. 3323.

If it appears, in any action for foreclosure, that nothing is due on the mortgage, judgment is rendered for the defendant, and for costs, and he holds the land discharged of the mortgage: Me. 90,10.

NOTES. — <sup>a</sup> Any condition other than the payment of money must also be performed. <sup>b</sup> Applies to foreclosures by bill in equity only. <sup>c</sup> To foreclosures by action only (§ 1925).

§ 1942. **Redemption after Condition Broken, but before Foreclosure.** At any time before absolute foreclosure, the mortgagor, or person claiming under him, may redeem on paying the mortgage debt or performing any other condition of the mortgage, paying all other sums due on the mortgage, and costs of suit if there has been suit to foreclose: Mass. 181,22; Me. 90,6; Minn. 40,37.

Redemption may be made in the same way before an entry for breach of condition: Mass. 181,24; Minn.

If the mortgagee does not accept tender so made, and discharge the mortgage, the mortgagor has a suit in equity for redemption; but such suit must be brought within one year after the tender, or such tender will not prevent foreclosure: Mass. 181,25; Me. 90,15 and 19.

Such suit for redemption may be brought at any time before foreclosure without a previous tender of performance: Mass. 181,27; Me. Or if the tender was insufficient: Mass. 181,30. See also § 1883.

The decree in such suit is that upon payment of the sum found to be due by the court, or performance of any other condition within such time as the court orders, the plaintiff shall have possession discharged of the mortgage: Mass. 181,33.

When the mortgagee has not unreasonably refused to render account (see § 1902) the court may award him interest on the sum due, at a rate not exceeding twelve per cent a year, from the expiration of three years after his entry to the time of such decree of redemption: Mass. 181,34.

If it appears that the mortgagee has received from the rents and profits a sum exceeding the sum due on the mortgage, the court awards execution against him for such excess (compare § 1883): Mass. 181,36; Me. 90,21.

(B) The mortgagor may also maintain a writ of entry in the case contemplated by this section: Me. 90,31.

(C) He has also a suit for damages against the mortgagee for refusing to release (compare § 1902): Minn.

§ 1943. **Redemption after Foreclosure.** Except as in § 1940 provided, the expiration of the periods respectively limited in §§ 1921,1922,1925, or the sale, and deed or writ of possession delivered under §§ 1923-1925, operate as absolute foreclosure, and the mortgagee's title (subject to § 1927) is absolute: N.H. 136,14; Mass. 181,21; Me. 90,4; Vt. 1257; R.I. 176,4 and 14; N.J. *Chancery*, 78; Pa. *Deeds, etc.* 122; Neb. 2,853; Md. 66,52; Mo. 3310; Fla. 153,5.

But in other states, redemption is allowed as is below in this article provided: Mich. 8506; and see § 1944.

§ 1944. **General Principles.** In several states, redemption after a foreclosure sale under power or otherwise is allowed (A), as in the case of sales of land upon execution (see Part IV.): Io. 3321; Kan. 80,399; Ore. Civ. C. 414; Col. 1860; Dak. C. Civ. P. 607,634; Uta.\* C. Civ. P. 606; Ala. 2877. Within one year after the sale: Dak.

(B) In others, redemption may be made within one year after the sale (1) on paying the sum due, interest at the rate specified in the mortgage, and costs: Minn. 81,13 and 34-5; (2) on paying the price paid at the sale *plus* interest at ten per cent, or (in Michigan), at the rate prescribed in the mortgage if less than ten per cent: Mich. 8507; Wis. 3533; Ark. 4759.

(C) An action to redeem a mortgage of real estate, with or without an account of rents and profits, may be maintained by the mortgagor or those claiming under him against the mortgagee in possession or those claiming under him, unless he or they have continuously held an adverse possession of the mortgaged premises for (1) five years after some breach of condition: Cal. 10346; Ida.\* C. Civ. P. 166; (2) for ten years: N.C. 152; (3) for twenty years thereafter: N.Y. Civ. C. 379; (4) for fifteen years: Ky. 71,4,16; (5) for seven years: Uta. C. Civ. P. 203.

(D) "Any person entitled in equity to redeem mortgaged property" may bring a bill for that purpose, according to the principles of equity and usages in chancery: R.I.\* 176,13.

If there is more than one such mortgagor or person claiming under a mortgagor, some of whom are not entitled to maintain the action as provided above, any one of them who is entitled may redeem therein a divided or undivided part of the premises according to his interest, paying and having account for his proportionate part: Cal. 10347.

**Waiver.** The right of redemption provided in this section may, however, in Arkansas, be waived by the mortgagor by special clause in the mortgage: Ark. 4763.

**Record.** Upon payment as above to the register of deeds, or upon presentation to him of the mortgagee's certificate of satisfaction (§ 1905), he is to destroy the deed and make entry of the discharge on the record of the mortgage: Mich. 8508; Wis. 3165; Minn. 81,15.

If the mortgagee, etc., refuse to make such certificate, he is liable as in § 1902: Mich. 8509.

§ 1945. **Redemption by Creditors.** (A) Any junior mortgagee or lien-holder has frequently the privilege of redeeming under § 1944, or of otherwise satisfying a prior mortgage: Wis. 3540,3167; Minn. 81,34; 1883,25; Dak. C. Civ. P. 607.

Or a judgment creditor: Dak.

And upon so doing, he will be subrogated to the rights of the prior mortgagee: Wis.

(B) So, if the mortgagor and his privies do not redeem, the senior creditor may redeem on the same terms, within five days after the expiration of the year allowed in § 1943; and subsequent creditors have each five days thereafter in order successively; but any such creditor must have filed a notice of such intention within the year: Minn.<sup>a</sup> 81,16. See also in Part IV.

NOTE. — <sup>a</sup> Applies to foreclosures under a power only (§ 1924).

§ 1946. **Final Decree** of foreclosure is made upon the expiration of the period above limited for redemption: Minn. 81,36.

§ 1947. **Mortgagee in Possession.** If the possession of the property is given to the mortgagee, the mortgagor may redeem at any time within ten years from the last recognition by the mortgagee of such right of redemption: Ga. 1964, Miss. 2666.

§ 1948. **Fraud.** When a mortgage is proved to be fraudulent in whole or in part, an innocent assignee of the mortgagor for value may file his bill within the time of redemption and without a tender: Me. 90,16.

**Art. 195. Other Liens on Land.**

§ 1950. **Vendor's Liens.** In several states, the equitable lien of a vendor upon real estate sold, for purchase-money remaining unpaid at the time of conveyance, is abolished: Vt.<sup>a</sup> 1937; Io.<sup>a, b</sup> 1940; Va. 115,1; W.Va. 1882,64,1; Ga. 1997.

(So, in several other states, by decision of court.)

So, in Kentucky, the vendor has no lien against *bona-fide* creditors and purchasers for such consideration unpaid, unless it is stated in the deed what part of the consideration remains unpaid: Ky. 63,1,24.

But in others the statutes expressly recognize, and provide a process for the vendor's lien: Tenn. 4306; Cal. 8046; Dak. Civ. C. 1801; La. D. 2876; Ariz. 2141. So, "the transferee of a bond or note given for the purchase-money of land shall have the same lien on the land for payment thereof as the vendor had before transfer:" Ark.<sup>c</sup> 474; Ala. 1879,142.

The dissolution of the sale of immovables is summarily awarded, when there is danger that the seller may lose the price and the thing itself. If that danger does not exist, the judge may grant to the buyer a longer or shorter time, according to circumstances, provided such term exceed not six months. This term being expired without the buyer's yet having paid, the judge shall cancel the sale.

If, at the time of the sale of immovables, it has been stipulated that, for want of payment of the price within the term agreed on, the sale should be of right dissolved, the buyer may, nevertheless, make payment after the expiration of the term, as long as he has not been placed in a state of default, by a judicial demand; but after that demand, the judge can grant him no delay: La. 2562-3. See also § 1956.

NOTES. — <sup>a</sup> "Except such lien as is created and evidenced by deed, executed, acknowledged, and recorded like deeds of real estate." <sup>b</sup> But it seems the vendor has a lien as against the vendee in all cases. <sup>c</sup> Such lien must appear from the face of the deed or conveyance.

§ 1951. **Nature of the Lien.** In California, one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer: Cal. 8046; Dak. Civ. C. 1801.

When a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts and return the surplus is not a waiver of the lien: Cal. 8047; Dak. Civ. C. 1802.

§ 1952. **Purchaser's Lien.** And one who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property independent of possession for such part of the amount paid as he may be entitled to recover back in case of a failure of consideration: Cal. 8050; Dak. Civ. C. 1805.

§ 1953. **Effect.** The vendor's and purchaser's liens are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value: Cal. 8048; Dak. Civ. C. 1803.

§ 1954. **Lien on Crops.** (See also Art. 203.) A person making advances to a farmer may (if an agreement to that effect be recorded in the record office of deeds) have a lien on the crops of that year, to the preference of all other liens, existing at the time or subsequent:<sup>a</sup> Va. 115,12; N.C.<sup>a</sup> 1799; Ala.<sup>a</sup> 3286-7; Fla.<sup>a</sup> 143,40.

*Except* rent of land on which the crop is made: N.C. 1806; Ala.; and landlord's advances to make such crop: Ala.; and laborers' liens: Fla.

It seems only necessary that the agreement for the lien should be in writing, and the person so making advances of money, materials, or services will have the lien as above: Tenn. 4284; S.C. 2397; Ga. 1978. For laborers, see in Part III. For landlords, see §§ 2034,2035.

In Georgia, these are declared "superior in rank to other liens, except liens for taxes, the general and special liens of laborers, and the special liens of landlords, to which they are in-



ferior, and shall, as between themselves and other liens not herein excepted, rank according to date." They are assignable by writing: Ga.

In Virginia, this lien does not affect the right of landlords to a share of the rents or to distress, nor liens existing at the time of the agreement, such as are required to be, and are, recorded, nor the right of the party to whom the advances are made, to claim the part of the crops exempt by law from levy or distress for rent: Va. *ib.* 14.

In Mississippi, every employer has a lien on the share of his employee in any crop made under such employment for all advances of money, and for the fair market value of all things advanced by him: Miss. 1360; without any writing or recording: Miss. 1361.

Debts due for necessary supplies furnished to any farm or plantation are a lien upon the crops: La. D. 2873. So, money actually advanced and used to purchase necessary supplies or in payment of necessary expenses of any farm or plantation is a lien on the crops: La.

In Kansas, any person or corporation furnishing water for the irrigation of land under contract with the owner, his agent, etc., has a lien upon the crop for such contract price: Kan. 1885,133.

**§ 1955. Liens for Improvements.** In Connecticut, any person having a remainder in real estate in which a life interest has been created by devise, who pays for necessary repairs or improvements upon such real estate, has a lien upon it therefor: Ct. 18,7,14.

And upon the death of a married woman intestate, leaving estate in which the husband has no curtesy, but upon which he has during coverture with her assent or for their mutual benefit made repairs or improvements, he has a lien which he may enforce by petition in court within sixty days after the grant of administration on his wife's estate: Ct. 18,7,15-16.

#### **§ 1956. Louisiana Civil Law.**

Creditors who have a privilege on immovables are —

1. The vendor on the estate by him sold, for the payment of the price or so much of it as is unpaid, whether it was sold on or without a credit.

2. Architects, undertakers, bricklayers, painters, master-builders, contractors, sub-contractors, journeymen, laborers, cartmen, and other workmen employed in constructing, rebuilding, or repairing houses, buildings, or making other works.

3. Those who have supplied the owner, or other person employed by the owner, his agent or sub-contractor, with materials of any kind for the construction or repair of an edifice or other work, when such materials have been used in the erection or repair of such houses or other works.

The above-named parties shall have a lien and privilege upon the building, improvement, or other work erected, and upon the lot of ground, not exceeding one acre, upon which the building, improvement, or other work shall be erected; provided that such lot of ground belongs to the person having such building, improvement, or other work, erected; and if such building, improvement, or other work is caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease, and shall not affect the owner.

4. Those who have worked by the job in the manner directed by the law, or by the regulations of the police, in making or repairing the levees, bridges, ditches, and roads of a proprietor, on the land over which levees, bridges, and roads have been made or repaired.

The privilege granted to the vendor on the immovable sold by him extends to the beasts and agricultural implements attached to the estate, and which made part of the sale.

If there are several successive sales, on which the price is due wholly or in part, the first vendor is preferred to the second, the second to the third, and so throughout: La. 3249-3251.

**How Privileges are Preserved and Recorded.** The vendor of an immovable only preserves his privilege on the object when he has caused to be duly recorded at the office for recording mortgages his act of sale, in the manner directed hereafter, whatever may be the amount due to him on the sale: La. 3271.

Architects, undertakers, bricklayers, painters, master-builders, contractors, sub-contractors, journeymen, laborers, cartmen, and other workmen employed in constructing, rebuilding, or repairing houses, buildings, or making other works; those who have supplied the owner, or other person employed by the owner or his agent or sub-contractor, with materials of any kind for the construction or repair of any edifice or other works; those who have contracted, in the manner provided by the police regulations, to make or put in repair the levees, bridges,



canals, and roads of a proprietor, preserve their privileges only in so far as they have recorded with the register of privileges in the parish where the property is situated the act containing the bargains they have made, or a detailed statement of the amount due attested under the oath of the party doing or having the work done, or acknowledgment of what is due to them by the debtor: La. 3272; D. 2877. These privileges are concurrent.

The privileges enumerated in the last two paragraphs are valid against third persons from the date of the recording of the act or evidence of indebtedness: La. 3273; D. 2878.

No privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract was entered into: La. 3274. See also in Part IV., *Insolvents*.

**Art. 196. Mechanics' Liens.** (By a statute of 1885, all the local New York laws were repealed and a general statute enacted.)

§ 1960. **The Lien.** Any person<sup>a</sup> furnishing labor or materials for the erection or repair of a building has a mechanic's lien (subject to the following conditions): N.H. 139,11; Mass. 191,1; Me. 91,30; Vt. 1983; R.I. 177,1; Ct. 18,7,9; N.Y. 1854,402,1; 1875,379,1; 1862,478,1; 1864,366,1; 1880,143 and 48,6; 1865,778,1; 1882,410,1807; N.J. *Mechanics' Liens*, 1 and 8; Pa. *Mechanics' Liens*, 1; O. 3184; Ind. 1883,115,1; Ill. 82,1; Mich. 8377; Wis.<sup>a</sup> 3314; Io. 2130; Minn. 90,1; Kan. 80,630; Neb. 1885,621; Md.<sup>b</sup> 67,1,6 and 43; Del. V. 16,145,1; Va. 115,2-3; W.Va. 1882,64,2; N.C. 1781; Ky. 70,1; Tenn. 2739; Mo. 3172; Ark. 4402; Tex. 3164; Cal. 11183; 1885,152,1; Ore. 1885, p. 13, § 1; Nev. 1881, 36; Col. 2131; Wash. 1957; Dak. C. Civ. P. 655; Ida. Civ. C. 815; Mon. G. L. 820; Wy. p. 459, § 1; 1877, p. 77, § 1; Uta. C. Civ. P. 1057; S.C. 2350; Ga. 1979; Ala. 3440; Miss. 1378; Fla. 1885,3611,1; Dig. 143,1; La. D. 2879,2883; N.M. 1520; Ariz. 1476; Am. 1883,89; 1885,93,1; D.C. 692.

So, in many states, if the labor or materials are furnished for the "altering" a building, etc.: N.H.; Mass.; Me.; Vt.; N.Y.; Pa. 1879,198,1; O.; Ind.; Ill.; Mich.; Minn.; Kan.; Del.; W.Va.; N.C.<sup>c</sup> 1801; Ky.; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Ida.; Uta.; S.C.; Miss.; N.M.; Ariz.; or the "improving:" Mich., Kan., Md., Va., N.C., Dak., Wy., Ga.; the "beautifying" or "ornamenting:" Ill., Mich.; the "removing:" Vt., O., Ind., Wis., Neb.; the "enlarging:" Col.; the "preserving" or "taking care of:" Wis., Ida.

But, in New Jersey, the lien is expressly not allowed for "altering" a building: N.J. *Mechanics' Liens*, 5.

NOTES. — <sup>a</sup> In the noted states, "every person being a principal contractor." <sup>b</sup> The lien law does not apply in certain counties. And compare §§ 1965,1966. <sup>c</sup> Does not apply except to sub-contractors.

§ 1961. **Person Entitled.** (For citations, see also in § 1960.) The following tradesmen or artisans are expressly declared entitled to the lien in the several states: (1) mechanics: Ind., Io., Minn., Va., W.Va., Tenn., Mo., Ark., Tex., Cal., Ore., Dak., Ida., Mon., Wy., Ala., La.; (2) material-men: Ark., Cal., Wy., Ga., La.; (3) artisans: Va.; W.Va.; Ark.; Tex. 1885,66; Cal.; Ore.; Ida.; Mon.; (4) architects: Cal.; La. D. 2877; N.M.; Ariz.; (5) builders: Va., W.Va., Ark., Cal., Ore., Ida., Mon., La., N.M., Ariz.; (6) lumber dealers: Va., Tex., Ore., Ida., Mon.; (7) laborers: W.Va.; Ark.; Cal.; Ore.; Col.; Ida.; Mon.; La.; D.C. 709; (8) paper-hangers: Pa. *Mechanics' Liens*, 13 (in Philadelphia only); Del. V. 16,145,4; (9) plumbers: Pa. *ib.* 11 (in Philadelphia only); Del.; (10) machinists, for furnishing or repairing machinery: O.; Ind.; Mich.; Io.; Minn.; Kan.; Neb.; Del.; Ky.; Tenn.; Mo.; Ark.; Tex.; Cal.; Ore.; Nev. *ib.* 19; Col.; Wash.; Dak.; Mon.; Ga.; Ala.; Fla.; (11) foundrymen: Tenn.; Nev.; Ariz. 1885,93,

21; (12) persons planting trees, hedges, or vines: Kan.; (13) proprietors of saw-mills or planing-mills furnishing materials or labor, or both: Ga. 1983; (14) persons furnishing curbstones: Pa.; or paving: N.Y.,<sup>c</sup> Del.; (15) gas, grate, and furnace men: Pa. *ib.* 14 (in Philadelphia); Del.; (16) farm laborers, for work or material on farms or crops (see also § 1951): N.C.; Ga. 1975; (17) journeymen: Tenn. 2746; La.; D.C.; (18) cartmen: Minn., Col., La.; (19) bricklayers: La.; (20) painters: La.; (21) surveyors and engineers of mines: Col. 2138; (22) persons constructing cellars or vaults: Ky.; (23) persons digging or constructing wells, fountains, or cisterns: Wis., Ky.; (24) persons who, at the owner's request, fill in, grade, or improve any lot in a town, or the street in front of it: N.Y.,<sup>d, f, i</sup> 1879, 379, 2; 1880, 486, 1; 1882, 410, 1807; O. 3186; Cal. 11184; 1882, 152, 3; Ore. 1885, p. 13, § 8; Nev. 1875, 64, 2; Col. 2135; Wash. 1958; Ida. Civ. C. 817; Mon.; Uta. C. Civ. P. 1059; N.M. 1521; Ariz.<sup>a</sup> *ib.* 2; D.C.; (25) persons filling up water-lots, or dredging the channel in front of them: Wis.; (26) lumbermen have a similar lien on the lumber cut or hauled: N.H. 139, 16; (27) any person doing manual labor upon fences or land: Wis.; (28) miners: Cal.

In Pennsylvania, there are many special laws for specified counties.

NOTES. — <sup>a</sup> When such lot is not exempt from execution, only. <sup>c, d, e, f, i</sup> See § 1962, same notes.

§ 1962. **Nature of Improvement.** Similarly, besides ordinary buildings, the lien is expressly given to persons furnishing labor or materials in the construction or improvement of (1) bridges: O.; Ind.; Wis.; Neb.; Md. 67, 6, 22; Del.; Cal.; Ore.; Nev.; Col. 2136; Wash.; Dak.; Ida.; Mon.; Uta.; Miss.; N.M.; Ariz.; so, railway bridges and trestles: N.Y. 1870, 529; (2) wharves: N.Y.,<sup>d, j</sup> 1875, 379, 1; 1872, 669; 1882, 410, 1807; N.J. *Mechanics' Liens*, 10; Pa. *Mechanics' Liens*, 12; Mich.; Wis.; Md.; Del.; Cal.; Ore.; Col.; Wash.; Dak.; Ida.; Uta.; N.M.; Ariz.; (3) fences: N.Y.,<sup>d, e, g, h, i, j</sup> Wis., Kan., Cal., Ore., Nev., Wash., Dak., Ida., Uta., N.M., Ariz.; (4) fixtures generally: N.J. *Mechanics' Liens*, 5; O.; Io.; Kan.; Neb.; Ky.; Tenn.; Mo.; Ark.; Col.; Dak.; Mon.; Wy.; Ala.; Miss.; (5) mills or factories: N.J. *Mechanics' Liens*, 7; O.; Ind.; Minn.; Neb.; Del.; Nev.; Wy.; Ga.; Miss.; Fla.; Ariz.; (6) railroads: <sup>a</sup> N.H. 139, 17; R.I.; Ct. 18, 7, 13; Io. 2132; Minn.; Cal.; Nev.; Col.; Wash.; Dak.; Ida.; Uta.; Ga. 1979; Miss. 1882, 88; N.M.; Ariz.; (7) machines [cf. § 1961 (10)]: N.J.; Pa. *Mechanics' Liens*, 15; Mich.; Wis.;<sup>b</sup> Neb.; Md.; Ky.; Tenn.; Mo.; Ark.; Cal.; Ore.; Nev.; Col. 2148; Wash.; Dak.; Ida.; Wy.; Uta.; Ga.; Miss.; Fla.; N.M.; (8) railings or enclosures: Miss.; (9) dikes: Wash.; (10) flumes: Cal., Ore., Nev., Col., Wash., Dak., Ida., Mon., Uta., N.M., Ariz.; (11) tunnels: Cal., Ore., Wash., Dak., Ida., Uta., N.M.; (12) canals: R.I., Io., Neb., Nev., Col., Mon., Ariz.; (13) aqueducts: Cal., Ore., Nev., Col., Wash., Dak., Ida., Uta., N.M., Ariz.; (14) roads: O., Cal., Col., Wash., Ida., Uta., N.M., Ariz.; (15) tollroads: R.I., Nev., Col., Dak.; (16) viaducts: Io.; (17) reservoirs: Ind.; so, cisterns: Wis., Nev., Col., Dak., Ariz.; or water-works: Ind., Ida.; (18) mines or mining claims: Cal.; Nev.; Col. 2137; Wash.; Dak.; Ida.; Mon.; Uta.; N.M.; Ariz.; (19) tramways: Nev., Col.; (20) ditches: O., Cal., Ore., Nev., Col., Wash., Dak., Mon., Uta., N.M., Ariz. For citations, see § 1960.

(21) Boilers: R.I. 177, 19; Mo.; Nev.; Wy.; Ala.; Ariz.; (22) "appurtenances": N.H., Me., O., Neb., Va., W.Va.; (23) waterwheels in or near mills or factories: Vt., R.I.; (24) steam-engines in or near mills or factories: Vt., R.I., Pa.; (25) pipes, steam, gas, or water: R.I.; (26) shafting or gearing: R.I., N.J., Pa.; (27) sidewalks: N.Y.,<sup>c, e, g, h, i</sup> O.; (28) wells, fountains, or fishponds: N.Y.,<sup>c, e, g, h, i</sup> Wis.; (29) fruit or ornamental trees: N.Y.;<sup>c, e, g, h, i</sup> (30) vaults: N.Y.;<sup>d, j</sup> (31) oil wells: N.Y.<sup>a</sup> 1880, 440; (32) structures for repairing vessels: N.J. *Mechanics' Liens*, 6; (33) sewers: O.; (34) "ranches" (see § 1951): Mon.; (35) drains: O.; (36) boats, vessels, or water craft (see, for other states, Title V.): O.; Minn.; Del. V. 16, 145, 5; N.C.; Miss.; (37) "any other structures": Mass., N.Y.,<sup>f</sup> O., Mich., Del., Va., Ky., Cal., Ore., Nev., Wash., Ida., Uta., S.C., N.M., Ariz.; (38) "other (internal) im-

provements:" R.I.; N.Y.; Io. 2130; Ky.; Tex.; Dak.; Mon.; Ala.; (39) all kinds of property, real or personal: N.C.

NOTES (to this and following sections). — <sup>a</sup> Many states have special provisions for such laborers' liens. See Part III. <sup>b</sup> If annexed to the freehold. <sup>c</sup> Does not apply to New York City. <sup>d</sup> Applies in New York City. <sup>e</sup> Does not apply to Kings and Queens Counties. <sup>f</sup> Applies in Kings and Queens. <sup>g</sup> Does not apply in Rensselaer County. <sup>h</sup> Does not apply in Onondaga County. <sup>i</sup> Does not apply in Buffalo. <sup>j</sup> Applies in the cities other than Buffalo. <sup>k</sup> Applies in Onondaga County. <sup>l</sup> Applies in Buffalo. <sup>m</sup> Applies in cities other than Buffalo. <sup>n</sup> Applies in Rensselaer County.

§ 1963. **Conditions.** For citations, see also § 1960.

The materials must have been actually used: N.H., Mass., R.I., S.C. [The same would be implied in all states.]

The contract must be substantially complied with: Ga. 1980.

No person is entitled to the lien who at the time of contract, or before completion of the work, takes any note or other evidence of debt: Io. 2129. But after completion, the lien having once accrued, it is not lost by taking such note, unless taken expressly in lieu thereof: Wis. 3317; Io.

So, in others, the lien does not attach if the person claiming it takes security at any time: Ky. 70,5; Dak. C. Civ. P. 654; Ga. 1979; N.M. 1538.

But in two states, the note may be recorded, with affidavit, as evidence of the lien: Kan. 80,630; Neb. 1885,62,3.

No lien is defeated by taking a note or other security, unless it is taken in discharge of the amount due and of the lien: N.H. 139,20; Md. 67,6,3; Del. V. 16, C. 145,1.

The labor or materials must have been to the value of \$15: N.H.; \$5: Nev.; \$10: N.Y.<sup>k</sup> 1864,366,1; 1882,119; \$50: Pa.<sup>a</sup> 1879,198,1; \$25: Ct.; Del. V. 16,145,1; Ida.; Ariz.; \$20: D.C.

It must amount to one fourth the value of the building: Md. 67,6,1.

NOTE. — <sup>a</sup> In the case of a lien for *repairs* or *additions* only. For other notes, see § 1962.

§ 1964. **Contract.** (For citations, see also § 1960.) (A) In most states, the materials or labor must (in the case of principal contractors) have been furnished by virtue of agreement with or consent of (1) the owner of the building: N.H.; Mass.; Me.; Vt.; R.I.; N.Y.;<sup>g</sup> O.; Ind. 1883,115,2; Io.; Minn.; Neb.; Del.; Va.; W.Va. 1882,64,2; Mo.; Tex. 3164,3166; 1885,66; Cal. 11183; 1885, 152,1; Ore.; Nev.; Wash.; Dak.; Ida.; Uta.; S.C.; Ga. 1980; Ala.; Miss. 1380; Fla. 143,2; La.; N.M. 1520; Ariz.; D.C. 692.

Or (2) the owner of the land, in other states: Ct. 18,7,9; 1875,15; 1879,43; N.Y.<sup>d,i,m</sup> 1880,486,1; N.J. *Mechanics' Liens*, 8; Ind.;<sup>a</sup> Ill.; Mich.; Kan.; Va. 115,2; Ky.; Tenn.; Ark.; Col.; Wy.; Fla.

Or with the person in possession of the land: N.Y.<sup>d,i,m</sup>

Or, (B) in others, with the agreement or consent of a person acting for such owner or having authority from him: Mass.; Ct.; N.Y.;<sup>d,i,l</sup> N.J.; O.; Va.; Cal.; Nev.; S.C.; N.M. 1880,16,2.

As, in detail (1) his agent: N.Y.,<sup>d,i,l</sup> O., Ind., Io., Minn., Kan., Neb., W.Va., Tenn., Mo., Ark., Tex., Ore., Nev., Wash., Dak., Ida., Wy., Uta., Ala., N.M., Ariz., D.C.; (2) his trustee: Io., Kan., Mo., Ark., Tex., Nev., Dak., Wy., Ala.; (3) his contractor or sub-contractor: N.Y.<sup>d,i,k</sup> 1882,119; Io.; Mo.; Ark.; Tex.; Cal.; Ore.; Nev.; Wash.; Dak.; Wy.; Ala.; N.M.; Ariz.; (4) his wife or her husband: Kan.; (5) his lessee: N.Y.;<sup>m</sup> (6) his architect or builder: Cal., Ore., Nev., Wash., N.M., Ariz.

Or (C) by contract or agreement with the lessee: N.Y.,<sup>d,j</sup> Ind., Mich.

(D) Such contract or agreement may be either express or implied: N.Y.,<sup>k</sup> Mich., Neb., Del., Ark., Col.

It must be in writing: N.J., Va., Cal.;<sup>b</sup> and signed by the owner: Va.; and it must be recorded: Va., Cal.<sup>b</sup>



But only the *consent* of the owner need be in writing ; if the work is unade under *contract* with him, the contract may be oral : Ky.

If the owner has knowledge of the work done, that is deemed sufficient agreement under this section : Wis. 1885,349 ; Cal. 11192 ; Ore. 1885, 13, 4 ; Nev. 9 ; N.M. 1529.

The owner's *consent* may be acknowledged or proved like a deed : N.J. *Mechanics' Liens*, 4. The owner's *request* is sufficient : R.I. So probably, in other states.

NOTES. — <sup>a</sup> If it is intended to hold the land under the lien. <sup>b</sup> If the amount exceed \$1,000. For other notes, see § 1962.

§ 1965. **Notice to the Owner.** (A) In several states, if the contract of the person claiming a lien was not made with the owner, whether the claim is for labor or materials, written notice must be given him : N.H. 139,15 ; Ill. 82,30 ; Md. 67,6,11 ; Mon. ; Ga. 1979. See also § 1967.

So, if the contract was made with a lessee or tenant, the written consent of the landlord must be obtained in order to bind his title : R.I. 177,2 ; Pa.<sup>a</sup> 1879,198,1 ; Miss. 1380. Or, written notice must be given him, as above : Pa. *Mechanics' Liens*, 34. So, if the contract was made with the husband, such written consent must be obtained from the wife to bind her estate : R.I. 177,1. So, in any case where the contract was made with the owner of a particular estate, it does not bind the title of the owner of the fee without his written consent ; see § 1973 : R.I. 177,3.

(B) In two states, no lien attaches for materials furnished unless the person claiming gives notice in writing to the owner of the property, if such owner is not the purchaser of the materials, that he intends to claim such lien : Mass. 191,3 ; S.C. 2351.

For other states, see *Sub-contractors*, § 1966.

And consequently the lien for labor may be enforced alone, even when the agreement was for an entire contract, when it can be shown how much of the debt is for labor and how much for materials : Mass. 191,2.

(C) And in others, notice must be given the owner (1) in all cases : Mich. 8378 ; Fla. 1885,3611,2 ; (2) if the contract be verbal : Tex. 3166.

(D) In Ohio, if a lien has been taken to secure a claim about which there is a dispute, notice must be given to the owner within thirty days of filing the statement, or the lien is void : O. 3196.

(E) Such notice is a copy of the statement recorded under § 1968 : Mich. 8378. It must be given within sixty days after furnishing the labor, etc. : Md.

NOTE. — <sup>a</sup> In the case of a lien for *repairs* or *additions*.

§ 1966. **Sub-contractors.** In many states, there are special provisions applying to liens of sub-contractors. And compare also §§ 1961,1965.

**Definition.** All persons are considered sub-contractors except those who have contracts directly with the owner or his agent : N.Y. <sup>d, f, f, k, l, m</sup> 1880,143,14 ; 1882,410,1816 ; Io. 2137 ; Ark. 4422 ; Dak. C. Civ. P. 671 ; Ida. Civ. C. 824 ; Mon. G. L. 845 ; Wy. p. 460, § 2 ; Uta. C. Civ. P. 1066.

If the contract, express or implied, is with the principal contractor, the party is a sub-contractor in the first degree ; if with a sub-contractor in first degree, he is one in the second degree : Col. 2132-3.

In most states, it is expressly enacted that sub-contractors shall have the lien like other contractors (see, however, § 1967) : N.H. 139,15 ; N.Y. <sup>d, f, f, k, l, m</sup> 1880, 486,1 ; 413,1 ; 1864,366,1 ; 1862,478,1 ; N.J. 1883,14 ; Pa. *Mechanics' Liens*, 19 ; O. 3198,3202 ; Ill. 82,29 ; Mich. 8377 ; Wis. 3315 ; Io. 2130 ; Minn. 90,2 ; Kan. 80,631 ; Neb. ; Va. 115,5 ; N.C. 1801 ; Ky. 76,5 ; Tenn. 2740 ; Mo. 3172 ; Ark. 4402 ; Tex. 3176 ; Cal. 1885,152,1 ; Ore. 1885, p. 13,5 ; Col. ; Dak. C. Civ. P. 656 ; Ida. Civ. C. 816 ; Mon. G. L. 821 ; Wy. ; Uta. C. Civ. P. 1058 ; Ala. 3452 ; Miss. 1381 ; La. 2879 ; N.M. 1520 ; Ariz. 1885,93,1 ; D.C. 709. See also § 1964. So, in several, mechanics or journeymen laborers : Ill. ; Mich. ; Io. ; Minn. ; Va. 115,3 ; W.Va. 1881,64,2 ; N.C. ; Tenn. 1984 ; Tex.



But in Wisconsin, no sub-contractor of a sub-contractor can have the lien. So, any sub-contractor must have a contract with the head contractor: W.Va.

In others, any person performing labor or furnishing materials for a contractor may be subrogated to the rights of such contractor upon giving him the same notice as is required for the owner (§ 1967): Ida., Uta.

In one, he is so subrogated, if the owner refuse to pay: La. D. 2882.

In other states, where there is no special provision, sub-contractors would have the lien under the general provisions of § 1960.

When the contract (by which the building is erected) was in writing in whole or in part, the contractor alone has the lien, such contract being recorded before the work: N.J. *Mechanics' Liens*, 2; Pa. *Mechanics' Liens*, 64 (in Philadelphia only); Miss. 1379.

In others, however, a sub-contractor, or other person to whom the original contractor is indebted for work or materials, has the benefit of a lien claimed by the original contractor, and may petition for apportionment: Md. 67,6,20; Va. 115,2 and 8; Tenn. 2744.

The sub-contractor's lien, whether taken for non-payment of the first or of subsequent payments due, dates back from the beginning of the work or materials furnished: O. 3202. It does not attach in favor of a sub-contractor when the head contractor is not entitled: Ky. 70,5. No sub-contractor having a claim for repairs only, has a lien unless they were ordered by the owner or his agent: Va. 115,3.

NOTES. — See § 1962, notes.

§ 1967. **Notice.** Commonly (except as below), no sub-contractor has the lien unless written notice be given the owner (compare also § 1965):<sup>a</sup> N.H. 139,15; R.I. 177,6; Ct. 18,7,11; N.Y.<sup>k,l</sup> 1865,778,4; N.J. *Mechanics' Liens*, 3; O.<sup>a</sup> 3198, 3193; Ind. 1883,115,5 and 9; Ill. 82,30; Wis. 3315; Io. 2134; Neb. 1885,62,2; Md. 67,6,11; Va. 115,5; 1884,456; W.Va. 1882,64,5; N.C.<sup>b</sup> 1802; Ky. 70,5; Tenn. 2746; Mo. 3190; Ark. 4403; Tex. 3176; Cal. 1885,152,2; Dak. C. Civ. P. 658; Ida. Civ. C. 816; Mon. G. L. 821; Wy. p. 460, § 2; 1877, p. 81, § 18; Uta. C. Civ. P. 1058; Miss. 1381; La. 2879; Ariz. 1885,93,5; D.C. 709.

If the owner is unknown or not to be found it may be posted on the land: Mich. 8378; Md. 67,6,12; Cal.; Ida.; Ariz.

It must be given (1) within thirty days after commencing work: R.I.; (2) within thirty days after completing the work: Wis., Io., Va., W.Va.; (3) within forty days thereafter, or after payment is due: Ill.; (4) ten days before filing the statement in the registry (§ 1968): Mo.; Tex. 1885,66; Wy.; Ala. 3457; (5) within sixty days after commencing work: Ct.; (6) within sixty days after completing the work: Kan. 80,631; (7) sixty days before the time of payment due from the owner to the head contractor: Ore., Fla.; (8) immediately upon commencing work: Tenn.;<sup>c</sup> Dak. 816; Mon.;<sup>e</sup> (9) within five days after recording account, as in § 1968: N.Y.;<sup>n</sup> Ida. *ib.* 2; Ariz.; (10) within ten days thereafter: N.Y.;<sup>t</sup> (11) before or at the time of furnishing the work or later: Ill.; W.Va.;<sup>e</sup> Ark.; Col. 2142; (12) no time is specified: N.H., Tex., Cal., Ore., Ida., Wy., Miss., La., D.C.; (13) within five days after commencing work: Uta.; (14) at any time before the settlement with the contractor: N.C.; (15) within six months after furnishing the labor, etc.: Dak.; (16) within ten days after completing the work: Ark. 1885,57,2. A copy of the notice must be returned and filed with the proper record officer (§ 1963) within the time above limited: Ct.; O. 3195.

If this notice be not given, the lien is not, in most states, lost as against third persons; but the lien-holder loses his right to prevent payment by the owner to principal contractors (§ 1970): N.Y.<sup>k,l</sup> 1864,366,2; 1880,143,2; N.J.; O.; Ind.; Mich. 1885,216,3; Io. 2135; Va. 115,8; N.C.; Tenn. 2746; Ark. 4421; Tex.; Cal.; Col. 2142; Dak. C. Civ. P. 658; Ida.; Mon. G. L.; Wy. p. 460,4; La.; Ariz.; D.C.

Such notice must state the probable amount of claim: O. 3198; Ind.; Va. 115,5; Ark. 4403; Mon.; Uta.; D.C. An account must be furnished the owner within thirty days after completing the work: Mich. 8330.

The notice is a copy of the statement recorded under § 1963: Mich.; Kan. 80,631; Tex.<sup>d</sup> 3166; Dak.; Ida.; Mon.; Ariz. It is a sworn or attested account: O. 3193; Va.; Ark.;

Tex.; Wy.; La.; Ariz. The notice required for purposes of this section is the filing of the account required by § 1968: Neb., Col., Dak.,<sup>c</sup> La. An account must be rendered to the owner every thirty days: N.H. 139,18; "whenever required, from time to time:" Mich. 8330. The notice must state the amount due or demanded from the principal contractor: N.J., Wis., Va. If there is a written contract between the person claiming the lien and the principal contractor, a copy must be served with the notice: Ill. 82,31.

But such notice is not necessary when such sub-contractor made a written contract with the original contractor in writing, which was seen and assented to in writing by the owner, or other party to the original contract: Ct.

NOTES. — <sup>a</sup> And also, in the noted states, to the owner's agent. <sup>b</sup> It may be verbal. <sup>c</sup> This notice is a different one from the one generally referred to in this section; and its effect is to make the owner liable for such sub-contractor's lien, notwithstanding the liens exceed the sum due the principal contractor by the contract. <sup>d</sup> If the contract was verbal. For other notes, see § 1962.

§ 1968. **Record.** (A) Aside from the notice required by §§ 1965,1967, the lien, whether of a contractor<sup>a</sup> or sub-contractor, will, in most states, dissolve or will not arise unless the person claiming it record a statement specifying the property subject to lien, the work done, the amount claimed, and other particulars, (1) in the registry of deeds for the county where the estate subject to the lien lies: Mass. 191,6; O. 3185,3187,3195; Ind. 1883,115,3; Mich. 8378; Minn. 90,6 and 7; Mo. 3176; Cal. 11187; Nev. 1875,64,5; Ct. 2140-1; Wash. 1961; Dak. 820; Ida. Civ. C. 820; Mon. G. L. 825; Wy. 1877, p. 78, § 5; Uta. C. Civ. P. 1062; S.C. 2354; 1884,505; N.M. 524; Ariz. 1885,93,5.

(2) In the county clerk's office: N.Y. 1875,379,5; 1862,478,3; 1865,778,4; 1854, 402,4; 1864,366; 1880,143,5; 486,2; 1882,410; 1809; N.J. *Mechanics' Liens*, 11; Neb. 1885,62,2 and 3; Va. 115,4; W.Va. 1882,64,3; Ky. 70,6; Tex. 3165; Ore.; 1885, p. 13, § 5; Miss. 1382; (3) in the town clerk's office: Me. 91,32; Vt. 1983; R.I. 177,7; Ct. 18,17,10; Fla. 143,4; (4) with the register of privileges: La. D. 2877; (5) with the judge of probate: Ala. 3444; (6) with the prothonotary or clerk of the Common Pleas court for the county: Pa. *Mechanics' Liens*, 39; 1879,198,3; Del. V. 16,145,1; (7) with the county auditor: Wash. 1961; (8) with the clerk of the superior court: Wis. 3318; Io. 2133; Kan. 80,632; Md. 67,6,17; N.C. 1784; Mo. 3176; Ark. 4403,4406; Dak. C. Civ. P. 656; Ga. 1980; (9) with the chancery clerk: Miss.<sup>b</sup> 1378, 1382; (10) with the clerk of the Supreme Court: D.C. 693.

(B) In the case of a principal contractor, such record must be made (1) before the work is done or material furnished: N.J.<sup>b</sup> *Mechanics' Liens*, 2; Miss.; (2) no time is specified; and the lien does not arise until such record is made: Vt., Mich., Md., Miss.; see § 1969; (3) within thirty days after ceasing to labor, etc.: Mass., Me., N.Y.,<sup>d, f, m, n</sup> Pa.,<sup>r</sup> Mich.; (4) within forty days thereafter: Del., Va., N.C., Ga.; (5) within sixty days thereafter: Ct., N.Y., N.J., Ind., W.Va., Ky., Cal., Ore., Nev., Col., Wash., Ida., Uta.; (6) within ninety days, etc.: N.Y.;<sup>k, l</sup> Io.; Va. 115,4; 1884,456; Ark.; Dak. C. Civ. P. 662; Mon.; S.C.; N.M.; Ariz.; D.C.; (7) within four months: N.Y.<sup>i</sup> 1880,143,5; O.; Kan.; Neb.; Ga.;<sup>q</sup> (8) within four months after the indebtedness accrued: R.I.<sup>b</sup> 177,4; Tex. 3165; 1885,66; Ala.;<sup>q</sup> (9) within six months after ceasing to labor, etc.; Pa. *Mechanics' Liens*, 44; Wis.; Md.<sup>c</sup> 67,6,23; Tex.; Ala.; (10) within six months after the indebtedness accrued: Mo., Tex.; (11) within a year thereafter: Minn.; (12) within ninety days thereafter: Wy. 1877, p. 78, § 5; p. 137, § 1; (13) within six months after beginning the work: R.I.; (14) within a year after the work performed, etc.: N.J.; N.C. 1789.

(C) And in the case of a sub-contractor or other laborer, etc., within (1) six days after labor, etc., completed: Ariz.; (2) within ten days thereafter: N.Y.;<sup>i</sup> (3) twenty days after the indebtedness accrued: Wy.; (4) thirty days thereafter: Tex.; (5) thirty days after ceasing to labor, etc.: N.Y.,<sup>d, f, m, n</sup> 1875,379,5; Io.; Va.; Mo.; Cal.; Ore.; Nev.; Dak.; Ida.; Mon.; Uta.; Ala.; (6) forty days thereafter: Col.; (7) sixty days thereafter: N.Y.; Ind.; Minn.; Kan. 80,631; Neb.; W.Va.; Ky.; Ark.; Dak.; N.M.; Ariz.; (8) within ninety days thereafter; N.Y.;<sup>k, l</sup> Del.; S.C.; (9) within four months after the notice referred to in § 1967: R.I. 177,6-7; (10) within four months after the indebtedness accrued: Mo.; (11) within six

months after ceasing to labor, etc. : Pa. ; Wis. ; Md. ; <sup>b</sup> Dak. C. Civ. P. 658 ; (12) within a year thereafter : N.J. ; (13) at the time of giving the owner notice according to § 1967 : O. 3195 ; (14) no time is specified : Mich., Md.

NOTES. — <sup>a</sup> Only sub-contractors or journeymen need file this record, in the noted states. <sup>b</sup> If there was a written contract. <sup>c</sup> Only in the case of wharves, machines, and bridges. <sup>2</sup> If no written contract. <sup>3</sup> As to persons other than contractors or sub-contractors. <sup>4</sup> In the case of a lien for repairs. For other notes, see § 1962.

§ 1969. **Effect.** Such record is notice to all the world ; and the lien thereupon takes effect as against purchasers for value : Mich. 8379 ; Ky. 70,14 ; La. 2878.

So, in others, a lien is not valid as to purchasers or incumbrancers in good faith until recorded : Io. 2133 ; Miss. 1378 ; Mich. 1885,216,2.

Notice of such record must further be given to the owner of the property : Va. 115,4.

§ 1970. **Rights and Duties of the Owner.** In cases where the contract on which a lien exists was not made with the owner, the owner may <sup>a</sup> retain the sum due on it and pay the original contractor only the difference : N.H.<sup>a</sup> 139,18 ; N.Y.<sup>a, b, d, f, k, l, m, n</sup> 1865,778,18 ; 1864,366,2 ; 1880,143,3 ; 486,2 ; 1882,410,1808 ; N.J.<sup>a</sup> *ib.* 3 ; Pa. *Mechanics' Liens*, 35 ; O.<sup>a</sup> 3193-4,3201,3204 ; Ind.<sup>a</sup> 1883,115,9 ; Ill.<sup>a</sup> 82,34 ; Io.<sup>a</sup> 1934 ; Kan. 80,631 ; Neb.<sup>a</sup> 1885,62,2 ; Md.<sup>a</sup> 67,6,13 ; Del. V. 16,145,1 ; Va. 115,6 and 8 ; W.Va. 1882,64,5 ; N.C.<sup>a</sup> 1802 ; Ky.<sup>a</sup> 70,5 ; Tenn.<sup>a</sup> 2746 ; Mo. 3191 ; Ark.<sup>a</sup> 4405 ; Tex.<sup>a</sup> 3176 ; Cal.<sup>a</sup> 11193 ; 1885,152 ; Ore. *ib.* 11 ; Nev. *ib.* 10 ; Col.<sup>b</sup> 2145 ; Wash. 1966 ; Dak.<sup>a</sup> 825 ; C. Civ. P. 658 and 660 ; Ida.<sup>a</sup> Civ. C. 816 ; Mon. G. L. 823 ; Wy. p. 460, § 2 ; 1877, p. 81, § 19 ; Uta. C. Civ. P. 1067 ; Ga.<sup>a</sup> 1979 ; Ala.<sup>a</sup> 3457 ; Miss.<sup>a</sup> 1381 ; La.<sup>a</sup> 2879 ; N.M. 1530 ; Ariz.<sup>a</sup> 1885,93,6 ; Mich.<sup>a</sup> 1885,216,3 ; Wis.<sup>a</sup> 1885,312.

But in others, the owner is allowed payments made in good faith to the original contractor before notice of subordinate liens : Ct. 18,7,12 ; Ill. ; Va. 115,5 ; 1884,456 ; Ark. 4075.

But in others, he cannot pay except at his own risk, until the time (§ 1967) for notice has expired : Kan., Neb. And the contractor cannot sue during such time : Kan., Neb. So, in Arkansas, he is required to reserve for ten days after completion one third of the contract price to meet the claims of sub-contractors, etc. : Ark. 1885,57,1.

So, no payment made to the contractor for the purpose of avoiding anticipated sub-contractor's liens will be valid : Col. 2159.

And in others, if the head contractor is paid in advance, by collusion, the owner is liable to sub-contractors, laborers, etc., to the extent of such payment : N.Y.<sup>c</sup> 1854, 402,3 ; 1862,478,1 ; 1865,778,3 ; O. 3204 ; Ill. 82,46 ; Cal. 1184 ; 1885,152 ; La. D. 2884.

So, in California, the owner is forbidden to pay in advance, but must pay by instalments as the work progresses ; and at least twenty-five per cent of the contract price must be payable thirty-five days after completion of the work : Cal. So, no payment made the principal contractor before thirty days from the completion of the building is valid as against sub-contractors, etc. : Ore. 1885, p. 13, § 10.

The owner may be sued by the sub-contractor, and judgment recovered to the extent of any balance due the head contractor at any time : Wy. p. 460, § 4.

If sub-contractors get judgment against the owner, he may recover back the amount, with costs, from the principal contractor : N.M. 1530 ; Ariz. *ib.* 10. The owner may require from the principal contractor a sworn statement of all sub-contractors or other persons in his employ, and their wages, contracts, and how much is due to them : Ill. 82,35 ; Ala. 3458 ; Fla. *ib.* 2.

NOTES. — <sup>a</sup> He is *required* to do so after receiving notice (§§ 1965,1967) in the noted states, or <sup>b</sup> (in cities, only) after record made according to § 1968. For other notes, see § 1962.

§ 1971. **Amount of the Lien.** The lien of all persons claiming can in no case attach for a greater amount (1) than the price the owner agreed to pay to the



head contractor for the building and appurtenances: Mass. 191,2; Ct. 18,7,12; N.Y.<sup>a,4</sup> 1854,402,2; 1862,478,1; 1865,778,2; 1880,143,1; 1882,410,1809; Ill. 82,29; Mich. 8377; Wis. 3315; Io. 2134; Kan. 80,631; W.Va. 1882,64,2; Tenn. 2748; Ark. 4424; Tex. 3179; 1885,66; Cal. 1885,152,1; Nev. 1875, 64,10; Col. 2146; Wash. 1966; Dak.; Ida. Civ. C. 815; Uta. C. Civ. P. 1057; Ariz. 1885,93,10.

So, (2) the lien only applies to the amount to which the owner (at the time of the record under § 1968: N.Y.) is indebted to the principal contractor at the time of service or notice (§§ 1967,1968), or may so become indebted thereafter: N.Y.<sup>d</sup> 1875,379,1; O. 3201; Ill. 82,33; Mich. 8379; Wis.; N.C. 1801; Ky. 70,5; Dak. C. Civ. P. 658; Ga. 1979; Ala. 3449; La. D. 2882; D.C. 709.

(3) The owner will only be liable for the amount specified in the notice (§§ 1966-7): Ind. 1833,115,3; Va.; Mon. G. L. 823.

(4) He is liable to the value of the improvement: Ark. 4405.

(5) To the value of the labor and materials: N.Y.;<sup>e</sup> Ind. 1883,115,1; Cal. 11183, Amt.; Ore. *ib.* 1; Col. 2131; Fla. *ib.* 1.

NOTES. — See § 1962.

### § 1972. Rights and Duties of the Head Contractor.

The owner is, in a few states, required to give a copy of the account-notice (§ 1967) to the principal contractor owing the money: O. 3199; Tex. 3178; Wy. p. 460, § 3; La. D. 2880.

Who may dispute the claim, and if so, the owner must withhold the amount until its determination: O.; Mo. 3191; Tex. 3179; Wy.; La. If not disputed, he must pay *pro rata*: O.; or, in others, the owner may pay the sub-contractor whenever it is due: Va. 115,6; Tex.; Wy.; La.

The owner may set off against such contractor moneys paid to sub-contractors under §§ 1970,1972: Kan. 80,634; Neb. 1885,62,2; Va.; Tex. 1885,66; Cal. 11193; Ore. *ib.* 11; Nev.; Col. 2146; Wash. 1966; Ida. Civ. C. 825; Wy. 1877, p. 81, § 19; Uta. C. Civ. P. 1067; La. D. 2882; N.M. 1530; D.C. 710. But no set-off against the contractor can be availed of as against sub-contractors: Cal. 1885,152,2.

The head contractor must defend an action brought on the lien of a sub-contractor at his own expense: Kan.; Mo.; Tex.; Cal.; Ore. *ib.* 11; Nev. *ib.* 10; Wash.; Ida.; Wy. 1877, p. 81, § 19; Uta.; Ala. 3459; N.M.

If the judgment and costs recovered in all such actions upon liens for which the head contractor was originally liable exceed the amount due by the owner to the head contractor, he may recover back from such contractor the excess: Tex.; Cal.; Ore.; Nev.; Wash.; Wy.; Ala.; N.M.; Ariz. *ib.* 10.

§ 1973. Subject Property. (A) In most states, the lien attaches to the building or other thing erected and (1) the interest of the owner of the building in the land on which it stands: N.H. 139,11; Mass. 199,1; Me. 91,30; R.I. 177,2-3; N.Y.<sup>h</sup> 1882,410,1807; 1875,379,3; 1862,478,1; 1865,778,1; 1880, 143,1; 486,1; N.J. *Mechanics' Liens*, 4; Pa. *Mechanics' Liens*, 18 and 36; O. 3184; Ind. 1883,115,1; Mich. 8377; Wis. 3314; Io. 2131; Minn. 90,1; Md. 67,6,9; Del. V. 16,116,1; Va. 115,2 and 9; Mo. 3172-3; Cal. 11185; Ore. 1885, p. 13, § 2; Nev. 1875,64,3; Wash. 1959; Dak. C. Civ. P. 665; Ida. Civ. C. 818; Mon. G. L. 827; Uta. C. Civ. P. 1060; S.C.<sup>a</sup> 2350,2381; Ala. 3440,3441; Fla. *ib.* 1; 143,17; Ariz. 1479.

(2) To the building and the land, by whomever it is owned: Vt. 1983; Ct. 18,



7,9 ; N.Y.<sup>a</sup> 1864,366,1 ; N.J.<sup>b</sup> *Mechanics' Liens*, 8 ; Ind.<sup>b</sup> 1883,115,2 ; Neb. 1885, 62,1 ; W.Va. 1882,64,2 ; N.C. 1781 ; Tenn. 2745 ; Tex. 3164 ; Miss. 1378.

(3) To the building, and the interest of the owner of the land or other person making the contract in the land : Ill. 82,2 ; Kan. 80,630 ; Ky. 70,1 ; Ark. 4402 ; Col. 2131 ; Dak. C. Civ. P. 655 ; Wy. 1877, p. 77, §§ 1-2 ; N.M. 1522 ; Ariz. 1885,93,3.

(B) The extent of land covered by the lien is, (1) in many states, the land on which the building stands, with the lot or curtilage immediately about it and necessary for its use : N.H. ; Me. ; Vt. ; N.Y. ; N.J. *Mechanics' Liens*, 1 and 10 ; Pa. *Mechanics' Liens*, 2 ; Neb. 1885,62,1 ; Md. 67,4-6 ; Va. 115,1-3 ; N.C. ; Tex. 3170 ; Cal. ; Ore. ; Nev. ; Col. 2148 ; Wash. ; Dak. ; Ida. ; Uta. ; Miss. ; Fla. 143,16 ; N.M. ; Ariz. ; D.C. 692.

(2) In other states, the lien covers (or may cover) all the land held by the owner of the building in one piece : R.I. 177,20 ; Ill. 82,1 ; Io. ; Kan. ; Tenn. 2739 ; Dak. ; Ala. So, all the lot back, and of the width of the building : D.C. 704.

(3) So, all such land not exceeding, in the country, (a) one hundred and sixty acres : Mich. ; (β) fifty acres : Tex. 3169 ; (γ) forty acres : Wis., Minn. ; (δ) one acre : Mo., Mon., Wy., Ala. ; (ε) two acres : Ark. 4409 ; (ζ) half an acre : N.J.

And not exceeding, in a town, (a) the lot on which the building stands : N.J. *Mechanics' Liens*, 16 ; O. ; Ill. ; Mich. ; Mo. ; Mon. ; Wy. ; Ala. ; (β) one acre : Wis., Minn.

The owner may define in writing the boundaries of the lot, and record them in the court before the work is commenced : Md. 67,6,5.

NOTES. — <sup>a</sup> "Whether the estate be in fee, for life, years, or any other estate or right of redemption." <sup>b</sup> When done by his contract or consent, according to § 1964. See § 1975. For other notes, see § 1962.

§ 1974. **Estate of Owner.** (A) The lien attaches to the estate of a lessee making improvements on leased land : R.I. 177,3 ; N.Y. 1854,402,1 ; 1882, 410,1807 ; Pa. 1879,198,2 ; Ind. 1883,115,2 ; Mich. 8377 ; Io. ; Md. 67,6,9 ; Mo. 3175 ; Ore. 1885, p. 13, § 2 ; Dak. C. Civ. P. 665 ; Mon. ; Wy. 1877, p. 78, § 4 ; Ala. 3443 ; Miss. 1380.

And if the lessee is afterwards evicted, the forfeiture of the lease does not destroy the lien upon the building : Io. 2131 ; Ore. ; Dak. ; Wy. ; Ala. ; Mich. 1885,216,1.

But it does not attach to the lessor's estate, except by consent, etc., as in §§ 1964-5 : R.I., N.J., Md., Del., Miss.

If the owner's interest is by executory contract which is afterwards rescinded or set aside, the lien follows the property into the hands of any person to whom it may come or in whom it may remain, to the extent the actual value is enhanced by such improvements : Ky. 70,2 ; Mo. ; Mon. G. L. 828.

If the owner or claimant be evicted by judgment, and is entitled to compensation for improvements, the person entitled to a lien under this chapter is subrogated to such rights to the satisfaction of his debt and costs : Ky. 70,3.

(B) The lien may attach to property held as homestead : Vt. 1986. See also in Part IV. But in Texas, in such case, to fix a lien, there must be a written contract, signed by husband and wife, and acknowledged by her as in case of sale of homestead, recorded in the county clerk's office in the county where the improvements are being made or the land situated : Tex. 3174. This lien inures to the benefit of all mechanics, laborers, and material-men who have furnished labor or materials for a homestead : Tex. 3175.

The lien attaches to water rights : Col. 2139 ; rights of way : Col. ; foundries and corporation privileges : Col.

(C) In a few states, the estate of a married woman is only subject to the lien when she joins in the contract : Me. 91,30 ; Vt. 1987 ; Tenn. 2741. See also §§ 1963-4.

But in New Jersey, it is so subject unless she file written notice in the county clerk's office that she does not consent to such erection or repairs : N.J. *Mechanics' Liens*, 9.

And in others, it is subject if the contract with the husband be with her knowledge and con-

sent: Mich. 8377; Minn. 1883,43. But in others, any person, including all cestuis que trustent, for whose immediate use and benefit any building or improvement shall be made is included in the word "owner" in the principal provision: Io. 2136; Mo. 3192; Dak. C. Civ. P. 669; Mon. G. L. 840; Wy. 1877, p. 81, § 20; not excepting married women, as to their separate property: Ark. 4419; Ala. 3460.

So, in Maryland, written notice must be given a married woman, if she is owner, and the contract was made with her husband: Md. 67,6,10.

The lien attaches to the estate of minors above eighteen: Mon., Wy.; to the estate of any minor making the contract: Me.; or whose guardian makes it: Dak.

(D) If the owner of the building has an estate for life, or less than a fee, or if the estate is subject to a mortgage or other incumbrance, the lien only binds the estate of such owner (compare § 1973, A): Mass. 191,36.

(E) The lien attaches to the estate of a vendee in possession under contract of sale: N.Y., Mich.

(F) Any person having a transferable interest in the land is deemed the "owner:" Col. 2131.

§ 1975. **Preventing Lien.** In several states, the lien may be prevented, as to labor or materials not already actually furnished, if the owner is not the person with whom the contract for labor or materials was made, (1) by his giving written notice to the person claiming the lien: Mass. 191,4; Me. 91,31; S.C. 2353; (2) or by his posting a notice to that effect on the premises: Cal. 11192; Ore. 1885, p. 13, § 4; Nev. *ib.* 9; Wash. 1965; N.M. 1529; (3) or by his filing bond to pay judgments and costs on such liens: Mass. 191,42; Pa. *Mechanics' Liens*, 62; Ind. 1883, 115,11; Io. 2134; Fla. 143,9; D.C. 708; (4) or paying the amount claimed into court: N.C. 1793.

Such notice must be given by the owner (1) within three days after he has knowledge that the lien is claimed: Cal., Ore., Nev., N.M.; (2) within ten days thereafter: Wash.

The lien of sub-contractors, etc., may be prevented (1) by the head contractor's giving bond with surety for their use, and filing it in court: Ill. 82,42; Io. 2134; Minn. 90,3-4; or by the owner's filing a similar bond: Io. The owner must join in such bond: Ill., Minn.

In other states, the owner may offer to pay money or file a bond or security, and if the lienholder do not accept it in discharge of the lien, and fail afterwards to get a more favorable judgment, he is liable for all costs incurred by the owner from the time of the offer: N.Y.<sup>a</sup> 1875,379,13; 1880,143,13.

NOTES.— See § 1962.

§ 1976. **Limitation for Suit.** Commonly suit must be brought upon the lien within a certain period, or the lien will be lost. Thus, in a few states, (1) within ninety days from the time of ceasing to labor or furnish materials: N.H. 139,12; Mass. 191,9; Me. 91,34; Ill.<sup>b</sup> 82,47; (2) within a year thereafter: N.J. *Mechanics' Liens*, 13; Kan. 80,633; Tenn. 2745; Fla. 143,5; D.C. 696; (3) within ninety days after the time of making record (§ 1968): N.Y.<sup>d</sup> 1875,379,8; Pa.<sup>c</sup> 1879,198,4; Mo. 3187; Cal. 11190; Dak. 823; Ida. Civ. C. 823; Mon.<sup>b</sup> G. L. 839; Uta. C. Civ. P. 1065; Ala. 3454; Ariz. 1885, 93,9; (4) within sixty days thereafter: Mich. 8381; Wy. 1877, p. 80, § 15; (5) within six months thereafter: Va. 115,2 and 7; W.Va. 1882,64,11; N.C. 1790; Ark.<sup>b</sup> 4418; Ore. 1885, p. 13, § 7; Nev. *ib.* 8; Col. 2151; Ariz. 1481; (6) within eight months: Wash. 1964; (7) within nine months: Ark.;<sup>a</sup> (8) within one year: N.Y. 1854,402,20; 1862,478,8; 1880,143,8; 486,5; 1882,410,1812; Minn.<sup>b</sup> 90,6; Ky. 1882,17; Mon.;<sup>a</sup> N.M. 1527; (9) two years: O. 3185; Minn.<sup>a</sup> 90,7; Neb. 1885,62,3; (10) five years: N.Y.<sup>a</sup> 1865,778,19; Pa.; Neb. 57; Md. 67,6,38; (11) within ninety days from the time the last payment was due: Vt. 1984; (12) within six months from such time: Ill.<sup>a</sup> 82,28; Miss. 1384; (13) within one year from such time: Ind. 1883,115,6; Wis. 3318, Amt.; Ida. *ib.* 6; 1876-7, p. 56; Ga. 1980; (14) within six months from ceasing

labor, etc.: Ore. 1874,104,16; S.C. 2356; (15) within two years: Ct. 1881,148,1; Minn. 90,7; (16) within twenty days before the term of court next after filing (§ 1968): R.I. 177,9.

But if credit has been given, the lien lasts until (1) eight months from the expiration of the credit: Wash.<sup>a</sup> 1964; (2) one year therefrom: Ind., Kan., Fla.;<sup>d</sup> (3) ninety days therefrom: Cal.,<sup>c</sup> Nev.,<sup>c</sup> Dak.,<sup>d</sup> Ida.,<sup>c</sup> Ariz., D.C.; (4) thirty days therefrom: N.C.; (5) six months therefrom: Va.,<sup>c</sup> Ore.,<sup>c</sup> N.M.,<sup>c</sup> Ariz.<sup>c</sup>

A lien may be revived, in a few states, at the expiration of the above-mentioned period (1) by filing an affidavit or agreement, for one year longer: N.J., Wis.; (2) by *scire facias*: Pa., Io., Md. (five years).

NOTES. — <sup>a</sup> As to principal contractors. <sup>b</sup> As to sub-contractors only. <sup>c</sup> But in no case over two years from the completion of the work; or, <sup>d</sup> from such time of giving credit. <sup>e</sup> In the case of a lien claimed for *repairs*. See also § 1962.

§ 1977. **When the Work must be Performed.** When the contract is expressed, no lien shall be created under this act, if the time stipulated for the completion of the work or furnishing the materials is beyond three years from the commencement thereof, or the time of payment beyond one year from the time stipulated for the completion thereof; if under an implied contract, no lien unless work done, etc., within one year from the commencement of the work or delivery of the materials: Ill. 82,3.

And if the work be suspended by the default or decease of its owner, without consent of the contractor, sub-contractor, or material-man, he, or they, or any of them, may proceed in accordance with the original plan or contract, and, on completion thereof, have either or all the remedies provided by this chapter: O. 3205; Minn. 90,9; Neb. 1885,62,5. But only so far as to enclose the building and to prevent waste: Minn., Neb.

§ 1978. **Assignment of Liens.** In many states, the lien is assignable by writing: Wis. 3316; Io. 2129; Ark. 4423; Nev. *ib.* 17; Ga. 1996; Ariz. 1885,93,18. And it follows the assignment of the debt: Io.

The lien operates only in favor of the mechanic or person who furnishes materials, and does not pass to any person to whom the debt is transferred without notice of the lien: Tenn. 2749. The journeyman's lien shall not operate where the debt is transferred by the undertaker to any person without notice thereof, but to the extent of the debt, if any, not so assigned: Tenn. 2750. Notice in writing of assignment must be served on the owner within fifteen days thereafter; and all payments made by him before notice are good in discharge of his original debt: Wis.

**Assignment of Estate.** If the owner of the building or person for whom the work is done dies or conveys away his estate or interest, the lien may be enforced against his heirs or assigns: Mass. 191,37.

§ 1979. **Special Liens.** In Ohio, any person who performs labor or furnishes material for constructing, altering, or repairing any street, road, sidewalk, way, drain, ditch, or sewer, by virtue of a private contract between him and the owner of lands abutting thereon, or his authorized agent, has a lien on the lands of such owner; the statement must be filed in the recorder's office within four months of the labor, and action may be brought within a year from the date of the first item: O. 3186-7. Such liens are concurrent, and to be paid *pro rata*: O. 3188.

If a person orders or contracts for machinery, not having an interest in the building sufficient for a lien, the person furnishing such machinery has a lien on it, and may remove it for default of payment: Wis. 3314.

§ 1980. **Co-existing Liens.** (A) In a few states, all the liens upon the same property are considered as of the same date when duly recorded according to § 1968: Mich. 8381; Ga. 1980.

(B) And in others, all lien claims upon the same building are concurrent, and to be paid *pro rata* if the building is sold to enforce the lien: Mass. 191,28; N.J. *Mechanics' Liens*, 24; Pa. *Mechanics' Liens*, 55; Ind. 1883,115,4 and 8; Wis. 3325;



Kan. 80,637 ; W.Va. 1882,64,2 ; Mo. 3193 ; Tex. 3179 ; 1885,66 ; Ida. *ib.* 7 ; Wy. p. 461, § 5 ; 1877, p. 81, § 21 ; S.C. 2373 ; Miss. 1392 ; La. 2878 ; D.C. 702.

So, only proportional execution is issued : Fla. 143,11.

So, as to the liens of principal contractors only : Ill. 82,14 ; Md. 67,6,36.

(C) In many states, however, if there are several liens, amounting altogether to more than the agreed price, the sub-contractors are first paid in full, or apportionment made among them according to the amount of debts due them respectively from the original contractor : Ct. 18,712 ; N.Y.<sup>1</sup> 1875,379,14 ; 1880,143,14 ; Mich. 8388 ; Md. 67,6,13 ; N.C. 1801 ; Ky. 70,5 ; Ark. 4408 ; Cal. 1885,152,1 ; Ala.<sup>b</sup> 3461 ; and the latter recovers only balance due thereafter : N.Y. ; Ark. ; Cal. ; Dak. 824 ; Ala.

In Ohio, all sub-contractors duly filing their claims are to be paid *pro rata* with the person first filing his account and each other : O. 3198.

All liens filed within thirty days after first lien filed are concurrent ; after expiration of such thirty days, all filed within sixty days are of the second class, and share concurrently after the first class : Mon. G. L. 827.

(D) So, in other states, where different liens are claimed against the same property, (1) all persons other than original contractors and sub-contractors are paid in full (*i. e.*, sub-contractors in the second degree) ; (2) sub-contractors ; (3) original contractors : N.Y.<sup>d, f</sup> 1882,410,1808 and 1816 ; O. 3199,3203 ; Ore. 1885, p. 13, § 9 ; Nev. *ib.* 11 ; Col. 2150 ; Wash. 1967 ; Dak. 826 ; Ida. Civ. C. 826 ; Uta. C. Civ. P. 1068 ; N.M. 1531 ; Ariz. 1885,93,11. In others, the liens have precedence according to priority of filing : N.Y.<sup>e</sup> 1854,402,22 ; 1865,778,21 ; Io. 2135 ; 1876,100 ; N.C. 1802 ; Dak. C. Civ. P. 664 ; N.M.<sup>a</sup> 1541.

(E) In California, the order is : (1) manual laborers ; (2) material-men ; (3) sub-contractors ; (4) original contractors : Cal. 1885,152,4.

NOTES. — <sup>a</sup> *i. e.*, as to the same class of lien. <sup>b</sup> Except liens specially reserved in the original contract, which are paid first of all. See also § 1962 for other notes.

§ 1981. **Removal of Lien.** In a few states, the owner of property upon which a lien has been taken to secure any mechanic, laborer, or material-man, may notify, in writing, the owner of the lien to commence suit thereon ; and if he fails so to do within sixty days after receiving the notice thereon, the lien is null and void : O. 3197 ; Ind. 1883,115,10 ; Io. 2139 (thirty days). But suit may still be maintained on the debt, as in § 1985 : O., Ind. See also § 1975.

When the debt is paid, the claimant must generally enter satisfaction on the margin of the record of the lien.

§ 1982. **Precedence.** (A) The lien does not generally take precedence (1) of a mortgage executed and recorded before the contract was made on which the lien is claimed : Mass. 191,5 ; N.Y.<sup>f, k</sup> 1862,478,12 ; 1864,366,3 ; Md. 67,6,15 ; Ark. 4410 ; Col. 2149 ; Ida. *ib.* 4 ; S.C. 2352 ; Fla. 143,6 ; Ariz. 1885,93,4.

(2) Nor is it valid against a subsequent *bona-fide* purchaser or mortgagee before it is filed and recorded according to § 1968 : N.Y. ; <sup>k</sup> N.J. *Mechanics' Liens*, 8 ; Miss. 1378.

(3) Nor has it precedence of any other prior incumbrance : N.Y. ; <sup>f</sup> Ill.<sup>a</sup> 82,17 ; Ark. ; Fla. ; Ariz.

(4) And it is inferior to liens for taxes : Ga. 1980. (5) It is inferior to the liens of laborers, both general and special : Ga. (6) They are inferior to levies by the landlord for rent : Ga.

(7) They are inferior to claims for purchase-money due persons who have only given bonds for titles : Ga. (8) They are inferior to all general liens of which actual notice has been communicated before the work was done or materials furnished : Ark., Ga. (9) An attachment of the owner's interest in the land, if made before the statement recorded (§ 1968), takes precedence, to the extent of the value of the land and buildings as they were at that time : Mass. 191, 31 ; Ill. 82,17 ; S.C. 2376.



(B) In most states, the lien takes precedence of any other incumbrance originating (1) after the commencement of the services or furnishing materials: R I. 177,1; Ct. 18,7,9; N.Y.<sup>d.i.</sup> 1880,143,7; Pa. *Mechanics' Liens*, 10; Wis. 3314; Io.; Kan. 80,630; Md.; Va. 115,9; W.Va. 1882,64,2; Mo. 3178; Cal. 11186; Ore. 1885, p. 13, § 3; Nev. 1875,64,4; Col. 2149; Wash. 1960; Dak. 819; C. Civ. P. 664; Ida. Civ. C. 819; Mon. G. L. 827; Wy. 1877, p. 79, § 7; Uta. C. Civ. P. 1061; Ga.; Ala. 3442; N.M. 1523; Ariz. 1885,93,4; D.C. 701; Mich. 1885,216,5; (2) after the record (§ 1968): Ind. 1883,115,5.

And also of liens, mortgages, or incumbrances created before such time, if they were unrecorded and the lien-holder had no actual notice of them: N.Y. 1875,379,4; Md.; Ark.; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Ida.; Uta.; N.M.; Ariz.

It takes precedence "of any lien taken by the principal contractor:" N.Y.

So, in others, it has precedence of any mortgage given to secure the payment of money to be used in the construction or repair of the building, except such part as was given to secure the purchase-money of the land: N.J. 1879,52; Pa. *Mechanics' Liens* (Ann. Dig. 1877), 1; 1881,65.

But in several, the lien on the *building* or *erection* for which work was done or materials furnished has preference over any prior lien, incumbrance, or mortgage on the *land*: Ill. 82,17; Io.; Mo. 3174; Ore.; Col. 2148; Dak. C. Civ. P. 666; Mon. G. L. 829; Wy. 1877, p. 77, § 3; Ala. 3442. *Provided*, that it does not take preference of a recorded mortgage on the land which expressly secures money advanced for the building: Mich. See also note<sup>a</sup>.

And in one, if the contract be made with the mortgagor, and the mortgagee has written notice of the same before the work is begun or materials furnished, and consent thereto, the lien has priority over the mortgage; and if he fail to object within ten days after notice, his consent shall be implied: Tenn. 2742. So, the same rule as to the vendor's lien, when he has conveyed expressly reserving lien, or has only given bond for title: Tenn. 2743. In Ohio, there is no homestead or other exemption, as against mechanics' liens: O. 3185. See also Part IV.

No attachment, garnishment, or levy upon money due a contractor from the owner of such property is valid against the sub-contractor's lien; nor of a sub-contractor in the first degree as against a sub-contractor in second degree: Col. 2149. Any attachment to secure a lien has precedence of any attachment made after the lien accrued (unless founded on an earlier lien): N.H. 139,19.

The lien relates back to commencement of work: Col. 2149. And no incumbrance upon the land, if made after the contract for erecting a building, is to operate upon the building erected until the liens for such erection are satisfied: Va. 115,9. They take priority of all garnishments upon the person of the owner for the contract debt made prior or subsequent to the furnishing of the material: Mich.; Io. They take precedence of all liens, except as above: Ga.

NOTE. — <sup>a</sup> *i. e.*, such lien does not take precedence as to the *land* taken at its value at the time of making the building contract; but the lien on the *building* is preferred to all incumbrances, prior or subsequent. For other notes, see § 1962.

§ 1983. **Removal of Fixtures by Mechanic.** If the labor be done or materials furnished by contract with a lessee for a term whose interest is forfeited or surrendered before expiration, and the lessor refuse to pay for same, the person furnishing work and materials may remove the same [*sic*] from the premises, *provided* it can be done without material injury to any previous improvement on said leased premises: Ky. 70,4.

§ 1984. **Materials not liable to Execution.** When materials are furnished in good faith for the erection or repair of a structure, they are not subject to attachment or execution or any process to enforce a debt due by a purchaser thereof, except a debt due for the purchase-money: Cal. 11196; Ore. 1885, p. 13, § 12; Nev. *ib.* 13; Wash. 1969; N.M. 1533; Ariz. 1885,93,13.

§ 1985. **Other Suits.** Nothing in this article prevents suit by the lien-holder on the debt, as in ordinary contracts: Mass. 191,46; N.Y.<sup>d</sup> 1875,379,9 and 20; 1882,410,1822; Pa. *Mechanics' Liens*, 60; Mich. 8394; Md. 67,6,42; Del. V.

16,145,1 ; Va. 115,11 ; Cal. 11197 ; Nev. *ib.* 14 ; Col. 2161 ; Wash. 1970 ; Dak. 828 ; Ida. Civ. C. 828 ; Mon. G. L. 830 ; Uta. C. Civ. P. 1070 ; S.C. 2337 ; N.M. 1534 ; Ariz. 1885,93,14.

And if upon sale under lien process there is a deficiency in the proceeds, the balance may be entered as a judgment against the contractors or other persons liable : N.Y.<sup>4,5,6</sup> 1875,379,17 ; 1880,143,17 ; 1882,410,1819. And the lien-holder has also a remedy as in ordinary cases of liens : O. 3206 ; 1881, p. 78.

NOTES.— See § 1962.

§ 1986. **Insurance.** In Nebraska, the lien-holder may notify the owner to insure, and if he fail to do so, may insure to two thirds the value of the total liens at his expense : Neb. 1885, 62,13.

§ 1987. **Rights of Sub-Contractors, etc.** When any process for a lien under this article has been commenced, all contractors for any part of the building are excused from going on with their contracts, and have their liens for the full value of what they have performed : R.I. 177,21.

When the owner has failed to perform his part of the contract, the mechanic may have a lien for so much as he has performed : Ill. 82,11 ; Mich. 8385 ; W.Va. 1882,64, 6 ; S.C. 2369.

So, when the principal contractor has failed to complete his contract : Ill. 82,45 ; Cal. 1885, 152,6. In all cases in which a building is commenced and not finished, the lien attaches thereto to the extent of the work done or materials furnished : Md. 67,6,2.

The owner and principal contractor cannot by their contract waive or impair the claims or liens of other persons without their written consent : Cal. 1885,152,7. So, the bond filed by the principal contractor for faithful performance of his contract must be recorded, and it inures to the benefit of all persons furnishing labor or materials, and they have an action upon it : Cal. 1885,152,9.

## Art. 199. Civil Law.

§ 1990. **Of Constructing Buildings according to Plots, and other Works by the Job, and of Furnishing Materials.** To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price.

A person who undertakes to make a work may agree, either to furnish his work and industry alone, or to furnish also the materials necessary for such a work.

When the undertaker furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it, though duly notified to do so.

When the undertaker only furnishes his work and industry, should the thing be destroyed, the undertaker is only liable in case the loss has been occasioned by his fault.

In the case mentioned in the preceding paragraph, if the thing be destroyed by accident, and not owing to any fault of the undertaker, before the same be delivered, and without the owner be in default for not receiving it, the undertaker shall not be entitled to his salaries, unless the destruction be owing to the badness of the materials used in the building.

If the work be composed of detached pieces, or made at the rate of so much a measure, the parts may be delivered separately ; and that delivery shall be presumed to have taken place if the proprietor has paid to the undertaker the price due for the parts of the work which have already been completed.

If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin, either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years, if it be built in wood or with frames filled with bricks.

When an architect or other workman has undertaken the building of a house by the job, according to a plot agreed on between him and the owner of the ground, he cannot claim an

increase of the price agreed on on the plea of the original plot having been changed and extended, unless he can prove that such changes have been made in compliance with the wishes of the owner.

An exception is made to the above provision in a case where the alteration or increase is so great that it cannot be supposed to have been made without the knowledge of the owner, and also where the alteration or increase was necessary and has not been foreseen.

The proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require.

Contracts for hiring out work are cancelled by the death of the workman, architect, or undertaker, unless the proprietor should consent that the work should be continued by the heir or heirs of the architect, or by workmen employed for that purpose by the heirs.

The proprietor is only bound, in the former case, to pay to the heirs of the undertaker the value of the work that has already been done and that of the materials already prepared, proportionably to the price agreed on, in case such work and materials may be useful to him.

The undertaker is responsible for the acts of the persons employed by him.

If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

Masons, carpenters, and other workmen, who have been employed in the construction of a building or other works, undertaken by the job, have their action against the proprietor of the house on which they have worked, only for the sum which may be due by him to the undertaker at the time their action is commenced.

Masons, carpenters, blacksmiths, and all other artificers, who undertake work by the job, are bound by the provisions contained in the present section, for they may be considered as undertakers each in his particular line of business.

The undertaker has a privilege, for the payment of his labor, on the building or other work, which he may have constructed.

Workmen employed immediately by the owner in the construction or repair of any building have the same privilege.

Every mechanic, workman, or other person doing or performing any work towards the erection, construction, or finishing of any building erected under a contract between the owner and builder or other person (whether such work shall be performed as journeyman, laborer, cartman, sub-contractor, or otherwise), whose demand for work and labor done and performed towards the erection of such building has not been paid and satisfied, may deliver to the owner of such building an attested account of the amount and value of the work and labor thus performed and remaining unpaid; and thereupon such owner shall retain out of his subsequent payments to the contractor the amount of such work and labor for the benefit of the person so performing the same.

Whenever any account of labor performed on a building erected under a contract as aforesaid shall be placed in the hands of the owner or his authorized agent, it shall be his duty to furnish his contractor with a copy of such papers, in order that if there be any disagreement between such contractor and his creditor they may, by amicable adjustment between themselves or by arbitration, ascertain the true sum due; and if the contractor shall not, within ten days after the receipt of such papers, give the owner written notice that he intends to dispute the claim, or if, in ten days after giving such notice, he shall refuse or neglect to have the matter adjusted as aforesaid, he shall be considered as assenting to the demand, and the owner shall pay the same when it becomes due.

If any such contractor shall dispute the claim of his journeyman or other person for work or labor performed as aforesaid, and if the matter cannot be adjusted amicably between themselves, it shall be submitted, on the agreement of both parties, to the arbitrament of three disinterested persons, — one to be chosen by each of the parties, and one by the two thus chosen; the decision, in writing, of such three persons, or any two of them, shall be final and conclusive in the case submitted.

Whenever the amount due shall be adjusted and ascertained as above provided, if the contractor shall not, within ten days after it is so adjusted and ascertained, pay the sum due to his creditor with the costs incurred, the owner shall pay the same out of the funds as provided; and the amount due may be recovered from the owner by the creditor of the contractor, and the creditor shall be entitled to the same privileges as the contractor to whose rights the creditor



shall have been subrogated, to the extent in value of any balance due by the owner to his contractor under the contract with him at the time of the notice first given as aforesaid, or subsequently accruing to such contractor under the same, if such amount shall be less than the sum due from the contractor to his creditor.

All the foregoing provisions shall apply to the person furnishing materials of any kind to be used in the performance of any work or construction of any building, as well as the work done and performed towards such building, by any mechanic or workman; and the proceedings shall be had on the account duly attested of such person furnishing materials, and the same liabilities incurred by, and enforced against, the contractor or owner of such building, or other person, as those provided for work or labor performed.

If, by collusion or otherwise, the owner of any building erected by contract as aforesaid shall pay to his contractor any money in advance of the sum due on the contract, and if the amount still due the contractor after such payment has been made shall be insufficient to satisfy the demand made for work and labor done and performed, or materials furnished, the owner shall be liable to the amount that would have been due at the time of his receiving the account of such work, in the same manner as if no payment had been made.

Workmen and persons furnishing materials who have contracted with the undertaker have no action against the owner who has paid him. If the undertaker be not paid, they may cause the moneys due him to be seized, and they are of right subrogated to his privilege.

The payments which the proprietor may have made in anticipation to the undertaker are considered, with regard to workmen and to those who furnish materials, as not having been made, and do not prevent them from exercising the right granted them by the preceding article.

No agreement or undertaking for work exceeding five hundred dollars which has not been reduced to writing and registered with the recorder of mortgages, shall enjoy the privilege above granted.

When the agreement does not exceed five hundred dollars, it is not required to be reduced to writing, but the statement of the claim must be recorded in the manner required by law to preserve the privilege.

Workmen employed in the construction or repair of ships and boats enjoy the privilege established above without being bound to reduce their contracts to writing, whatever may be their amount, provided the statement of the claim is recorded in the manner required by law; but this privilege ceases if they have allowed the ship or boat to depart without exercising their right: La. 2756-2777.

## CHAPTER IX. — LANDLORD AND TENANT.

§ 2000. **Note to Chapter.** See also *Ejectment, Forcible Entry, etc.*, in Part IV.

### Art. 200. Creation of Tenancy.

§ 2001. **Definitions.** Any contract or consent pursuant to which a tenant shall enter into or continue in possession of lands, etc., under an agreement to pay rent, shall be a demise: Del. 120,1.

The letting of part of a room is, in two states, forbidden: Cal. 6950; Dak. Civ. C. 1122.

In Georgia, a distinction is made between the relation of landlord and tenant, and the relation of lessor and his lessee for years. Thus, when the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate, either for a fixed time or at the will of the grantor, and the tenants accept the grant, the relation of landlord and tenant exists between them; no estate passes out of the landlord, and the tenant has only a usufruct, which he cannot convey without the landlord's consent and which is not subject to levy or sale: Ga. 2279.

And all renting or leasing of real estate for a period of time less than five years is held to convey only the right to possession and enjoyment, the usufruct, not the estate, unless the contrary be expressed in the contract: Ga.

§ 2002. **Tenancy without Contract.** Generally every tenancy or occupancy of real estate, without special agreement to the contrary, is deemed, (A) in



a few states, a tenancy at will : N.H. 250,5 ; Io. 2014 ; Kan. 55,1 ; Col. 1885, p. 226, § 6. So, in many states, where there is no written lease ; see §§ 2003,2021.

But such tenancy must be with the owner's knowledge or consent ; otherwise the occupant will be a trespasser : Io., Kan.

(B) It is deemed a tenancy at sufferance : D.C. 2680.

(C) In others, it is deemed a tenancy from year to year : R.I. 232,5 ; Ind. 5208 ; Del. 101,15 ; Uta. 1205.

So, in New York City, it lasts until the first of May following, and rent is payable on the usual quarter days : N.Y. 2,1,4,1.

(D) And in others, it is deemed to be for one calendar year : Del. 120,2 ; Cal.<sup>a</sup> 6943 ; Dak.<sup>b</sup> Civ. C. 1116 ; Ga. 2290 ; S.C. 1812.

"Except as to houses or lots usually let for a less time : " Del., Cal.<sup>a</sup>

In one, all parol leases are understood to be for one year, unless stipulated to be for a shorter term : S.C. 1812. See also the Statute of Frauds, Art. 414.

But it is deemed from month to month, if the letting be at a monthly rate : R.I. 1882,317.

(E) And in others still, it is from term to term : Cal.<sup>c</sup> 6944 ; Dak.<sup>c</sup> 1117.

And in detail, (1) all unwritten contracts or agreements for leasing houses, shops, or tenements in towns create tenancies from month to month : Mo. 3078 ; Uta. (2) So, in two others, unless the rent is made payable at other periods : Cal., Dak.

NOTES. — <sup>a</sup> In the absence of a local usage. <sup>b</sup> Except as to lodgings or dwelling-houses. For these, see § 2005. <sup>c</sup> As to lodgings or dwelling-houses only.

§ 2003. **Tenancy at Will.** In several states, tenancy without contract creates an estate at will, § 2002, A. And by the provisions of the Statute of Frauds, all estates created by parol for a term over a year (or a few years) are made estates at will only. See Art. 414 ; and also §§ 1471,1551. Otherwise, in a few states, an estate at will can be created only by express words : Ind. 5208 ; Ga. 2290 ; D.C. 680.

§ 2004. **Tenancy by Sufferance.** (A) "When a tenant holds over his term" (Stimson's "Law Glossary"). This definition expresses the law in two states : Ind. 5213 ; Wy. 72,1.

(B) But in Washington Territory, "where a person obtains possession without consent of the owner, he is deemed a tenant by sufferance : " Wash. 2057. So, in many states, tenancy by sufferance is confounded with tenancy at will.

§ 2005. **Tenancy from Term to Term.** (A) In Wyoming, all tenancies from term to term are abolished : Wy. 72,1-2.

So, in two territories, all tenancies from year to year : Wash. 2053 ; Wy.

Thus, in detail, no holding over by any lessee after the expiration of his term shall be evidence of any agreement for a further lease : Ct. 18,6,1,16 ; Wy. 72,1. A parol lease reserving a monthly rent creates a tenancy for one month only (not from month to month) : Ct.

Except, that tenancies from year to year may be created by express written contract : Wash.

(B) But in several states, expressly, tenancies from year to year exist : Ind. 5208 ; Md. 67,7,6 ; Ky. 66,4,1 ; Cal. ; Dak. ; Uta. C. Civ. P. 1035.

Thus, in detail, (1) if there be a demise for a year or term of years, and the required notice (Art. 205) is not given by either party before the end of the term, a tenancy from year to year is created : Del. 120,4.

(2) So, in others, if the tenant in such case hold over, he may be considered a tenant from year to year, according to the terms of the lease : Wis. 2187 ; Kan. 55,2. But only at the option of the landlord : Wis.

(3) All tenancies without special contract are deemed from year to year (§ 2002, C).

(4) If a tenant for a year or more hold over ninety days after the end of his term : Ky. ; (5) sixty days thereafter : Uta.

(C) And in Maryland, expressly, tenancies from term to term exist.

And in many states, tenancies so called at will are in effect held or treated as if from term to term. See §§ 2051,2052. And in others, tenancy without contract is held from term to

term. See § 2002. Thus, in detail, (1) when rent is reserved payable at intervals of three months or less, the tenant is deemed to hold from one period to another equal to the interval between the days of payment, unless there is an express contract to the contrary: Kan. 55,3.

(2) When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed as from month to month, or period to period on which rent is payable, and shall be terminated by written notice of thirty days or more if the term is longer, preceding the end of any of said months or periods, given by either party to the other: Cal. 6944,6946; Wash. 2054; Dak. Civ. C. 1117,1119.

(3) And if the lessee remains in possession after the lease has expired, and the lessor accepts rent from him, the parties are presumed to have renewed the lease from year to year, or from term to term if the rent is payable oftener than once a year: Cal. 6945; Dak. Civ. C. 1118. So, as to tenancies from term to term of less than a year: Nev. 59.

§ 2006. **Tenancy for Years.** (See Art. 134.)

§ 2007. **Tenancy for Life.** (See Art. 133.)

§ 2008. **Attornment.** In most states, the attornment of a tenant to a stranger is absolutely void, and does not affect the landlord's possession, unless made (1) with the landlord's consent: N.Y. 2,1,4,3; N.J. *Landlord and Tenant*, 24; Ind. 5216; Wis. 2182; Io. 2013; Kan. 55,14; Del. 120,7; Va. 134,4; W.Va. 113,4; Ky. 63,1,16; Mo. 3080,3948; Cal. 6948; Nev. 275; Dak. Civ. C. 1121; Ida. 1874-5, *Conveyances*, 49; Mon. G. L. 225; S.C. 1784; Ga. 2283; Miss. 1192; D.C. 683.

(2) Pursuant to, or in consequence of, a judgment or decree: N.Y., N.J., Ind., Wis., Io., Kan., Del., Va., W.Va., Ky., Mo., Cal., Nev., Dak., Ida., Mon., S.C., Miss.

So, in Wisconsin, "to a purchaser upon a judicial sale who shall have acquired title to the lands by a conveyance thereof after the period of redemption if any has expired."

(3) Or after a mortgage has been forfeited, if made to the mortgagee: N.Y., N.J., Io., Mo.

§ 2009. **Attornment Unnecessary.** (A) In most states, a grant of the remainder or reversion or other conveyance by the landlord is valid without the attornment of the tenant: N.Y. 2,1,2,146; N.J. *Conveyances*, 74; Ind. 5215; Kan. 55, 13; Del. 120,6; Va. 134,3; W.Va. 113,3; N.C. 1764; Ky. 63,1,16; Mo. 3947; Cal. 6111; Nev. 274; Dak. Civ. C. 632; Ida. 1874-5, *Conveyances*, 48; Mon. G. L. 224; Ala. 2177; Miss. 1191; N.M. 1429.

So, in many, a grant of the rent: Del., Va., W.Va., N.C., Ky., Mo., Cal., Nev., Dak., Ida., Mon., Miss., N.M.

(B) But in all these cases, a payment of rent made by the tenant, in good faith and without notice of the grant to the grantor, is good as a discharge from the rent so paid, and due: N.Y.; N.J.; Ind.; Kan.; Del.; Va.; W.Va.; Ky.; Mo.; Cal.; Nev.; Dak.; Ida.; S.C. 1823; Ala.; Miss.; N.M.

So, in New York, the tenant is not liable, before notice, to the grantee for breach of condition. And in North Carolina, the tenant is "not prejudiced by any act done by him as holding under his grantor, before notice as above."

§ 2010. **Conveyances of Rents** in fee, or devises, with powers of distress or re-entry, pass such powers to the grantee or devisee without express words: Va. 134,3; W.Va. 113,3. The grantee or assignee of the estate or term in land may recover the rent: Va. 134,8; W.Va. 113,8; Ky. 66,2,7.

Rent may be recovered from the lessee or his assignee; but no assignee is liable for rent accruing before his interest began: Va. 134,9; W.Va. 113,9; Ky. 66,2,8; Mo. 3095. Compare § 1352.

**Art. 202. Rent.**

§ 2020. **Use and Occupation.** See §§ 2002, 2021. For form of action, see in Part IV.

§ 2021. **Tenants at Will.** (A) Where a tenancy at will exists, or where such tenancy is created by an occupation by the tenant without demise, or with parol demise, which is not good as a written lease because not written, not sealed, or not recorded according to law, the tenant is liable, in most states, for a reasonable rent, to be recovered in an action on the case for use and occupation, *assumpsit*, etc.: Me. 94,10; N.Y. 2,1,4,26; N.J. *Landlord, etc.* 3; Ill. 80,2; Wis. 2196; Del. 120,13; Va. 134,7; W.Va. 113,7; N.C. 1746; Ky. 66,2,2; Mo. 3081; Ark. 4167, 4169; S.C. 1813; Ala. 2956; Miss. 1323; Fla. 137,16.

So, in others, "the occupant without special contract of any lands shall be liable for rent to any person entitled thereto:" Ind. 5222; Kan. 55,20; Miss.

(B) And in such case, a parol demise or other agreement may be used in evidence to fix the amount of such rent: N.Y.; N.J.; Wis.; Del.; Va.; W.Va.; N.C.; Ky.; Mo. 3082; Ark. 4168; S.C.; Miss.; Fla.

When land has been sold under a judgment or decree of court, where the party defendant or his tenant refuses to yield possession, after written demand by the party entitled, he is liable for rent, or a reasonable satisfaction for the use and occupation: Ill. 80,1. So also, where the premises have been sold under a mortgage or trust-deed, and the mortgagor or his tenant refuses as above: Ill.

When there is no usage or contract to the contrary, rents are payable at the termination of the holding, if it does not exceed one year: Cal. 6947; Dak.<sup>a</sup> Civ. C. 1120. If the holding is by the day, week, month, quarter, or year, rents are payable at the termination of every successive such period: Cal., Dak.

In tenancies at will rent is payable at any time upon demand: N.H. 250 5.

So, a person who has obtained the possession of real estate under a written or verbal contract to purchase, when before a deed is given the right to possession is terminated by forfeiture or non-compliance with the agreement (and, in Illinois, possession is wrongfully refused or withheld after a written demand) is liable for rent in the same way: Ill.; Del. 120,14; Tenn. 4141; Ala. But all payments previously made by such vendee may, in Illinois, be set off against such rent.

Rents of lodgings are payable monthly; other rents, quarterly: Cal. 6944; Dak.

NOTE. — <sup>a</sup> Of wild or agricultural land only.

§ 2022. **Tenant by Sufferance.** In several states, a tenant by sufferance is liable to pay rent: Mass. 121,3; Ill. 80,1; Wash. 2057; Ala. 2956. So, probably, in most others.

"Reasonable rent for time of actual occupation:" Mass., Wash.

§ 2023. **Rent by Tenant for Life.** In most states, a lessor for life or lives has the same remedy for recovering rent as if the lease were for years: N.Y. 2,1,4,19; N.J. *Landlord, etc.* 1; Ind. 5219; Ill. 80,1; Wis. 2188; Kan. 55,17; Ky. 66,2,19; Mo. 3069; Ark. 4160; Cal. 5824; Dak. Civ. C. 262; S.C. 1827.

He has an action of debt: Del. 120,8. So, a grantor in fee or tail reserving rent: Del.

§ 2024. **Rent due Tenant for Life.** In several, if the tenant for life rents land for the year, and dies,<sup>a</sup> or the estate is otherwise terminated during the year, the tenant is entitled to the land for the term of the year (1) upon complying with his contract with the tenant for life: Ga. 2258; (2) if he shall pay a reasonable rent from the death of the life-tenant: Va. 135,1; W.Va. 78,1; Ky. 39,2,29.

(3) In South Carolina, the person hiring shall not be dispossessed until the crop of that year is finished, he securing payment of the rent when due: S.C. 1807.



The administrators of such tenant may recover rent due at his decease, and may distrain for it : N.J. *Distress*, 20. See also in Probate Code.

NOTE. — <sup>a</sup> If he die after March 1 in such year : Ky.

§ 2025. **Rent due Tenant pur Autre Vie.** In many states, any person entitled to any rents dependent on the life of any other person may, notwithstanding the death of such other person, have the same remedy by action for arrears unpaid at his death as if such person were alive: N.Y. 2,1,4,20; N.J. *Distress*, 18; Ind. 5220; Wis. 2191; Io. 2011; Kan. 55,18; Ky. 66,2,20; Mo. 3067; Ark. 4158; Cal. 5825; Dak. Civ. C. 263; Miss. 1328.

So, in a few, he may distrain: N.J. *Distress*, 18; Del. 120,11; Ky.

§ 2026. **Rent due the Husband.** The rights and remedies of a husband who in right of his wife has any interest in or title to rents in arrear whilst she is alive shall in no wise be affected by her death: N.J. *Distress*, 19; Ky. 66,2,21; Mo. 3068; Ark. 4159. So, in New Jersey, he may still distrain. See also in Division II.

§ 2027. **Apportionment.** (A) In a few states, there is a general provision that all rents, annuities, dividends, or other fixed payments, are apportioned between the landlord's representatives and remainder-men, so that, on the death of any person interested in such rents, etc., or the determination of his interest by any other means or contingency, he or his executor or administrator is entitled to a proportion of such rents, etc., up to and including the day of his death or other termination of his interest: Mass. 121,8; N.Y.<sup>a, b</sup> 1875,542,1-3; Va.<sup>a</sup> 136,1 and 3; W.Va.<sup>a</sup> 135,1 and 3; N.C. 1747-8.

(B) So, in many states, when a life tenant who has demised any lands shall die, his executor or administrator may recover from the under-tenant the proportion of the rent due at his death: Mass. 121,8; N.Y. 2,1,4,22; N.J. *Landlord, etc.* 2; Pa. *Decedents*, 98; Ind. 5223; Wis. 2193; Io. 2011; Del. 120,15; Va. 135,1; W.Va. 78,1; N.C.; Ky.<sup>c</sup> 39,2,30; Tenn. 3289; Mo. 3066; Ark. 4157; S.C. 1805-6; Miss. 1328.

Or when the lessor's estate is ended by any other contingency: Del., Va., W.Va., Ky.

\* (C) In Massachusetts, a similar apportionment of rent is had when an estate at will or a tenancy under lease is determined by surrender, or by notice to quit for non-payment of rent: Mass.

(D) *Vice versa*, in such cases, if the rent has already been paid for the whole period, the tenant, upon such determination, may recover back a part proportional to the remainder of his term: Mass. 121,9.

(E) When the holder of a rent purchases part of the land out of which it issues, or a holder of land part of the rent, apportionment is had as if the land or rent had come to him by descent: Va. 136,4; W.Va. 135,4.

NOTES. — <sup>a</sup> Unless it is expressly stipulated to the contrary. <sup>b</sup> Does not apply to sums made payable on policies of insurance. <sup>c</sup> Unless, in case of a devise, the will otherwise direct.

§ 2028. **Apportionment among Sub-lessees.**<sup>a</sup> (A) In several states, every person in possession of land out of which rent is due, whether originally demised in fee or for life or years, is liable for the rent, or proportion of rent, due from the land in his possession, although only a part of what was originally demised: Mass. 121,4; N.J. *Distress*, 22; Mich. 5771; Wis. 2189; Minn. 75,36; Ore. 17,31.

Such rent may be recovered by suit, and the principal deed or demise is evidence: Mass. 121,5; Mich. 5772; Wis.; Minn. 75,37; Ore. 17,32.



This does not deprive landlords of any other legal remedy, or contract remedy : Mich. 5773 ; Minn. 75,38 ; Ore. 17,33.

(B) In New Jersey, when premises are sub-let or under-let,<sup>a</sup> the sub-lessee or under-lessee is liable to pay to the lessor the rent which shall accrue after written notice to him for that purpose, or which is then unpaid, and the lessor has the same remedies as against the principal lessee, *provided* the amount of rent so paid shall not exceed the amount due the lessor from the principal lessee.

NOTE. — <sup>a</sup> See definition *Underlease* in Stimson's "Law Glossary."

§ 2029. **Anticipation of Rent.** In one state, "no payment made in anticipation of rent, for a longer period than twelve months, shall be considered a valid discount against the claims and rights of third persons : " S.C. 1810.

§ 2030. **Interest on Rent.** All rents bear legal interest from the time they are due : Ky. 66,2,3 ; Ga. 2288 ; Fla. 137,17.

§ 2031. **Distress for Rent.** Distress for rent has, in several states, been expressly abolished : N.Y. 1846,274 ; 2,1,4,18 ; Wis. 2181 ; Minn. 75,39 ; Uta. 1203 ; D.C. 677.

In others, distress is recognized by the statutes as still existing : N.J. *Distress*, 1 ; Pa. *Landlord, etc.* 4 ; Ill. 80,16 ; Md. 67,7,8 ; Del. 120,19 ; Va. 115,14 ; 135,7 ; Ky. 66,2,1 ; S.C. 1824,1828 ; Ga. 2285 ; Miss. 1302-1310.

And it makes no difference as to the right of distress that security has been given by the tenant : Md. 67,7,17.

In most other states, the procedure has practically fallen into disuse.

In many states, distress is practically preserved under the law of liens and attachments (see §§ 2033-2035 ; also in Part IV.).

§ 2032. **Procedure in Distress.** In several, the landlord may distrain for rent before it is due, if the tenant is seeking to remove his goods from the premises : Ill. 80,34 ; Ga. 2285 ; Miss. 1305.

In others, he may distrain after the term has ended : N.J. *Distress*, 17 ; Pa. *Landlord and Tenant*, 1 ; Del. 120,21 ; S.C. 1828 ; Miss. 1308.

Within two years thereafter only : Del. 120,44. Within five years after the rent is due : Va. 135,19 ; within one year after : W.Va. 113,10 ; 1882,65 ; S.C. 1824.

See Part IV. for other provisions relating to distress.

§ 2033. **Suits for Rent.** Any person having rent in arrear or due upon any lease or demise of land or tenements for life, years, or at will, may bring an action for such arrears of rent against the person who ought to have paid the same, his executors or administrators : Va. 134,8 ; W.Va. 113,8 ; Mo. 3093 ; Miss. 1322. Even though the tenant's estate or interest be ended : Va., W.Va., Mo.

"Nothing contained in the preceding sections shall deprive landlords of any legal remedy for the recovery of their rents, whether secured to them by their leases or provided by law : " Mass. 121,7 ; Wis. 2190.

The provisions of this article for the recovery of rent by action or distress extend to any rent in arrear, whether of money, or quantity, or shares, or of any other thing certain or that can be reduced to certainty, and whether it be a rent-charge, rent-seek, quit-rent, or otherwise : Del. 120,12. So, in Maryland, when the rent is payable in crops or produce as well as when payable in money : Md. 67,7,10.

So, in two others, rent "of every kind" may be recovered by distress or action : Va. 134,7 ; W.Va. 113,7.

§ 2034. **Special Lien for Rent.** The landlord has a lien on the fixtures, furniture, and other personal property of the tenant or under-tenant, after possession taken under the lease, for not more than one year's rent due, or for any rent which has been due for more than one hundred and twenty days : Ky. 66,2,13.

In many states, the landlord has always a lien for his rent (1) on the crops grown during the term, unless otherwise agreed: Ind. 5224; Ill. 80,31; Io. 2017; Kan. 55,24; Md.<sup>a</sup> 67,7,13; N.C. 1754; Ky. 66,2,13; Tenn. 4280; Mo. 3083; Ark. 4453; Tex. 3107,3121; S.C.<sup>b</sup> 2399; Ga. 1977; Ala. 3467; Miss. 1301; Fla. 137,1; La. D. 2873; Ariz.<sup>c</sup> 1881,46,1.

This special lien dates from the maturity of the crop: Ga.; from December 25 (unless otherwise stipulated): Ala. 3468.

(2) On the furniture in the house: Ky.; La.; N.M. 1537; (3) on the farm implements: La.; (4) on any other personal property which has been used on the premises: Io.; Ky.; Mo. 3091; 1883, p. 105; Fla.; D.C. 678.

In many states, it is superior to all other liens, older or younger (except, in Georgia, liens for taxes, to which it is inferior): N.C.; Ky.; Tenn.; Ark. 4454; Tex.; Ga. 1977,2286; Ala. 3467; 1879,67; Fla.

In a few, it is paramount to all other liens or demands upon such products: Tenn., Miss., Fla.

It exists in spite of all laws exempting property from execution, and is paramount thereto: Tex. 3109.

In many, the landlord has also a lien, without agreement, on the crops for supplies, money, utensils, or other articles advanced by him which are necessary to make crops: Md.<sup>a</sup>,<sup>e</sup> 67,7,14; Va. 1882,230; N.C.; Tenn. 4285; Ark. 1885,134,1; Tex. 3107; S.C.<sup>a</sup> 2399; Ga. 1978,2287; Ala. 3467; Miss. 1301; Fla. 137,12.

In a few, also, on the articles advanced, or property purchased with money or articles so advanced, for the aggregate price or value of all such property or articles advanced: Tex., Ala., Fla.

Both these special liens, when created by special contract in writing, are assignable by the landlord: Ga. 1833,390; 1978. So, whether so created or not: Ala. 3470. The lien continues (1) for three months after the debt becomes due and until the termination of any suit for rent commenced within that time: Tenn. 4281; D.C.; (2) for six months: Ark.; (3) for eight months after rent due: Mo.; (4) as long as property subject to lien remains on the premises, and for one month thereafter: Tex. 3109.

Lien lasts for one year after any rent was due: Io. 2017; and six months after expiration of the term: Ill. The lien continues until rent paid and all conditions performed: N.C. The landlord may recover from the purchaser of the crop, with notice of the lien, the value of the property, so that it does not exceed the amount of the rent and claims: Tenn. 4283.

The lien expires, unless suit is brought before September 1 following the record of the lien: Ariz. 1881,46,1.

The lien is not for more than one year's rent, nor for rent which has been due more than one hundred and twenty days: Ky. 66,2,13.

The lien is not superior to mortgages recorded or liens which attached prior to record of the lease: Ariz. 1881,46,4.

In Maryland, when the rent agreed to be paid is part of the crop, such portion shall not be liable to be levied on by any process for debt against the tenant (provided the contract is in writing and the rent does not exceed one half of the crop): Md. 67,7,13. A lien, for rent or advances, for a greater amount than a third of the crop must be written, and recorded in the registry of deeds: S.C. 2399.

In cases where there is a sub-tenancy, the superior landlord must enforce his lien against the crop of his immediate tenant before that of the sub-tenant: Ala. 3476. The sub-lessee is only responsible for the rent of such land as is occupied by him: Ark. 4455. But the landlord has the same remedy against the sub-lessee or assignee that he has against the original tenant: Ill. 80,32. And *vice versa*, the sub-lessee against the landlord: Kan. 55,15.

The provisions of this article apply as between persons related as tenant-in-chief and sub-tenant: Ala. 3478.

It is not lawful for the tenant, while such rent and advances remain unpaid, to remove, or permit to be removed, from the premises so rented any of the agricultural products, or animals, tools, etc., furnished by the landlord (except, in North Carolina

and Arkansas, without his consent): N.C. 1759; Ark. 4459; 1885,134,2; Tex. 3108; Ga. 1977.

This lien is enforced (1) by distress-warrant: Va.: Tex. 3112; 1881,85; Ga.; Fla. 137, 13; (2) by attachment: Kan.; Mo. 3091; Ark.; D.C. 679.

If the tenant abandon the premises, the landlord may seize the crops, whether rent is due or not: Ill. 80,33.

Such writ of attachment may be levied on the crop in the possession of the tenant or of any one holding it in his right, or in the possession of a purchaser from him with notice of the lien of the landlord: Ark. 4461.

If the tenant removes, or intends to remove, the crop, the landlord may attach at once, though the rent be not due: Kan. 55,27; Mo.; La. 3218-9.

When a lease of land with rent payable is made for the purpose of erecting a mill or other buildings thereon, such buildings and all the interest of the lessee are subject to a lien for the rent: Me. 91,36. And in all cases where rent is due, whether under a lease or otherwise, all buildings upon the premises while the rent accrues are subject to a lien, although other persons than the lessee may own them, and whether the land was leased for the purpose of erecting them or not: Me. 91,37.

See also *Distress*, in Part IV.

NOTES. — <sup>a</sup> Only when the rent is payable in a share of such crop. <sup>b</sup> Not exceeding one third the value of the crop: S.C. 2400. <sup>c</sup> *Provided* the lease be recorded. <sup>d</sup> Such contract for advances must be in writing. <sup>e</sup> Applies only in certain specified counties.

§ 2035. **General Lien.** In several states, a landlord has a general lien for rent on all the property of the tenant liable to distress, or to levy and sale: N.J. *Landlord and Tenant*, 4; Pa. *Landlord, etc.* 14; Tex.<sup>a</sup> 3122a; Ga. 1977.

So, the landlord of stores, dwelling-houses, or other buildings has a lien for rent on all the tenant's goods, furniture, and effects: Ala. 1885,69.

Such lien continues as long as the tenant occupies the demised premises and for one month thereafter: Tex. It is enforceable by distress-warrant: Tex. 3122b; Ga.; by attachment: Ala. 1883,102,2. And dates from the time of the levy of such warrant: Ga. 1977,2286.

It is inferior to liens for taxes: Ga., Ala.; and to the general and special liens of laborers, but ranks with all other liens, and with other similar liens, according to date as above: Ga.

It is superior (up to one year's rent) to any execution, attachment, or other legal process: N.J., Pa.

It may be assigned (by writing): Ga. 1996; Ala. 1883,102,6.

A tenant may waive, in writing, the benefit of exemption laws for all debts contracted for rents: Kan. 55,30. See also in Part IV.

NOTE. — <sup>a</sup> When a *house* or *building* is demised.

§ 2036. **Express Liens.** The tenant may agree in the lease to give the landlord a lien on minerals or timber for the payment of rent, if the lease was for mining or lumbering purposes, and such lien is valid as in § 2034: N.C. 1763. Generally, nothing in this article prevents the creation of express liens by agreement: Tex. 3121.

So, in two states, a lien may be given in writing for supplies, services, and articles furnished by the landlord or a lessee to a sub-lessee: Tenn. 4284; Ga. 1978,2286.

This lien is not prior to the lien of the owner of the land for rent: Tenn.

§ 2037. **Farming on Shares.** When one party furnishes land and the other party labor, with stipulations expressed or implied to make division of crop, the relation of landlord and tenant is created with all its incidents, and the portion of the crop due the person owning land is held and treated as the rent: Ala. 3474. In such case there is also a contract of hire, and the laborer has a lien on the crop: Ala. 3475.

Such rent, part of the crop, is not liable for the debts of the tenant, *provided* the contract be in writing and the rent do not exceed one half the crop: Ga. 2289.

Contracts by which the landlord is to receive a portion of the crop planted or to be planted, as a compensation for the use or rent of the land, shall vest in him the right to such portion of the crop: Kan. 55,25; Ky. 66,5,1; though the crop be planted or raised by a person other than the one with whom he contracted: Ky. And so, even if the land be planted with a different kind of crop than the one contracted for: Ky. And for the taking or injury to any of the



crops aforesaid the landlord may recover damages against the wrongdoer : Ky. And also have an injunction to prevent such taking, etc. : Ky.

A purchaser without notice acquires no right valid as against the landlord's right in such crop until twenty days after the crop severed has been removed from the rented premises : Ky.

The landlord has entry and replevin for his share of the crop : Kan.

He may recover rent from any purchaser of the crop with notice of the lien : Kan. 55,26.

§ 2038. **Civil Law of Rent-Charges.** A rent-charge, created by way of condition to the alienation of the property, has been hereinbefore explained. But a rent-charge may be created and imposed on particular property, independent of any alienation of it, for the security or extinguishment of a debt ; and it may be perpetual or temporary, and, in either case, form a real obligation which passes with the land.

By the constitution of rent-charge, the possession of the property does not pass to the obligee ; it is merely a designation of the property which is subject to the obligation. Should the possession be delivered, it becomes another species of contract called antichresis, the rules relative to which are found under the proper head : La. 2017,2018.

There are two species of rent,—that of land which is properly called rent, and that of money : La. 2778.

§ 2039. **Civil Law of Rent of Lands.** The contract of *rent of lands* is a contract by which one of the parties conveys and cedes to the other a tract of land, or any other immovable property, and stipulates that the latter shall hold it as owner, but reserving to the former an annual rent of a certain sum of money, or of a certain quantity of fruits, which the other party binds himself to pay him.

It is of the essence of this conveyance that it be made in perpetuity. If it be made for a limited time, it is a lease.

A contract of sale, in which it is stipulated that the price shall be paid at a future time, but that it bears interest from the day of sale, is not a contract of rent.

On the contrary, a contract made bearing the name of a sale in which the seller does not stipulate the payment of the price, but at a capital bearing interest forever, is a contract of rent.

The contract of rent partakes of the nature of sale and of lease.

Of sale, inasmuch as it transfers the ownership of the thing, and subjects the party to the same warranty which is imposed on the vendor.

And of lease, inasmuch as it subjects the rentee to the payment of rent.

The contract of rent is subjected to the same rules as the contract of sale, except in the cases hereafter specified.

The thing sold with reservation of rent becomes the property of the person receiving it, in the same manner as a thing sold becomes the property of the purchaser ; but whereas the purchaser may make what use he pleases of the thing bought, and may even destroy it, when he has paid the price, the purchaser under reservation of rent is bound to preserve the thing in good condition, that it may continue capable of producing wherewith to pay the rent.

When a thing sold is destroyed from unforeseen accident, the loss falls entirely on the purchaser ; in case of a sale reserving rent, the loss is sustained by both parties ; for on one side the lessee loses the enjoyment of the thing, and on the other the lessor loses the right to demand the rent which is extinguished.

But in order that the rent be extinguished the thing must have perished entirely ; if it be lost only in part, the rent is only reducible in proportion to the loss.

A thing sold and paid for may be alienated absolutely and unconditionally ; but if it be sold with a rent reserved it remains perpetually subject to the rent into whatsoever hands it may pass.

The price of a thing sold is a debt personal to the purchaser. But where there has been rent reserved it is a charge imposed on the property, and the person alienating it is only answerable for the arrears which became due while he was in the possession.

The rent-charge, although stipulated to be perpetual, is essentially redeemable. But the seller may determine the terms of the redemption and stipulate that it shall not take place until after a certain time, which can never exceed thirty years.

If the value of the property has been determined by the contract, the possessor who wishes to redeem cannot be made to pay anything beyond that value.



If there has been no valuation the rent is considered as fixed at the rate of six per cent on the value, and the lessee may pay the capital at that valuation.

The rentor has for the payment of his rent a right of mortgage on the property, commencing from the date of the contract. But he cannot have it seized and sold unless there be at least one entire year's rent due.

The rent-charge, being inherent to the property burdened with it, is itself susceptible of being mortgaged, except where it has been gratuitously established for the benefit of a third person, on condition that it should not be liable to seizure: La. 2779-2792.

## Art. 204. Miscellaneous Rights.

§ 2040. **Of the Tenant.** In Georgia, it is enacted that the tenant has no right beyond the use of the land and tenements rented, and such privileges as are necessary to the enjoyment of its use: Ga. 2281.

In several states, every tenant to whom a declaration, or process in ejectment, or other proceeding for the recovery of the land occupied by him, is served, shall forthwith give notice to his landlord under penalty of forfeiting (1) three years' rent to such landlord: N.Y. 2,1,4,27; Pa. *Ejectment*, 2; Ill. 45,17 (two years' rent); Wis. 2197; Del. (two years' rent) 120,72; Mo. 3071.

(2) The actual damages sustained by the landlord in consequence thereof: Ark. 4162; Cal. 6949; Dak. Civ. C. 1121.

He cannot cut trees, nor remove fixtures, nor otherwise injure the property: Ga. He may use other timber for firewood, and use the pasturage for his cattle: Ga.

NOTE. — <sup>a</sup> See also §§ 1342-3, 1346.

§ 2041. **Of the Landlord.** The tenant cannot dispute the landlord's title: Del. 101,15; Ga. 2283.

It is in some states a misdemeanor for the tenant to give up the possession of the premises to any other person than the lessor (see also in Part V.): N.C. 1760.

The landlord must keep the premises in repair: Ga. 2284.

He is liable for all substantial improvements placed on the premises by his consent: Ga.

No lessor of property, merely by reason that he is to receive as rent a share of the proceeds or net profits, or any other uncertain consideration, shall be held a partner of the lessee: N.C. 1744.

§ 2042. **Taxes.** In two states, the tenant of real estate is liable for road and all other taxes upon it, and, unless otherwise agreed in the demise, may deduct all such payments from the rent: Pa. *Landlord, etc.* 2 and 3; Md. 11,65.

When a tenant paying rent for real estate is taxed therefor, he may retain out of his rent the taxes paid by him for the same, unless there be an agreement to the contrary: N.Y. 1,13,5,4; Mich. 1006; Del. 120,70; Va. 1875,269,45; 1879, Special Session, 60,45; W.Va. 187,11; 1881,13,15. See also under *Taxation*, in Part III.

§ 2043. **Sub-leasing.** In two states, a tenant cannot under-let, assign, or sub-lease, without the landlord's consent: Tex. 3122; Ga. 2279. So, in the case of tenancies for a term greater than two years (without consent): Mo. 3075.

In several, unless the landlord consent thereto in writing, every assignment or transfer of his term, or interest in the premises, or any portion thereof, by one who is a tenant at will or by sufferance, or who has a term less than two years, shall operate a forfeiture to the landlord, who, after ten days' notice to quit in writing, may re-enter: Kan. 55,11-12; Ky. 66,1,2; Mo. 3076.

In Arkansas, tenants who sub-lease are forbidden to collect the rents due them before their own final settlement with the landlord, except under written direction of the latter: Ark. 4456-7.

§ 2044. **Alterations.** It is not lawful for any tenant to make alterations or remove buildings erected upon the leased premises, under pain of forfeiting the residue of the term: S.C. 1821.

§ 2045. **Repairs by Tenant.** (Compare § 2062.) In several states, it is declared that no covenant or promise by the lessee for repairs shall bind him (in the absence of special agreement), to re-erect or repair the building, if destroyed by accidental fire without his fault : Va. 113,19 ; W.Va. 64,22 ; Ky. 63,1,26 ; Mo. 667 ; Miss. 1239.

Or to pay for it, or any part thereof : W.Va., Miss.

In North Carolina, an agreement in a lease to repair does not bind the tenant to rebuild or repair, in case the house is destroyed or damaged to more than one half its value by accidental fire not occurring from the want of ordinary diligence on his part : N.C. 1752.

But the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenable, except such as are occasioned by the lessee's negligence : Cal. 6941 ; Dak. Civ. C. 1114.

And if, within a reasonable time after notice to the lessor, he neglect to repair as above required, the lessee may repair himself, and deduct the expenses, to an extent not exceeding one month's rent, from the rent ; or he may vacate the premises, and be discharged from further payment of rent or performance of other conditions : Cal. 6942 ; Dak. Civ. C. 1115.

§ 2046. **Waste.** (See § 1343 for the general provisions.) In several states, a tenant for life or years who assigns his estate, but remains in possession, is still liable for waste, in treble damages : N.J. *Waste*, 7 ; and see in Part IV.

§ 2047. **Fires.** No action can be maintained or damages recovered by any person, in the absence of an express contract with the landlord, in whose house a fire accidentally begins : N.J. *Waste*, 8 ; Del. 88,6 ; Mo. 667. Compare § 2062.

## Art. 205. Termination.

§ 2050. **Tenant by Sufferance.** (A) In states where the statutes are silent, it would seem that holding over by a tenant or sub-tenant creates a tenancy at sufferance as at common law, which may be determined by either landlord or tenant, without notice to quit, and it is so expressed in a few states : Ind. 5213 ; Kan. 55,9 ; N.C. 1766 ; Wash. 2057 ; S.C. 1817,1819 ; Fla. 137,18.

Notice to quit must be given by one of the two parties ; but then the tenancy is immediately terminated : R.I. 232,1 and 4 ; N.J. *App. Distr. Cts.* 123.

So, in Kentucky, no right of possession is acquired by tenant holding over for ninety days ; but if proceedings are not instituted in that time, then none shall be allowed until one year from the day the first term expired, and so on from year to year : Ky. 66,4,1.

There is a summary process for such removal, without notice to quit : N.J. *Landlord*, 29 ; N.C. ; Miss. 1333.

The landlord has forcible entry and detainer against the person holding over : Wash. 2053 ; and so in most states. See in Part IV.

(B) But in other states, notice to quit is required ; thus, in some, by either party, one month's : N.Y. 1,4,7 ; Wis. 2183 ; Md. 67,7,1 and 7 ; Ky. 66,6,1 ; Mo. 3078. So, by the landlord only : Ala. 2956 ; D.C. 681. And in others, three months' notice by the landlord : N.J. *Landlord*, etc. 27 ; Pa. *Landlord*, etc. 17 and 20 ; Del. 101,14 ; Ore. 17,34 ; by either party : Mich. 5774 ; Ore. ; or equal to the intervals of payment, as in § 2051 : Mich., Wis., Ore.

The landlord must give seven days' notice : N.H. 250,1 and 4 ; three days' : Nev. 56.

§ 2051. **Same Subject : Tenant at Will.** Tenancies at will may be terminated by the landlord or tenant immediately on giving notice : N.H. 250,1 and 6 ; R.I. 232,1 and 4 ; S.C. 1818 ; Fla. 137,18.

After three days' notice : N.J. *Landlord*, 29 ; Col. 1885, p. 226, § 6 : five days' : Uta. C. Civ. P. 1035. So, where no rent is reserved or due at the time the notice expires : Me. 94,2.

In other states, by the landlord on giving one month's notice: N.Y. 2,1,4,7; Ind. 5207; Ill. 80,6; Ky. 66,6,1; Cal. 5789; Dak. Civ. C. 239; D.C. 681; three months': Pa. *Landlord, etc.* 17 and 20; Del. 101,14.

In others, by either party on thirty days' notice: Me. 94,2; Wis. 2183; Io. 2015; Kan. 55,4; Md. 67,7,1 and 7; 1882,355; Mo. 3078.

In others, by either party on giving three months' notice, or if rent is reserved payable oftener than at quarterly periods (or at thirty-days periods or less, in Kansas) by a notice equal to terms of payment: Mass. 121,12; Mich. 5774; Minn. 75,40; Kan. 55,4; Del. 101,14; Ore. 17,34.

So, in Maine, "such notice must expire on a rent-day, if the tenant be not in arrears."

In Rhode Island, by either party, in cases of tenancy by parol of houses or farms, on giving notice equal to half the term of the demise, not exceeding three months: R.I. 232,3.

In New Hampshire, thirty days' notice, if rent is payable oftener than once in three months, whether due or not: N.H. 250,2.

Three months' notice by the landlord is sufficient in all cases where the tenant is entitled to any notice: N.H. 250,2; N.J. *Landlord, etc.* 27; Pa.

When rent is payable at periods of less than one month, a notice by either party equal to the intervals of payment is sufficient: Wis., Io.

When no term is agreed upon, and the rent is payable monthly, so long as the rent is paid the landlord cannot dispossess the tenant before the April 1st following, except after three months' notice (except in case of nuisance, etc.): N.J. 1884,116.

In Georgia, a tenancy at will may be determined by the landlord upon two months' notice, or by the tenant upon one: Ga. 2291.

But in case of tenants occupying and cultivating farms, the notice must fix the termination of the tenancy to take place March 1: Io. 2015. But where an express agreement has been made, whether in writing or not, the tenancy ceases at the time agreed upon, without notice: Io.

**§ 2052. Same Subject: Year to Year.** In the states where the statutes recognize tenancy from year to year, three months' notice, in many states, may be given (1) by either party to determine the tenancy: N.H. 250,2; R.I. 232,2 and 5; Kan. 55,5; Del. 120,4; Va. 134,5; W.Va. 113,5; N.C. 1750; Mo. 3077; Uta. 1205; (2) by the landlord to the tenant: Ind. 5209; Del. 101,14; Col. 1885, p. 226, § 6.

Thirty days': Wis. 1885,109; Cal. 6946; sixty days': Ill. 80,5; Miss. 1330. In two others, six months': Md. 67,7,6-7; Va. (when the land is not in a town). In one, no notice is necessary: Ky. 66,4. In Illinois, the notice may be served at any time during the last four months preceding the last sixty days of the year. One year's notice is required, Mich. 1885,162.

In case of farms, the termination must be on the 1st March: Kan. 55,6. In two, when the holding is by the half year or quarter year, one month's notice: Col., Miss. When from term to term of less than three months, a notice equal to such term: Ind., Del. When by the month or week, one week's notice: Miss. So, when by the week: Md. Tenancies from month to month, one month's notice by either party: R.I. 1882,317; Mo.; fourteen days': N.C.; five days', by the landlord: N.Y. 1882,303 (in New York City only); ten days': Col.; fifteen days': Uta. So, the notice need never exceed the term of payment of rent: Cal. 6946. In tenancies from week to week, two days' notice by either party: N.C. In all leases from month to month, the landlord, upon giving written notice fifteen days before the expiration of the month, may change the terms of the lease, to take effect at the expiration of such month, if the tenant hold over; and in such case a tenancy will be created according to the terms and conditions specified in such notice: Cal. 5827; Nev. 59; Dak. Civ. C. 261.

**§ 2053. Same Subject: Written Lease.** In several, every lease or written agreement for the leasing of land shall absolutely and unequivocally end and determine at the period therein stated, without its being obligatory on the tenant or the landlord to give the notice required by law: R.I. 232,5; Kan. 55,9; Va. 134,5; W.Va. 113,5; Ky. 66,4,1; S.C. 1811; Ga. 2282.

So, in two, when the landlord agrees with the tenant to rent the premises to him for a specified period of time: Mo. 3079; or when the time for the duration of the tenancy is specified in the contract: Ind. 5213; Ky. 66,6,2. So, in others, notice to quit is necessary only when



the tenancy is not to expire at a fixed time : Ky. 66,1,3 ; Col. 1885, p. 226, § 6 ; Uta. 1207 ; Miss. 1330. So, in others, the contract may expressly dispense with the notice to quit, and then none need be given : Va., W.Va., Ky., Mo. In all cases where premises are rented for a specified time, by express or implied contract, the tenancy shall be deemed terminated at the end of such time : Ill. 80,12-13 ; Wash. 2055. For other states, see in § 2050 or § 2052 ; as a tenant for years, after the termination of his estate, becomes a tenant by sufferance.

**§ 2054. Same Subject : Non-Payment of Rent.** Generally, in all cases of neglect or refusal by any tenant to pay rent, his estate may be determined by the landlord, and he may re-enter (1) on fourteen days' notice : Mass. 121,11 and 12 ; Mich. 5774 ; Wis. 2183 ; Minn. 75,40 ; Ore. 17,34 ; (2) ten days' : Ind. 5211 ; Kan. 55,7 ; Wash. 2056 ; (3) immediately after demand made for possession : Ill. 80,8 ; N.C. 1766 ; Mo. 3097-8 ; S.C. 1819 ; (4) five days', if the tenancy be for less than three-months periods : Kan. 55,8 ; (5) on seven days' notice : N.H. 250,2 ; (6) on thirty days' : Me. 94,2 ; (7) on fifteen days' : R.I. 232,6 ; (8) three days' : Nev. 56 ; Col. 1491 ; 1885, p. 502 ; Uta. 1207 ; C. Civ. P. 1035 ; Fla. 137,18 ; (9) five days' : Va. 130,4 ; (10) nine days', in parol leases : Ct. 1885,35.

In others, when six months' rent is in arrear and unpaid, the landlord may, if he has a right of re-entry, re-enter or proceed in ejectment or otherwise : N.J. *Landlord, etc.* 7-9 ; Ill. 80,4 ; N.C.<sup>a</sup> 1745 ; Mo.<sup>a</sup> 3084,3086 ; Ark.<sup>a</sup> 4170-2.

In a few, the landlord may re-enter and dispossess the tenant immediately : N.J.<sup>b</sup> *Landlord, etc.* 9 ; *App. Distr. Cts.* 123 ; Ga. 2285 ; Fla. 137,14.

Demand above required may be made at any time after rent due : Mo. 3102.

In Indiana, where by express terms of the contract the rent is to be paid in advance, and tenant has entered and refuses or neglects to pay rent, no notice to quit is necessary : Ind. 5213.

Such remedy is by action : Vt. 1259 ; N.J. ; Mo. 3100 ; Ark. If the lease specifies a certain time after which there is forfeiture in case of non-payment of rent, no action can be had until such time has elapsed : Mo. 3101. If action is brought, no demand of rent is generally necessary : Vt., N.J., Wash. See in Part IV. If a tenant being in arrear for rent, or who was cultivating on shares, or had given a lien for rent, desert the premises and leave them unoccupied and uncultivated, the landlord has forcible entry and detainer : N.C. 1777.

In states where distress still exists, this remedy is generally sufficient ; and hence, in several, the landlord can summarily determine the tenancy only (but see also above) when the rent has been unpaid for a year (except in Virginia and West Virginia), and the tenant has deserted the premises, having no sufficient distress : N.J. *Landlord, etc.* 10 ; *App. Distr. Cts.* 122 ; Va. 134,6 ; W.Va. 113,6 ; S.C. 1814-5 ; Miss. 1332.

Such process can be brought upon fourteen days' notice : N.J., S.C. One month's notice posted on the premises : Va., W.Va.

But in several, when in the case of a tenancy for years, at will or sufferance, any rent is unpaid, and no distress can be found, (1) the landlord has summary process on three days' notice requiring rent to be paid : N.J. *Landlord, etc.* 29 ; *App. Distr. Cts.* 123 ; Miss. 1333.

And in one, (2) such process on fifteen days' notice given between April 1 and September 1, or otherwise thirty : Pa. *Landlord, etc.* 25.

NOTES. — <sup>a</sup> In the noted states, without a formal demand of the rent. <sup>b</sup> In the case of leases for years or at will only.

**§ 2055. Same Subject : Condition Broken.** In several states, when the lessee violates any condition of the lease, the landlord may determine the tenancy on seven days' notice : N.H. 250,3 ; on ten days' notice : Ill. 80,9 ; three days' : Uta. C. Civ. P. 1035. Such breach may be either by committing waste, by breaking a covenant against assignment, or other breach : Uta.

In others, tenancy is determined by declaration in ejectment, etc. : Va. 134,16 ; W.Va. 113,16 ; N.C. 1766. See also in Part IV.

When a tenant at will commits waste, no notice to quit is necessary : Ind. 5213 ; Kan. 55,9. In one, when a tenant who is in arrear for rent, or has agreed to cultivate the land and



pay part of the crop as rent, or who has given the lessor a lien on the crop for rent, deserts the premises and leaves them unoccupied and uncultivated, the landlord may enter or recover the premises, as in the case of a tenant holding over: N.C. 1777.

When a tenant holds land under contract to labor for the landlord, and fails to do so, his right to the lands ceases at once, and he shall abandon them without notice: Ky. 66,6,3.

§ 2056. **Notice.** The notice required in §§ 2050–2055 must generally be written: N.H. 250,1; Mass. 121,12; Me. 94,2; R.I. 232,1; N.Y. 2,1,4,7; N.J. *Landlord, etc.* 29; Ind. 5210,5212; Ill. 80,5–6; Wis. 2183; Io. 2015; Minn. 75, 40; Kan. 55,4; Md. 67,1 and 6; Ky. 66,6,1; Mo. 3078; Ore. 17,34; Col. 1885, p. 226, § 5; Dak. Civ. C. 240; Uta. 1206; Fla. 137,18; D.C. 681.

But in one state, a parol notice given by the tenant is sufficient, and the landlord need not then give written notice: Md. 67,7,7.

§ 2057. **Service.** Generally, the notice must be served personally, or left at the tenant's (or landlord's) abode with a person of proper age and discretion: N.Y. 2,1,4,8; N.J.; Ind. 5214; Ill. 80,10; Wis. 2184; Io. 2016; Kan. 55,10; Col. 1885, p. 226, § 7; Dak.; Uta. C. Civ. P. 1036; D.C. 681.

But if this be impossible it may be affixed on the premises: N.Y.; N.J.; Ind.; Ill.; Wis.; Io.; Ark. 4171; Col.; Dak.; Uta.; S.C.; Fla.; D.C.

§ 2058. **Re-entry.** When the tenancy is duly terminated, and after proper notice has been given, as above provided, the landlord may either re-enter, or proceed by action, as in Part IV. specified: N.Y. 2,1,4,9; Cal. 5790; Dak. Civ. C. 241. So, probably, in many other states.

But whenever a right of re-entry is expressly reserved in the lease, or otherwise, such re-entry can be made at any time after the right has accrued only after three days' notice given: Cal. 5791; Dak. Civ. C. 242.

§ 2059. **Same Subject: Illegal Trade or Nuisance.** In several states, whenever the lessee or occupant shall use any part of the premises for an illegal trade, the landlord may determine the tenancy at once, and has the same remedies as are given in case of the tenant holding over: Me. 17,3; R.I. 80,1; N.Y. 1873,583,1; O. 4276; Ill. 43,9; Ore. 1876, p. 40,5; Wash. 1257; Uta. 1211; Ala. 1885,97,4.

And if the owner knowingly lease or give possession of the premises to be occupied in whole or part for an illegal trade, (1) he is jointly and severally liable with the tenant and occupant for resulting damages: N.Y. 1873,583,3; O. 4275; Ill. 43,9; (2) or for the other penalty imposed by law: Mass. 99,2; Me. 17,4; R.I. 80,5; Ore. 1876,40,4; Ala. 1885,97,2.

The following are declared illegal trades or nuisances, for which the landlord may terminate the lease as above: (1) keeping a house of ill-fame: Me. 17,1; R.I. 80,1; Uta.; (2) a house for the illegal sale of intoxicating liquors: Me., R.I., Ill., Ala.; (3) a house of resort for lewdness: Me., R.I.; (4) or gambling: Me., R.I., O., Ore., Wash., Uta.

See also *Gaming, Liquors, etc.*, in Parts IV., V., and Title VI. of this Part.

§ 2060. **Damages by the Tenant.** In many states, any tenant, or any person who has gained possession under such tenant, who holds over,<sup>a</sup> after legal termination of his estate after demand from the landlord, is liable for damages to the person entitled, (1) in double the yearly value of the lands: N.Y. 2,1,4,11; N.J. *Landlord, etc.* 25; Ill. 80,2; Wis. 2186; Mo. 3074; Dak. Civ. C. 1976; Fla. 137,15.

So, (2) in others, in double the yearly rent: Io. 2012; Del. 120,5; Ky. 66,1,3; Ark. 4165; Uta. 1210; S.C.<sup>a</sup> 1808; Ga. 2285; Ala. 2956; Miss. 1331; (3) in treble the rent or value: Cal. 8345; Nev. 70.

And there is no relief in equity: N.Y.; N.J.; Ark. 4166. See also in Part IV.

But there must also be due notice from the landlord (see §§ 2050-2056) : N.Y. (one month's), N.J., Io., Del., Cal., Miss.

And in one, thirty days' notice is necessary : Ark.

And besides this, the person so holding over is liable for all special damages, to the person entitled to the land : N.Y., Wis., Uta.

In one state, the tenant is only liable for damages for the withholding when the case is appealed by him to the Superior Court : N.C. 1775.

And he is so liable both when he holds over and when possession is required for non-payment of rent or breach of condition : N.C.

NOTE. — <sup>a</sup> In the noted states, only when such holding over is for the space of three months after demand.

§ 2061. **Same Subject.** In several, any tenant who does not yield possession at the time after giving the landlord notice to quit, is liable to the landlord (1) for double rent from that time : N.Y. 2,1,4,10 ; N.J. *Landlord, etc.* 26 ; Ill. 80,3 ; Wis. 2185 ; Io. 2012 ; Del. 120,5 ; Ky. 66,1,3 ; Mo. 3072 ; Ark. 4163 ; Dak. Civ. C. 1975 ; S.C. 1820 ; Miss. 1331 ; (2) in treble rent from such time : Cal. 8344.

To be recovered in the same manner as single rent would have been : N.Y. ; N.J. ; Mo. 3073 ; Ark. 4164.

§ 2062. **Destruction of the Premises.** (Compare § 2045.) In several states, the lessees or occupants of any building which, without fault of theirs, is destroyed or so injured by the elements or other cause as to be uninhabitable, may (in the absence of written agreement to the contrary) quit and surrender up the premises : Ct. 18,6,1,17 ; N.Y. 1860,345,1 ; O. 4113 ; Minn. 1883,100,1.

So, only when a building is totally destroyed by fire : N.J. *Landlord, etc.* 28.

And they are not liable for rent from the time of such destruction or injury (in the absence of written agreement) : Ct. ; N.Y. ; O. ; Miss. 1240. So, in the case of total destruction only : N.J. But in one, they are still liable for rent, if the landlord proceed to repair as soon as possible : N.J. Or, in default thereof, the rent ceases until the buildings are put in such perfect repair : N.J. So, in one, they are liable for rent from the time the building is put in perfect repair (if this be done during the continuance of the lease) : Ct.

In one, the principal provision is that, if the building is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired except at an expense exceeding one year's rent of the premises, such damage occurring without negligence on the part of the lessee, his agents, or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged was the main inducement to the hiring, the lessee may surrender his estate by a writing delivered within ten days of the damage, paying at the same time all rent due and apportioned to the day of the damage : N.C. 1753. In Georgia, the destruction of a tenement by fire, or the loss of possession by any casualty, not caused by the landlord or from defect of his title, does not abate the rent contracted to be paid : Ga. 2293. In one, a tenant for life, years, or a less term, is not liable for damage occurring on the premises accidentally and notwithstanding reasonable diligence on his part : N.C. 1751. Unless he so contract : N.C. Compare § 2047.

§ 2063. **Surrender.** In two states, if a lease is surrendered in order to be renewed, and a new lease is made by the chief landlord, such new lease is good and valid without a surrender of the underleases, and the chief landlord, his lessee, and the underlessees enjoy all their rights as if the original lease had continued ; and the chief landlord has the same remedy by entry for the rents and duties, so far as they do not exceed rents and duties reserved in the original lease : N.Y. 2,1,4,2 ; N.J. *Landlords, etc.* 23.

When the reversion expectant on a lease is surrendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements shall, to the extent and for the purpose of preserving such incidents and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease : Ill. 30,40.

§ 2064. **Emblements.**<sup>a b</sup> When a lease for years of farming land on which a rent is reserved determines during a current year of the tenancy by the happening of an uncertain event determining the estate of the lessor, the tenant, in lieu of emblements, is to continue his occupation to the end of such current year, and then give up possession to the person entitled, paying him the proportion of the rent due since the termination of the lessor's estate : N.C. 1749.

And such tenant is entitled to the emblements as at common law : Va. 135,1 ; W.Va. 78,1 ; and in others, such tenant is furthermore entitled to a reasonable compensation from the person succeeding to the possession for the tillage and seed of any crop not gathered at the expiration of such current year of the tenancy : Va., W.Va., N.C.

If the emblements are severed after the expiration of the current year (§ 2024), the lessee must pay a reasonable rent from such time : Va., W.Va.

The tenant at will is entitled to emblements, if the crop is sowed before notice to quit by the landlord, or the tenancy otherwise suddenly terminated : Ga. 2292.

The life-tenant, or his legal representatives, is entitled to the emblements when the estate is terminated not by his act : Ga.<sup>b</sup> 2257.

A tenant for years is not entitled to emblements unless the estate be terminated before the period fixed, by the happening of some contingency provided in its creation, and without fault on the part of the tenant : Ga. 2276.

In all other cases, the right to emblements is declared to remain as at common law : Va. 135,3 ; W.Va. 78,3. See also in Part IV.

NOTES. — <sup>a</sup> See also § 2024. <sup>b</sup> See Glossary.

## Art. 207. Civil Law of Lease.

§ 2070. **Definition.** The contract of lease or letting out (besides the rules in which it is subject in common with other agreements, and which are explained under the title: *Of Conventional Obligations*) is governed by certain particular rules, which are the subject of the present title : La. 2668.

§ 2071. **Of the Nature of the Contract of Lease and of its Several Kinds.** *Lease* or *hire* is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price.

To the contract of lease, as to that of sale, three things are absolutely necessary, to wit : the thing, the price, and the consent.

The price should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased.

The price, notwithstanding, may be left to the award of a third person named and determined, and then the contract includes the condition that this person shall fix the price ; and if he cannot or will not do it, there is no lease.

The contract would be null if the price were left to be fixed by a person not designated.

There are two species of contracts of lease, to wit : —

1. The letting out of things.
2. The letting out of labor or industry.

To let out a thing is a contract by which one of the parties binds himself to grant to the other the enjoyment of a thing during a certain time, for a certain stipulated price which the other binds himself to pay him.

To let out labor or industry is a contract by which one of the parties binds himself to do something for the other, in consideration of a certain price agreed on by them both : La. 2669–2675.

§ 2072. **Of Letting out Things : General Provisions.** The letting out of things is of two kinds, to wit : —

1. The letting out houses and movables.
2. The letting out predial or country estates.

He who grants a lease is called the *owner* or *lessor*. He to whom a lease is made is called the *lessee* or *tenant*.

All corporeal things are susceptible of being let out, movable as well as immovable, excepting those which cannot be used without being destroyed by that very use.



Certain incorporeal things may also be let out, such as a right of toll, and the like; but there are some which cannot be the object of hire, such as a credit.

A right of servitude cannot be leased separately from the property to which it is annexed.

He who possesses a thing belonging to another may let it to a third person; but he cannot let it for any other use than that to which it is usually applied.

He who lets out the property of another warrants the enjoyment of it against the claim of the owner.

Leases may be made either by written or verbal contract.

The duration and the condition of leases are generally regulated by contract, or by mutual consent.

If the renting of a house or other edifice, or of an apartment, has been made without fixing its duration, the lease shall be considered to have been made by the month.

The parties must abide by the agreement as fixed at the time of the lease. If no time for its duration has been agreed on, the party desiring to put an end to it must give notice in writing to the other at least fifteen days before the expiration of the month which has begun to run.

The lease of a predial estate, when the time has not been specified, is presumed to be for one year, as that time is necessary in this State to enable the farmer to make his crop and to gather in all the produce of the estate which he has rented.

If after the lease of a predial estate has expired the farmer should still continue to possess the same during one month, without any step having been taken, either by the lessor or by a new lessee, to cause him to deliver up the possession of the estate, the former lease shall continue subject to the same clauses and conditions which it contained; but it shall continue only for the year next following the expiration of the lease.

If the tenant either of a house or of a room should continue in possession for a week after his lease has expired, without any opposition being made thereto by the lessor, the lease shall be presumed to have been continued, and he cannot be compelled to deliver up the house or room without having received the legal notice or warning above directed.

In the cases provided for in the two preceding paragraphs the security which may have been given for the payment of the rent shall not extend to the obligations resulting from the lease being thus prolonged.

When notice has been given, the tenant, although he may have continued in possession, cannot pretend that there has been a tacit renewal of the lease: La. 2676-2691.

**§ 2073. Of the Obligations and Rights of the Lessor.** The lessor is bound from the very nature of the contract, and without any clause to that effect, —

1. To deliver the thing leased to the lessee.
2. To maintain the thing in a condition such as to serve for the use for which it is hired.
3. To cause the lessee to be in a peaceable possession of the thing during the continuance of the lease.

The lessor is bound to deliver the thing in good condition, and free from any repairs. He ought to make, during the continuance of the lease, all the repairs which may accidentally become necessary, except those which the tenant is bound to make, as hereafter directed.

If the lessor do not make the necessary repairs in the manner required in the preceding paragraph, the lessee may call on him to make them. If he refuse or neglect to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable.

The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

If the lessee be evicted, the lessor is answerable for the damage and loss which he sustained by the interruption of the lease.

If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages.



The lessor has not the right to make any alteration in the thing during the continuance of the lease.

If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, — as if a neighbor, by raising his walls, shall intercept the light of the house leased, — the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity.

If, during the continuance of the lease, the thing leased should be in want of repairs, and if those repairs cannot be postponed until the expiration of the lease, the tenant must suffer such repairs to be made, whatever be the inconvenience he undergoes thereby, and though he be deprived either totally or in part of the use of the thing leased to him during the making of the repairs. But in case such repairs should continue for a longer time than one month, the price of the rent shall be lessened in proportion to the time during which the repairs have continued, and to the parts of the tenement of the use of which the lessee has thereby been deprived.

And the whole of the rent shall be remitted, if the repairs have been of such nature as to oblige the tenant to leave the house or the room, and to take another house while that which he had leased was repairing.

If, in the lease of a predial estate, the premises have been stated to be of a greater extent than they in reality are, the lessee may claim an abatement of the rent, in the cases and subject to the provisions prescribed in the title: *Of Sale*.

The lessor, and not the lessee, unless there be a stipulation to the contrary, must bear all the real charges with which the thing leased is burdened. Thus, he has to pay the taxes, rents, and other dues imposed upon the thing leased.

The lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises; but in that case the lessee has a right of action for damages sustained against the person occasioning such disturbance.

If the persons by whom those acts of disturbance have been committed, pretend to have a right to the thing leased, or if the lessee is cited to appear before a court of justice to answer to the complaint of the person thus claiming the whole or a part of the thing leased, or claiming some servitude on the same, he shall call the lessor in warranty, and shall be dismissed from the suit if he wishes it, by naming the person under whose rights he possesses.

The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased.

In the case of predial estates, this right embraces everything that serves for the labors of the farm, the furniture of the lessee's house, and the fruits produced during the lease of the land; and, in the case of houses and other edifices, it includes the furniture of the lessee, and the merchandise contained in the house or apartment, if it be a store or shop.

But the lessee shall be entitled to retain, out of the property subjected by law to the lessor's privilege, his clothes and linen, and those of his wife and family; his bed, bedding, and bedstead, and those of his wife and family; his arms, military accoutrements, and the tools and instruments necessary for the exercise of the trade or profession by which he gains his living and that of his family.

This right of pledge includes not only the effects of the principal lessee or tenant, but those of the under-tenant, so far as the latter is indebted to the principal lessee, at the time when the proprietor chooses to exercise his right.

A payment made in anticipation by the under-tenant to his principal does not release him from the owner's claim.

This right of pledge affects not only the movables of the lessee and under-lessee, but also those belonging to third persons, when their goods are contained in the house or store, by their own consent, express or implied.

Movables are not subject to this right when they are only transiently or accidentally in the house, store, or shop, — such as the baggage of a traveller in an inn, merchandise sent to a workman to be made up or repaired, and effects lodged in the store of an auctioneer to be sold.

In the exercise of this right the lessor may seize the objects which are subject to it before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified: La. 2676-2709.

#### § 2074. Of the Obligations and Rights of the Lessee. 'The lessee is bound, —

1. To enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease.

2. To pay the rent at the terms agreed on.

If the lessee makes another use of the thing than that for which it was intended, and if any loss is thereby sustained by the lessor, the latter may obtain the dissolution of the lease.

The lessee, in that case, shall be bound to pay the rent until the thing is again leased out; and the lessee is also liable for all the losses which the owner may have sustained through his misconduct.

The lessee may be expelled from the property if he fails to pay the rent when it becomes due.

When the lessor has given notice to the lessee, in the manner directed by law, to quit the property, and the lessee persists in remaining on it, the lessor may have him summoned before a judge or a justice of the peace and condemned to depart; and if, three days after notice of the judgment, he has not obeyed, the judge or justice of the peace may order that he shall be expelled and that the property shall be cleared by the sheriff or constable, at his expense.

The mode of proceeding in such cases is provided for by special laws.

The sheriff or constable charged with the execution of this order may force the doors and windows, if they are shut, and seize and sell such portion of the effects of the lessee as may be necessary to pay the costs.

The lessee is bound to cause all necessary repairs to be made which it is incumbent on lessees to make, unless the contrary hath been stipulated.

The repairs which must be made at the expense of the tenant are those which, during the lease, it becomes necessary to make:—

To the hearth, to the back of chimneys and chimney-casing.

To the plastering of the lower part of interior walls.

To the pavement of rooms when it is but partially broken, but not when it is in a state of decay.

For replacing window-glass when broken accidentally, but not when broken either in whole or in the greatest part by a hail-storm or by any other inevitable accident.

To windows, shutters, partitions, shop-windows, locks, and hinges, and everything of that kind, according to the custom of the place.

The expenses of the repairs which unforeseen events or decay may render necessary, must be supported by the lessor, though such repairs be of the nature of those which are usually done by the lessee.

The cleaning of wells and necessaries shall be at the expense of the lessor, unless the contrary has been stipulated.

If an inventory has been made of the premises in which the situation at the time of the lease has been stated, it shall be the duty of the lessee to deliver back everything in the same state in which it was when taken possession of by him, making, however, the necessary allowance for wear and tear and for unavoidable accidents.

If no inventory has been made, the lessee is presumed to have received the thing in good order, and he must return it in the same state, with the exceptions contained in the preceding article.

The lessee is only liable for the injuries and losses sustained through his own fault.

He is, however, liable for the waste committed by the persons of his family, or by those to whom he may have made a sub-lease.

He can only be liable for the destruction occasioned by fire, when it is proved that the same has happened either by his own fault or neglect, or by that of his family.

It is the duty of a farmer of a predial estate to prevent the same being encroached upon, and in case of such encroachment, to give notice to the proprietor, in defect of which he shall be liable in damages.

The lessee has the right to under-lease, or even to cede his lease to another person, unless this power has been expressly interdicted.

The interdiction may be for the whole or for a part, and this clause is always construed strictly.

The lessee has a right to remove the improvements and additions which he has made to the thing let, provided he leaves it in the state in which he received it.

But if these additions be made with lime and cement, the lessor may retain them on paying a fair price: La. 2710-2726.

**§ 2075. Of the Dissolution of Leases.** The lease ceases of course at the expiration of the time agreed on.

It is also dissolved by the loss of the thing leased.

The neglect of the lessor or lessee to fulfil his engagements may also give cause for a dissolution of the lease, in the manner expressed concerning contracts in general, except that the judge cannot order any delay of the dissolution.

A lease made by one having a right of usufruct ends when the right of usufruct ceases.

The lessee has no right to an indemnification from the heirs of the lessor if the lessor has made known to him the title under which he possessed.

A contract for letting out is not dissolved by the death of the lessor, nor by that of the lessee; their respective heirs are bound by the contract.

The lessor cannot dissolve the lease for the purpose of occupying himself the premises, unless that right has been reserved to him by the contract.

If the lessor sells the thing leased the purchaser cannot turn out the tenant before his lease has expired, unless the contrary has been stipulated in the contract.

If the lessor has reserved to himself in the agreement the right of taking possession of the thing leased whenever he should think proper, he is not bound to make any indemnification to the lessee, unless it be specified by the contract; the lessor is only bound in that case to give him the legal notice or warning above prescribed.

If it has been agreed by the parties, at the time the lease was made, that in case the property was sold the purchaser should be at liberty to take immediate possession, and if no indemnification has been stipulated, the lessor shall be bound to indemnify the lessee in the following manner:—

If it be a house, room, or shop, the lessor shall pay as indemnification to the evicted tenant a sum equal to the amount of the rent for the time which is to elapse between the notice and the going out.

If it be a predial estate, the indemnification to be paid by the lessor to the evicted farmer shall be the third of the price of the rent during the time which has yet to elapse.

The *quantum* of damages shall be determined by skilful men, when the controversy relates to manufactures, mines, and things of that kind, which require great disbursements.

The purchaser who wishes to use the right reserved by the lease is moreover bound to give previous notice to the tenant as above required.

The farmers of predial estates shall have one year's notice.

Previous to the expulsion of a farmer or tenant the before-prescribed indemnifications must be paid to him, either by the lessor, or in his default, by the new purchaser.

If the lease has not been reduced to writing the purchaser cannot be compelled to give any indemnification.

A person who has purchased an estate, the former proprietor of which has reserved by contract the right of redemption, cannot turn out the lessee until, by the expiration of the time fixed for the redemption, the purchaser becomes the irrevocable owner.

The tenant of a predial estate cannot claim an abatement of the rent under the plea that, during the lease, either the whole or a part of his crop has been destroyed by accidents, unless those accidents be of such an extraordinary nature that they could not have been foreseen by either of the parties at the time the contract was made,—such as the ravages of war extending over a country then at peace, and where no person entertained any apprehension of being exposed to invasion or the like.

But even in these cases, the loss suffered must have been equal to the value of one half of the crop at least to entitle the tenant to an abatement of the rent.

The tenant has no right to an abatement if it is stipulated in the contract that the tenant shall run all the chances of all foreseen and unforeseen accidents.

The tenant cannot obtain an abatement when the loss of the fruit takes place after its separation from the earth, unless the lease gives to the lessor a portion of the crop in kind; in which case the lessor ought to bear his share of the loss, provided the tenant has committed no unreasonable delay in delivering his portion of the crop: La. 2727-2744.



CHAPTER X.—FIXTURES AND INCORPOREAL RIGHTS.

**Art. 210. Fixtures.**

§ 2100. **Definition.** (Compare also § 1300.) A thing is deemed a fixture when it is attached to the land by roots [trees]; or imbedded in it [walls]; or permanently resting upon it [buildings]; or permanently attached to what is thus permanent [as by means of cement, plaster, nails, bolts, or screws]: Cal. 5660; Dak. Civ. C. 165.

In Georgia, fixtures are defined to be anything intended to remain permanently in its place, though not actually attached to the land (as, *e. g.*, rail fences): Ga. 2219. In Massachusetts, fixtures, as between life-tenants and the landlord, are declared to be all those things that would at common law be fixtures as between the landlord and a tenant for years: Mass. 126,10. This does not affect the right of the owner of land to make a different arrangement by will or otherwise as to their removal; nor does it impair or affect the provisions of any will or instrument by which the estate is created: Mass. 126,11.

Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine are deemed fixtures of the mine: Cal. 5661; Dak. Civ. C. 166.

Water-wheels, steam-engines, boilers, belting, pipes, and vats, etc., set or used in any manufacturing establishment, are declared to be fixtures when they belong to the owner of the real estate to which they are attached; but all other machinery, tools, or apparatus of every description so used are declared personal estate, except for purposes of taxation: R.I. 171,1 and 2.

In Georgia, machinery not actually attached, but movable at pleasure, is declared *not* to be a fixture: Ga. 2219.

Carpets, stoves, and funnels are not real estate, and do not pass by a deed thereof: Me. 73,1.

An outgoing tenant at will or for years cannot remove from the land or sell manure made in the ordinary course of husbandry; such manure being, in the absence of express agreement, attached to the realty so as to pass with the same to the landlord: Va. 1877,290.

Anything intended to remain permanently in its place, though not actually attached to the land (as, *e. g.*, a rail fence), is a fixture: Ga. Water-pipes are fixtures: La. 467.

Things which the owner of a tract of land has placed upon it for its service and improvement are immovable by destination.

Thus the following things are immovable by destination when they have been placed by the owner for the service and improvement of a tract of land, to wit:—

Cattle intended for cultivation; implements of husbandry; seeds, plants, fodder, and manure; pigeons in a pigeon-house; beehives; mills, kettles, alembics, vats, and other machinery made use of in carrying on the plantation works; the utensils necessary for working cotton and saw mills, tafia distilleries, sugar refineries, and other manufactures. All such movables as the owner has attached permanently to the tenement or to the building are likewise immovable by destination. The owner is supposed to have attached to his tenement or building forever such movables as are affixed to the same with plaster or mortar, or such as cannot be taken off without being broken or injured, or without breaking or injuring the part of the building to which they are attached: La. 468–469.

The following are considered as immovable from the object to which they apply:—

The usufruct and use of immovable things.

A servitude established on an immovable estate.

An action for the recovery of an immovable estate or an entire succession: La. 471.

§ 2101. **Appurtenances.** A thing is to be deemed incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or passage for light, air, or heat, from or across the land of another: Cal. 5662; Dak. Civ. C. 166.

§ 2102. **Removal of Fixtures.** In Massachusetts, fixtures annexed to the freehold by a life tenant or his assigns may be removed during the continuance of the life estate, or within a reasonable time after its determination: Mass. 126,10.

So, a tenant holding by demise from a tenant in dower may remove any building or structure by him erected, provided no damage result to the reversioner: Del. V. 15,170. When a

person affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it: Cal. 6013; Dak. Civ. C. 583. The owners of particular estates of freehold or for years in unimproved lots in towns may within ninety days after their interests cease remove any improvements they may erect thereon: Ky. 1882,333.

But a tenant may remove from the demised premises at any time during the continuance of his term anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises: Cal. 6019; Dak.

§ 2103. **Effect of Removal.** In Georgia, it is enacted that anything detached from the realty instantly becomes personalty: Ga. 2220.

And a thing so detached may be the subject of larceny, even by the person detaching it: Ga. See, for other states, in Part V.

§ 2104. **Preservation of Timber.** Several Western states have laws encouraging the growth of timber; (A) by exemption from taxation for a certain number of years: Wis. 1469-1470; and (B) in others by a bounty paid for plantations: Ill. 136,1; Wis.; Minn. 124,70; Neb. 2,4,10; Mo. 5697; Nev. 3838; Col. 3426; Dak. 1885,145. See U.S. 1878,190. See also in Part III.

And the increased value of the land caused by such trees is not to be taxed: Nev. 3841; Col. 3425.

**Art. 211. Franchises.** See also in Part III., *Corporations*.

§ 2110. **Grant of Franchises.** It is, in Georgia, enacted that no franchise granted by the State shall be held exclusive unless plainly expressed or so declared in the grant: Ga. 2234.

§ 2111. **Ferries.** It is also enacted that the right to establish and keep a public bridge or ferry is a franchise to be granted by the State: Ga. 2233. When such a grant interferes with the owner's right of exclusive possession, just compensation to him must be first made.

**Art. 213. Servitudes.**

§ 2130. **Definitions.** All servitudes which affect lands may be divided into two kinds, personal and real.

Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use, and habitation.

Real servitudes, which are also called *predial* or *landed servitudes*, are those which the owner of an estate enjoys on a neighboring estate for the benefit of his own estate.

They are called *predial* or *landed servitudes*, because, being established for the benefit of an estate, they are rather due to the estate than to the owner personally.

This kind of servitude forms the subject of the present title: La. 646.

The land to which an easement is attached is called the dominant tenement; the land upon which the burden is laid, the servient: Cal. 5803; Dak. Civ. C. 246.

Servitudes are either discontinuous or continuous.

Continuous servitudes are those whose use is or may be continual without the act of man.

Such are aqueducts, drain, view, and the like.

Discontinuous servitudes are such as need the act of man to be exercised.

Such are the rights of passage, of drawing water, pasture, and the like: La. 727.

They are either visible or non-apparent: —

Apparent servitudes are such as are to be perceivable by exterior works; such as a door, a window, an aqueduct.

Non-apparent servitudes are such as have no exterior sign of their existence; such, for instance, as the prohibition of building on an estate, or of building above a particular height: La. 728.

§ 2131. **Predial Servitudes.** A real or predial servitude is a charge laid on an estate for the use and utility of another estate belonging to another owner : La. 647.

From the definition contained in the preceding article, it follows that to establish a predial or real servitude there must first be two different estates, one of which owes the servitude to the other.

§ 2132. **Personal Servitudes.** If then a stipulation be made of a servitude in favor of a person, and not in favor of an estate, the obligation will not be null on that account, but it will not create a real servitude : La. 648.

§ 2133. **Ownership of Tenements.** It is necessary, in the second place, that these two estates belong to two different persons ; for if they are both the property of one person, the application which the owner makes of one to the advantage of the other is not called a servitude, but a disposition of the owner, which will be explained hereafter : La. 649.

§ 2134. **Nature of Right.** It is necessary, in the third place, that the servitude have for its object the use or benefit of the estate in favor of which it is established.

But it is not necessary that this benefit exist at the time of the contract ; a mere possible convenience or remote advantage is sufficient to support a servitude.

In order to render a servitude null, it is not enough that it should appear to be useless ; it must be shown that at no time, and under no circumstances, can it possibly become useful to the person in whose favor it is enacted : La. 650.

§ 2135. **Situation of Tenements.** Predial servitudes being due from one estate to another, it commonly happens that these estates are in the same neighborhood.

Nevertheless this neighborhood is not a condition essential to the existence of the servitude.

Nor is it necessary that the estate which owes the servitude and that to which it is due be contiguous ; it suffices that they be sufficiently near for one to derive benefit from the servitude on the other : La. 651.

§ 2136. **Servitudes Appendant.** A servitude is an incorporated right which cannot exist without the estate to which it belongs, and of which it is an accessory.

Servitude is a right so inherent in the estate to which it is due, that the faculty of using it, considered alone and independent of the estate, cannot be given, sold, let, or mortgaged without the estate to which it appertains, because it is a servitude which does not pass to the person but by means of the estate : La. 652, 654.

§ 2137. **Servitudes Unchangeable.** Servitudes being essentially due from one estate to another for the advantage of the latter, they remain the same as long as no change takes place in regard to the two estates, whatever change may take place in the owners : La. 653.

§ 2138. **Negative Obligation.** One of the characteristics of a servitude is, that it does not oblige the owner of the estate subject to it to do anything, but to abstain from doing a particular thing, or to permit a certain thing to be done on his estate : La. 655.

§ 2139. **Servitudes Indivisible.** The rights of servitude, considered in themselves, are not susceptible of division, either real or imaginary. It is impossible that an estate should have upon another estate part of a right of way, or of view, or any other right of servitude, and also that an estate be charged with a part of a servitude.

The use of a right of servitude may be limited to certain days or hours ; but thus limited, it is an entire right, and not part of a right.

From thence it follows that a servitude existing in favor of a piece of land is due to the whole of it, and to all the parts of it, so that if the land be sold in parts, every purchaser of a part has the right of using the servitude *in toto* : La. 656.

But, though the right of servitude be indivisible, and must be established for the whole, and not for a part, nothing prevents the advantage resulting from it from being divided, if it be susceptible of division ; as, for example, the right of taking a certain number of loads of earth from the land of another, or of sending to pasture a certain number of animals on the land of another : La. 657.



§ 2140. **Effect of Servitude.** The part of an estate upon which a servitude is exercised does not cease to belong to the owner of the estate; he who has the servitude has no right of ownership in the part, but only the right of using it.

Hence the soil of public roads belongs to the owner of the land on which they are made, though the public has the use of them; the owners of the land cannot change the roads except in conformity with the regulations of the police established on this subject: La. 658.

§ 2141. **Origin of Servitudes.** Servitudes arise either from the natural situation of the places, from the obligations imposed by law, or from contract between the respective owners: La. 659.

§ 2142. **Natural Servitudes.** Servitudes which originate from the natural situation of the place are, in Louisiana, (1) rights to streams, as against the proprietors above and below (see §§ 1170, 1171); (2) rights to fences and enclosure (see Art. 218): La. 660-3.

Every proprietor has a right to make an enclosure around his lands: La. 662.

He may compel his neighbors to fix and mark the limits of their estates which are contiguous to his.

The limits are established, and boundary stones or posts placed at their joint expense: La. 663.

§ 2143. **Legal Servitudes.** Servitudes imposed by law are established either for the public or common utility, or the utility of individuals.

Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common works.

All that relates to this kind of servitude is determined by laws or particular regulations.

The law imposes upon the proprietors various obligations towards one another, independent of all agreements; and those are the obligations which are prescribed in the following sections: La. 664-6.

§ 2144. **Sic utere tuo, etc.** Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbor's house, because this act occasions only an inconvenience, but not a real damage: La. 667-8.

§ 2145. **Nuisance.** If the work or materials for any manufactory or other operation cause an inconvenience to those in the same or in the neighboring houses by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police or the customs of the place: La. 669.

§ 2146. **Obligation to Repair.** Every one is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the neighbors or passengers, under the penalty of all losses and damages which may result from the neglect of the owner in that respect.

When a building threatens ruin the neighbor has a right of action against the owner to compel him to cause such a building to be demolished or propped up. In the mean time, if there be danger of any damage by its fall, he may be authorized to make the necessary works, for which he shall be reimbursed, after the danger shall have been ascertained by experts: La. 670-1.

§ 2147. **Destruction of Property.** The councils and other municipal bodies of cities and other incorporated places of this State are authorized to make such regulations as they may think proper to determine the mode of proceeding in the case of fire, when it becomes

necessary in order to arrest its progress to pull down houses which may have taken fire, or even those which the fire has not reached.

But in this case the proprietors whose houses have been thus pulled down before they have taken fire shall have a right to an indemnification in proportion to their loss, which indemnification shall be paid by the corporation of the city or place where the conflagration has taken place by means of an extraordinary and proportional tax, which shall be laid to this effect upon all the proprietors of houses of the said place, or in any other manner, from the funds of the corporation : La. 672. Compare also § 1149.

§ 2148. **Other Legal Servitudes.** The other particular servitudes imposed by law relate to the following objects : —

1. To boundary-walls, enclosures, and ditches.
2. To cases where it is necessary to have double or counter walls.
3. To the right of lights and of view on the property of a neighbor.
4. To carrying off water from roofs.
5. To the right of passage and of way : La. 674.

## Art. 215. Easements.

§ 2150. **Of Conventional or Voluntary Servitudes — Of the Different Kinds of Conventional or Voluntary Servitudes.** Owners have a right to establish on their estates or in favor of their estates such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to public order.

The use and extent of servitudes thus established are regulated by the title by which they are granted, and if there be no title, by the following rules : —

All servitudes are established either for the use of houses or for the use of lands.

Those of the first kind are called urban servitudes, whether the buildings to which they are due be situated in the city or in the country.

Those of the second kind are called rural servitudes : La. 709-710.

§ 2151. **Easements.** The principal kinds of urban servitudes are the following : —

The right of support; that of drip; that of drain or of preventing the drain; that of view or of lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls, or of preventing them from being raised; that of passage; and that of drawing water.

The principal rural servitudes are those of passage, of way, of taking water, of the conducting of water or aqueduct, of watering, of pasturage, of burning brick or lime, and of taking earth or sand from the estate of another : La. 711 and 721.

**Appendant Easements.** In two states, the following servitudes upon land may be attached to other land as incidents or appurtenances, and are then called easements : (1) the right of pasture; (2) of fishing; (3) of taking game; (4) of way; see Art. 220; (5) of taking water, wood, minerals, etc.; (6) of transacting business upon land; (7) of conducting lawful sports upon land; (8) of receiving air, light, or heat from or over, or discharging the same upon, land; (9) of receiving water from, or discharging the same upon, land; (10) of flooding land; (11) of having water flow without diminution or disturbance of any kind; (12) of using a wall as a party-wall (Art. 217); (13) of receiving more than natural support from adjacent land or things affixed thereto; (14) of having the whole of a division fence maintained by a co-terminous owner; (15) of having public conveyances stopped or of stopping the same on land; (16) the right of a seat in church; (17) of burial : Cal. 5801; Dak. Civ. C. 244.

Servitudes being established on estates in favor of other estates, and not in favor of persons, if the grant of the right declare it to be for the benefit of another estate, there can be no doubt as to the nature of this right, even though it should not be called a servitude.

If, on the other hand, the act establishing the servitude does not declare that the right is given for the benefit of an estate, but to a person who is the owner of it, it must then be considered whether the right granted be of real advantage to the estate, or merely of personal convenience to the owner.

If the right granted be of a nature to assure a real advantage to an estate, it is to be presumed that such right is a real servitude, although it may not be so styled.

Thus, for example, if the owner of a house contiguous to lands bordering on the high road

should stipulate for the right of passing through lands, without it being expressed that the passage is for the use of his house, it would be not the less a real servitude, for it is evident that the passage is of real utility to the house : *La.* 754-756.

**Easements in Gross.** And the following may be granted and held not attached to land : (1) the right to pasture and of fishing and taking game; (2) of a seat in church; (3) of burial; (4) of taking rents and tolls; (5) of way; (6) of taking water, wood, minerals, and other things : *Cal.* 5802; *Dak. Civ. C.* 245.

If, on the other hand, the concession from its nature is a matter of mere personal convenience, it is considered personal, and cannot be made real but by express declaration of the parties.

Thus, for example, if the owner of a house near a garden or park should stipulate for the right of walking and gathering fruits and flowers therein, this right would be considered personal to the individual, and not a servitude in favor of the house or its owner.

But the right becomes real and is a predial servitude if the person stipulating for the servitude acquires it as owner of the house, and for himself, his heirs and assigns.

When the right granted is merely personal to the individual it expires with him, unless the contrary has been expressly stipulated : *La.* 757-8.

**§ 2152. Creation.** A servitude can be created only by one who has a vested estate in the servient tenement : *Cal.* 5804 ; *Dak. Civ. C.* 247 ; *La.* 729.

A servitude thereon cannot be held by the owner of the servient tenement (see also § 2133) : *Cal.* 5805 ; *Dak. Civ. C.* 248.

**How Servitudes are Established.** He who has the naked ownership of an estate cannot subject it to a servitude without the consent of the usufructuary, unless it be to take effect at the termination of the usufruct.

The servitudes which do no injury to the rights of the usufructuary, such as that of not raising his house higher than it is, are excepted : *La.* 730.

It is not sufficient to be an owner in order to establish a servitude; one must be master of his rights and have the power to alienate, for the creation of a servitude is an alienation of a part of the property.

Thus minors, married women, persons interdicted, cannot establish servitudes on their estates, except according to the forms prescribed for the alienation of their property.

The husband cannot establish a servitude on the dotal property of his wife, even with her consent, unless it be expressly stipulated in the marriage contract that he shall be permitted to alienate her dotal property with her consent.

An attorney in fact cannot impose a servitude on the estate intrusted to him without a special power to that effect.

The co-proprietor of an undivided estate cannot impose a servitude thereon without the consent of his co-proprietor.

The contract of servitude, however, is not null ; its execution is suspended until the consent of the co-proprietor is given.

The co-proprietor who has consented to the establishment of a servitude on property held in common cannot prevent the exercise of the servitude by objecting that the consent of his co-proprietor has not been given.

If he becomes owner of the whole estate he is bound to permit the exercise of the servitude to which he has before consented.

If the co-proprietor has established the servitude for his part of the estate only, the consent of the other owners is not necessary, but the exercise of the servitude must be suspended until his part be ascertained by a partition. In this case he to whom the servitude has been granted may compel the co-proprietor from whom he received it to sue for a partition, or may sue for it himself.

If in the suit for a partition it be determined that the estate be disposed of by licitation, and he who has granted the servitude becomes owner of the whole, the servitude then exists on the whole estate as if he had always been the sole owner.

But if by the licitation the estate be adjudicated to any other of the co-proprietors, the servitude becomes extinct, and the person who granted it is bound to return the price he received for it.

If a co-proprietor who has established a servitude sell his undivided portion to a person who afterwards, by licitation, becomes owner of the whole, he is, like his vendor, bound to permit the exercise of the servitude on the whole estate.



Servitudes are established by all acts by which property can be transferred, and as they are not susceptible of real delivery, the use which the owner of the estate to whom the servitude is granted makes of this right supplies the place of delivery.

Servitudes may be established on all things susceptible of ownership, even on the public domain, on the common property of cities, and other incorporated places.

It is not contrary to the nature of servitudes that the same servitude should be established on several estates for the benefit of one, or that the same estate should be subject to a servitude for the benefit of several estates.

By the title by which a servitude is established in favor of an estate a servitude may also be imposed on that estate for the benefit of the estate from which the first servitude is due.

In cases where there are reciprocal servitudes, all the rules concerning simple servitudes are applicable.

A servitude may be established or acquired in favor of an estate which does not exist, or of which one is not yet the owner ; but if the hope of becoming the owner be not realized, the servitude falls.

It may also be stipulated that an edifice not yet built shall support a servitude, or shall have the benefit of one when it is built.

A servitude may be established or released for a certain part of an estate, provided the part be designated.

He whose estate is incumbered with a servitude may impose on it other servitudes of any kind, provided they do not affect the rights of him who has acquired the first.

An estate being mortgaged does not prevent the owner from establishing servitudes on it, saving always to the creditor the right of demanding his debt, if the establishment of the servitude evidently depreciates the value of the estate or of causing the estate to be sold as free from all servitudes ; but the person who has acquired the servitude shall have in such case his action for the restitution of the value of the servitude against the owner of the estate.

The exercise of servitudes may be limited to certain times. Thus the right of drawing water may be confined to certain hours, the right of passage to a part of the day.

Legal servitudes, and even those which result from the situation of places, may be altered by the agreement of parties, provided the public interest does not suffer thereby : La. 731-752.

**§ 2153. Extent.** The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired : Cal. 5806 ; Dak. Civ. C. 249.

Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them, are always interpreted in favor of the owner of the property to be affected : La. 753.

**§ 2154. Apportioning Easements.** In case of partition of the dominant tenement the burden must be apportioned according to the division of the tenement, but not in such a way as to increase the burden on the servient tenement : Cal. 5807 ; Dak. Civ. C. 250.

**§ 2155. Future Estate.** The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant : Cal. 5808 ; Dak. Civ. C. 251.

**§ 2156. Actions to Enforce Easements** may be brought by the owner of any estate in the dominant tenement or by the occupant thereof : Cal. 5809 ; Dak. Civ. C. 252. The owner in fee of a servient tenement may maintain an action for the possession of the land against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public : Cal. 5810 ; Dak. Civ. C. 253. See also in Part IV.

**§ 2157. Extinguishment.** A servitude is extinguished, (1) by the vesting of the right to the servitude and the right to the servient tenement in the same person (*i. e.*, confusion) (cf. § 2133) : Cal. 5811 ; Dak. Civ. C. 254 ; La. 783 ; (2) By the destruction of (a) the servient tenement : Cal., Dak., La. ; (3) of the dominant tenement : La. ; (3) by the performance of any act upon either tenement, by the owner of the servitude or with his assent, which is incompatible with its nature or exercise : Cal., Dak. ; (4) when the servitude was acquired by enjoyment, by the disuse thereof by the owner of the servitude for the period of prescription (Art. 229) : Cal., Dak., La. ; (5) by the abandonment of that part of the estate which owes the servitude : La. ;

(6) by renunciation, or express or tacit remission by the owner of the servitude : La. ; (7) by expiration of time for which the servitude was granted, or the happening of a dissolving condition attached : La. ; (8) by the dissolution of the right of him who created it : La. Also, they are extinguished when the things are in such a situation that they can no longer be used, and when they remain perpetually in such a situation.

If the things are re-established in such a manner that they may be used, the servitudes will only have been suspended, and they resume their effect unless, from the time they ceased to be used, sufficient time has elapsed for prescription to operate against them : La. 784-5.

If a wall in common, or a house subject to a servitude, or to which a servitude is due, be rebuilt after having been destroyed, demolished, or thrown down, all the servitudes, active and passive, which existed on this wall or house continue to exist on the new wall or house, but they cannot be augmented ; provided always that they be rebuilt within such a time that prescription has not operated against them, as is mentioned in the following paragraphs.

If the house or edifice which has been destroyed, demolished, or thrown down by any accident, belonged to the owner to whom the servitude is due, the servitude will be extinguished if he does not rebuild the house or edifice within the time required for prescription, because it depended on him alone, by rebuilding his house, to revive the servitude it enjoyed.

If, on the contrary, it is the house or edifice subject to the servitude which has been destroyed, demolished, or thrown down, the owner cannot, by rebuilding it after the time required for prescription, impair the servitude to which the house or edifice was previously subject, because he to whom the servitude was due had not the power to compel the other to rebuild the house or edifice thus destroyed : La. 786-8.

## **Art. 216. Of New Works.**

§ 2160. **Louisiana Law.** By a new work is understood every sort of edifice or other work which is newly commenced on any ground whatever.

When the ancient form of a work is changed, either by an addition being made to it, or by some part of the ancient work being taken away, it is styled also a new work.

Opposition may be made to every species of new work from which injury is apprehended, whether the work be in a city or in the country, in places built up or not built up, public or private, conformably to the rules hereinafter prescribed.

Opposition cannot be made to all works indiscriminately, but only to those which come under the denomination of new works, such as the constructing of new buildings or the demolition or destruction of old works.

Opposition cannot be made to those works which any one makes for the repairs and support of an old building, if its ancient form be not changed thereby, because, unless this be done, it is not properly a new work.

Opposition cannot be made to the works which any one makes for the repairs or cleaning of his canals, spouts, sewers, or aqueducts, whatever inconvenience or detriment may result therefrom, because it is for the public interest and safety that these things should be repaired and kept clean.

Works which have been formerly built on public places, or in the beds of rivers or navigable streams, or on their banks, and which obstruct or embarrass the use of these places, rivers, streams, or their banks, may be destroyed at the expense of those who claim them at the instance of the corporation of the place, or of any individual of full age residing in the place where they are situated.

And the owner of these works cannot prevent their being destroyed under pretext of any prescription or possession, even immemorial, which he may have had of it, if it be proved that at the time these works were constructed the soil on which they are built was public, and has not ceased to be so since.

If the works formerly constructed on the public soil consist of houses or other buildings which cannot be destroyed without causing signal damage to the owner of them, and if these houses or other buildings merely encroach upon the public way, without preventing its use, they shall be permitted to remain ; but the owner shall be bound, when he rebuilds them, to relinquish that part of the soil or of the public way upon which they formerly stood.

The corporations of cities, towns, and other places may construct on the public places, in the beds of rivers and on their banks, all buildings and other works which may be necessary

for public utility, for the mooring of vessels and the discharge of their cargoes, within the extent of their respective limits.

If any one commence on his own land a building or other new work which may be of detriment to his neighbor, or any other individual, the latter may, in the presence of witnesses, forbid him to continue the work.

If the person thus forbidden to continue his works will not suspend them, the person making the opposition may apply to the judge in order to have them destroyed at the expense of the person making them, on alleging the injury and detriment the work may cause to him.

The plaintiff, who sues in opposition, may obtain from the judge a mandate commanding the defendant to suspend his works until further order, if he affirm under oath at the foot of his petition that he has forbidden the defendant to continue his works, and that the construction may cause him injury or damage, and if he give good and sufficient security to the defendant in such sum as shall be fixed by the judge, to answer for the damage caused to the defendant, in case the opposition should not be well founded.

Though the judge may have commanded the defendant to suspend his works, he may, in the course of the suit, authorize him to continue them, if he thinks their continuance will not cause an irreparable injury to the plaintiff; but the defendant will be bound to give good and sufficient security, in such sums as shall be fixed by the judge, to pay any damages which may be caused to the plaintiff by their being continued, and that he will place everything in its former situation, if he should be finally condemned to destroy his works.

If, on the trial of the case, it be determined that the new works can cause injury or detriment to the person who complains of them, and who has made opposition to their erection, the judge shall order them to be destroyed at the expense of him who has caused them to be constructed, how far soever they may be advanced, even if they should be finished, under the authority given and the security furnished according to the terms of the preceding article, unless the works can be so changed as to cause no detriment to the complainant.

If, after the commencement of a suit for the destruction of new works, the defendant should sell the land upon which these works stand, the judgment which orders the destruction of them shall be executed against the purchaser, though he may have been ignorant of the prohibition made to his vendor to discontinue them, saving always his recourse for indemnity against his vendor: La. 856-868.

## Art. 217. Walls.

§ 2170. **Party-Walls; Erection.** In a few states, every person who shall erect, in a city or town, any building with brick (or stone, in Louisiana), may set half his partition wall on his next neighbor's ground: Io. 2019; S.C. 1842; Miss. 980; La. 675; D.C. 482.

§ 2171. **Dimensions, etc.** The person erecting the wall must (1) leave a tothing in the corner of such wall for his neighbor to adjoin unto: S.C. 1842.

(2) The wall must not exceed eighteen inches in width, and not be less than one story high: Io. 2019; La. 675. In several states, there are special provisions relating to party-walls in certain cities: Pa. *Party-Walls*, 1-27; Del. 73,74; D.C. 482,483; and there are in many states special laws upon the subject.

Every co-proprietor is at liberty to increase the height of the wall held in common; but he alone is to be at the expense of raising it, and of repairing and keeping the part above the height of the wall in common in good order; and besides, he alone is liable for all expenses arising from its being raised higher according to its value: Io. 2024; La. 681.

If the wall held in common cannot support the additional weight of raising it, he who wishes to have it made higher is bound to rebuild it anew entirely, at his own expense; and the additional thickness must be taken from his property: Io. 2025; La. 682.

§ 2172. **Contribution.** The person erecting it cannot, in two states, compel his neighbor to contribute thereto: Io. 2019; La. 675.

And the neighbor may of course contribute his half if he choose, at any time: Io.; La. 676.



But in several, when the owner of such adjoining land shall build, he shall pay for one half of the said partition wall, so far as he makes use of the same : Io. 2027 ; S.C. 1843 ; Miss. 980,981 ; La. 684.

If the wall is built entirely on land of the person erecting, the neighbor wishing to use it must also pay half the value of such land : Io., La.

The neighbor who did not contribute to the raising of the wall held in common may cause the raised part to become common, by paying one half the expense of such raising, and the value of the half of the soil employed for the additional thickness, if there is any : Io. 2026 ; La. 683.

**§ 2173 Ownership.** Whenever the neighbor pays his share, according to § 2171, the wall is owned in common between them : Io. 2020 ; La. 676.

**Presumption.** Every wall being a separation between buildings, is presumed to be a wall in common : Io. 2021 ; La. 677.

**Removal.** A party-wall so paid for by both owners (§ 2172) cannot be removed by either without the other's consent : Miss. 983.

**§ 2174. Repairs.** A land-owner making excavations is bound, if given the necessary license to enter on his neighbor's land, to preserve the wall or party-wall from injury at his expense : N.J. *Party-Walls*, 1.

The repairs and building of walls in common are to be made at the expense of all who have a right to the same, and in proportion to their interests therein ; nevertheless, every co-proprietor of a wall in common may be exonerated from contributing to the repairs and rebuilding, by giving up his right of common, provided no building belonging to him be actually supported by the wall thus held in common : Io. 2022 ; La. 678-9.

**§ 2175. Rights in Walls.** Every co-proprietor may build against a wall held in common, and cause beams or joists to be placed therein : Io. 2023 ; La. 680 ; within two inches of the whole thickness of the wall, saving to the neighbor the right of diminishing with the chisel the length of the beam till it do not exceed the half of the thickness of the wall, in case he himself should wish to fix beams in the same place, or to build a chimney against it : La.

So, in Iowa, any person building such wall shall, on being requested by his co-proprietor, make the necessary flues and leave the necessary bearings for the joists or beams as specified by the co-proprietor : Io.

Neither of the two neighbors can make any cavity within the body of the wall held by them in common, nor can he affix to it any work without the consent of the other, or without having, on his refusal, caused the necessary precaution to be used, so that the new work be not an injury to the rights of the other, to be ascertained by persons skilled in building : Io. 2028 ; La. 685.

**§ 2176. Double Walls.** He who wishes to dig a well or a necessary, to build a chimney or hearth, a forge, an oven, a furnace or stable, to put up shelves to store salt or other corrosive substances near a wall, whether held in common or not, is bound to leave the distance, and to cause to be made the works prescribed by the regulations of the police, in order that his neighbor be not injured thereby.

And if there be no regulations of police upon all or any of these subjects, he shall conform to the following rules, in cases which have not been foreseen.

He who wishes to build a chimney or hearth against a wall held in common, is bound to make a double wall of brick or other proper material six inches thick.

He who wishes to build an oven, a forge, or a furnace against the wall held in common, is bound to leave half a foot interval and vacancy betwixt such wall and that of his oven, forge, or furnace ; and this last wall must be one foot thick.

He who wishes to dig a necessary or a well against a wall, whether held in common or not, is bound to build another wall one foot thick ; and when there is a well on one side and a necessary on the other, there shall be four feet masonry betwixt the two, including the thickness on both sides ; but between two wells three feet interval are sufficient : La. 692-5.

**§ 2177. Express Agreement.** Any agreements for erecting walls which parties may make who own adjoining lots and desire to build party-walls are binding (1) whether in writing or not : Miss. 979. But in Iowa, (2) they must be in writing : Io. 2030.

**Art. 218. Fences.**

§ 2180. **Enclosures.** All fields or enclosures must be enclosed by a legal (§ 2188) fence : Ct. 16,3,1,1 ; Kan. 40,1 ; Mo. 5651 ; Ark. 3646 ; Ore. 15,1 ; 1878, p. 23 ; Miss. 971.

So, every gardener, farmer, and planter is required to enclose with a lawful fence his cleared land in cultivation : N.C. 2799 ; Tenn. 2248 ; Tex. 2431 ; Ariz. 1885,82,1.

It being impracticable for all fields to be fenced in, all animals must be kept under a shepherd, so that no injury may result to the fields ; and damages resulting must be paid by the person causing it : N.M. 3.

In Utah, any county may by two-thirds vote declare in favor of fencing ; and in such case stock may be allowed to run at large, and the owner will in no case be responsible for damages : Uta. 398. Stock cannot run at large in the summer : N.M. 1880,27,1.

In several states, any county or township may vote to prohibit cattle, sheep, and horses from running at large : N.J. 1881,12 ; W.Va. 1885,45 ; Ark. 3636 ; Ga. 1450, 1455.

In Indiana, it may be so ordered by the county commissioners : Ind. 4835.

Every fence which separates rural estates is considered as a boundary enclosure, unless there be but one of the estates enclosed, or there be some other title or proof to the contrary : La. 688.

§ 2181. **Fences in Towns.** The subsequent provisions of this article do not, in Maine, apply to house-lots not exceeding one half acre, but if the owner of such lot improves it the adjacent owner must make and maintain half the fence, whether he improves or not : Me. 22,14. No ditch can be made adjacent to a house-lot without the consent of the owner of the house : Ct. 16,3,1,1. When there is a dwelling-house within one hundred rods of the dividing line, the owner of such house may erect a better fence than is legally prescribed (§ 2188) and the other proprietor is bound to pay only the cost of an ordinary legal fence towards the same, and not the increased expense of maintaining it : Ct. 16,3,1,12. Cities [and towns] have special power to regulate fences, partition fences, etc., by ordinance : N.J. 1878,222 ; La. 686. The owner of a lot in a city, town, or village has a process in court to compel the adjacent owner to erect and maintain his share of a partition fence : Minn. 18,25.

Every wall betwixt the yard and garden in the cities and towns, and their suburbs, of this State, and even any other enclosure in the fields, shall be presumed to be in common, if there be no title, proof, or mark to the contrary : La. 677. There are special laws relating to fences in Philadelphia : Pa. *Fences*, 11-16 ; in Amador, Butte, Colusa, Contra Costa, Klamath, Modoc, Placer, San Bernardino, San Diego, Santa Barbara, Shasta, Siskiyou, Tehama, Trinity, Tuolumne, and Yuba Counties : Cal. 15306 ; in Wilmington : Del. 73,74 and 76 ; in Gallatin County : Ky. 1884,667 ; and in many states, private or local statutes. So, in Maryland, all fences are provided for by local or special laws.

§ 2182. **Erection.** (A) Generally, owners (or occupants)<sup>a</sup> of adjoining land, when either needs a fence, are each bound to erect half of it, or to contribute equally thereto : N.H. 142,1 ; Mass. 36,10 ; Ct. 16,3,1,1 ; N.J. *Fences*, 2 and 4 ; Ind. 4848 ; Cal. 15313 ; Ore. 1880, p. 46 ; Wash. 2492 ; Mon. 1881, p. 47, §§ 2,4 ; Ariz. 3370.

So, in others, only when both owners' land is improved : R.I. 106,3 ; N.Y. 1,11,4,30 ; Pa. *Fences*, 5 ; Mich. 797 ; Wis. 1391 ; Io. 1489 ; Minn. 18,3 ; Kan. 40,8 and 17 ; Del. 57,4 ; W.Va. 105,6 ; Col. 1885, p. 221, § 4 ; Ala. 1592 ; Miss. 971.

When they disagree the proportion is determined by the fence-viewers : Me. 22,9 ; O. 4242 ; Ill. 54,5 ; Mich. 800 ; Wis. 1393 ; Io. 1492 ; Minn. 18,6 ; Kan. 40,11 ; Neb. 1,2,2,4 ; Del. 57,3 ; Nev. 1875,92,2. So, in Vermont, either is bound to erect his portion, if the selectmen so determine : Vt. 3179.

(B) So, in other states; but no person not wishing his land enclosed, and not occupying or using it otherwise than in common, is compelled to erect or contribute to any partition fence: N.Y. 1,11,4,31; Ill. 54,3; Io. 1495; Minn. 81,20; Kan. 40,16; Neb. 1,2,2,2; W.Va. 105,4; N.C. 2800; Tenn. 2259; Cal. 5841; Dak. Civ. C. 272; Uta. 401; La. 687.

But when any fence is erected by a person on the boundary line of his land, and the person owning the land adjoining thereto afterwards enclose his land, so that such fence is used by him, he shall pay to the person owning it half value of so much of it as serves for a partition fence between them: N.H. 142,10; Mass. 36,7 and 13; Me. 22,5 and 11; Vt. 3180; R.I. 106,4 and 10; Ct. 13,6,1,2; N.Y. 1,11,4,32; Pa.; O. 4239; Ind. 4853; Ill. 54,4; Mich. 802 and 809; Wis. 1398-9; Io. 1498; Minn. 18,9 and 16; Kan. 40,16 and 20; Neb. 1,2,2,3; Del. 57,4; W.Va. 105,5; N.C. 2801; Tenn. 2259; Mo. 5656; Ark. 3654; Cal. 15312; Ore. 15,8; 1880, p. 46; Nev. 1875,921; Col. 1460; Wash. 2491; Ida. 1884-5, p. 118, § 1; Mon. 1881, p. 47, § 3; Ala.; Miss. 973; Ariz. 1885,82,6.

But a man may erect a fence of his own and leave a lane on his own land between them: Ind. 4855; Miss. 971.

If after notice and reasonable time the other party neglect so to erect one half of the fence, the first party may erect it and collect half cost from the other: N.J.; O. 4243; Kan. 40,17 and 12; Neb. 1,2,2,9; N.C. 2807; Cal.; Wash. 2493; Mon.; Miss. 972; Ariz. And also one per cent a month interest; Mich., Wis., Io., Minn., Kan.; and actual damages: Mon. In some, he may collect double the whole cost of fence or repairing from the other land-owner: Mich. 801; Wis. 1396,1397; Io. 1493; Minn. 18,5 and 7.

NOTE. — <sup>a</sup> The actual occupant of land is deemed the owner for any purposes of this chapter: N.H. 142,19.

§ 2183. **Ownership.** When the partition fence is paid for by both, as in § 2181, it is owned by both land-owners in common: Miss. 975.

§ 2184. **Removal.** (A) Neither party can generally remove his part of the partition fence: N.H. 142,12; Ct. 16,3,1,8; N.Y. 1,11,4,39-40; N.J. *Fences*, 6; O. 4241; Ind. 4856; Ill. 54,3; Mich. 813; Wis. 1400; Kan. 40,19; Neb. 1,2,2,10; N.C. 2802; Ky. 55,2,1; Mo. 5662; Ore. 15,11; Col. 1885, p. 222, § 8; Wash. 2496; Ida. 1884-5, p. 118, § 4; Mon. 1881, p. 47, § 5; Wy. 51,2; Miss. 975.

*Except* (1) with the consent of the other, in all states, and (2) except between December 1 and the March 1 following: Ky.; November 1 and April 1: N.Y.; December 1 and April 1: Neb.; January 1 and March 1: N.C.; (3) except upon written notice, viz., three months' notice: Ct.; N.C.; Ky. 55,2,2; Wash.; six months': O.; Ind.; Mich.; Wis.; Kan.; Mo.; Ore. 15,15; Ida. *ib.* 8; Mon.; Miss. 977; one year's: N.J., Ill., Col., Wy.; ten days': N.Y.; sixty days': Neb., Ore., Ida. Such notice must be served between July 1 and October 1: Kan.

(B) Neither party can remove the fence if the other will pay half its value: Mass. 36,12; Me. 22,10; Ct.; Ill. 54,14; Mich. 808; Wis.; Minn. 18,15 and 20; Kan. 40,18; Mo.; Ore.; Col.; Wash.; Ida.; Mon.; Miss. 978.

(C) Nor while the other has a crop standing: Ind. 4858; Ore. 15,11.

A person throwing his enclosure open is bound first to erect such fence as he would be bound to erect if it were not so thrown open: Ct. 1881,73.

But in Arizona, either party may remove "when the fence ceases to be a partition fence by the removal of the outside enclosure:" Ariz. 3370.

§ 2185. **Repairs.** Both owners are usually bound to contribute equally to the repairs of such partition fence: N.H. 142,1; Mass. 36,2; Me. 22,3; Vt. 3184; R.I. 106,5; Ct. 16,3,1,4; N.Y. 1,11,4,37; N.J. *Fences*, 2; O. 4240; Ill. 52,5;



Mich. 797; Wis. 1391; Io. 1489; Minn. 18,4; Kan. 40,8; Neb. 1,2,2,2; Del. 57,5; Ky. 55,2,4; Tenn. 2260; Mo. 5659,5661; Ark. 3193; Cal. 15315; Ore. 15,9; Col. 1885, p. 221, § 5; Wash. 2494; Ida. 1884-5, p. 118, § 2; Wy. 51,2; Uta. 401; Ala. 1592; Miss. 971; Ariz. 1885, 82,6.

If part owner of division fence fail, after notice, to repair, the other may proceed to repair, and recover value of repairs from the recusant: N.H. 142,7; Mass. 36,3-4; Vt.; N.Y. 1,11,4,38; N.J. *Fences*, 2; Pa. *Fences*, 7; Ind. 4849,4850; Ill. 54,6 and 11; Io. 1490-1; Kan. 40,9-10; Neb. 1,2,2,9 and 13; N.C. 2807; Ky.; Cal. 15319; Ore. 15,10; Col.; Ida. *ib.* 3; Mon. 1881, p. 47, § 6; Ala.<sup>a</sup> 1596; Miss. 974; Ariz. 1885,82,6; *plus* ten per cent interest: Ind.; *plus* twenty-five per cent damages: Cal.; and any actual damages suffered by such neglect: Ill., Mon.; *plus* one per cent a month interest: Me., R.I., Mich., Io., Minn., Kan.; *plus* double value of repairs: N.H. 142,9; Mass.; Me. 22,4 and 6; R.I. 106,6; Ct.; Mich. 798-9; Wis. 1396; Minn. 18,4-5; Del.; Mo. 5661.

All fences must, in most states, be kept in good repair through the year, unless there is a mutual agreement to the contrary: Mass. 36,8; Me. 22,7; R.I. 106,2; Ind. 4848; Mich. 803; Wis.; Io. 1494; Minn. 18,10; Kan. 40,15; Cal. 15318; Mon. 1881, p. 47, § 2.

But if either party ceases to use or improve his land as an enclosure, he is not bound to repair the fence, so long as his land lies unimproved and in common: N.H. 142,12; Mass. 36,11; Me. 22,2 and 13; Ct. 1881,73; Mich.; Wis.; Cal.; Col.; Miss.

NOTE. — <sup>a</sup> Only when such fence has been established by mutual agreement.

§ 2186. **Maintenance.** A division fence existing, each person must keep a lawful fence on his portion of the line: Mass. 36,2; Me. 22,2; Vt. 3179; R.I. 106,3-4; N.Y. 1,11,4,30; N.J.; Pa. *Fences*, 5; O. 4240; Ind. 4848; Mich. 797; Wis. 1391; Io. 1489; Minn. 18,3; Neb. 1,2,2,2; Del. 57,4; W.Va. 105,4; Ky. 55,2,3; Cal. 15318; Col. 1885, p. 222, § 6; Mon. 1881, p. 47, § 2.

§ 2187. **Express Agreement.** Persons owning adjoining lands may agree in regard to the erection of division fences and repairs (and if written, and [except in New Jersey, signed and acknowledged or proved] it may be recorded like deeds and with same effect: N.H.; Mass.; Me.; Vt.; R.I.; N.J. *Fences*, 16; Wis.; Io.; Minn.; Kan.; Ky.): N.H. 142,2; Mass. 36,11; Me. 22,5 and 13; Vt. 3190; R.I. 106,9; N.J. *Fences*, 7; Wis. 1392; Io. 1499; Minn. 18,8; Kan. 40,13; Ky. 55,3,1; Uta. 401. If there is a disagreement, an appeal to fence-viewers is had, who assign each a part of fence to keep up: N.H. 142,4; Mass. 36,5; Me. 22,5; Vt. 3179; R.I. 106,8; Ct. 16,3,1,2-3 and 6-7; N.Y. 1,11,4,32-33; N.J. *Fences*, 4; Pa. *Fences*, 6; Io. 1492; Kan. 40,11; Neb. 1,2,2,5; remedies and damages as above (§ 2185): Mass. 36,6; Kan. 40,12. The decision of the selectmen or fence-viewers is recorded in the same way: N.H.; Mass.; Me.; Vt.; R.I.; Ct.; N.Y. 1,11,4,36; N.J.; Ill. 54,10; Mich. 800; Wis. 1403; Io.; Minn. 18,8; Kan.; Neb. 1,2,2,8; W.Va. 105,9; N.C. 2805. Such agreement will then be binding on the parties and all succeeding owners and occupants of the land: N.H.; R.I.; Wis.; Io.; Minn. 18,19; Kan.; N.C. 2806; (and so also, it would probably be inferred, in other states).

Such division of the fencing may also be established by usage and acquiescence of the parties and those under whom they claim, for twenty years: N.H. 142,3.

§ 2188. **Lawful Fence.** Nearly all states prescribe by law the height, construction, and material required for a "lawful fence." It is generally four or four and one half feet high, with three rails, and may be of stone, wood, wire, or a bank and ditch. See N.H. 142,5; Mass. 36,1; Me. 22,1; Vt. 3178; R.I. 106,1; Ct. 16,3,1,1; N.J. *Fences*, 1; 1883,65; Pa. *Fences*, 1; Ill. 54,2; Mich. 796; Wis. 1390, Amt.; Io. 1507; Minn. 18,1-2; Kan. 1883,113,1; 40,1-3; Neb. 1,2,2,18; Del. 57,1; Va. 97,1; W.Va. 105,1; 1883,32; Ky. 55,1,1; 1882,878; Tenn. 2249-2250; Mo. 5652; Ark. 3643,3647,3649; Tex. 2431; Cal. 15308-15311; Vol. 3,

15321; Ore. 1878, p. 23; Col. 1885, p. 220, § 1; Wash. 2488; Ida. 1874-5, p. 831, 2-8; 1880-1, p. 306,1; 1884-5, p. 129; Mon. 1885, p. 76, § 1; Wy. 51,1 and 9; 1882,46; Uta. 399; Ga. 1443-4a; 1883, p. 139, §§ 1,2; Ala. 1586; 1879,73; Miss. 970; Fla. 105,1; 1885,3619; N.M. 1278; Ariz. 1885,82,2.

In some, each town has power to prescribe what shall be a lawful fence therein: N.Y. 1, 11,4,44; Ill. In others, there is no prescribed construction; but it must be such as husbandmen generally keep: O. 4239; Ind. 4834.

§ 2189. **Damages by Cattle breaking through, (A)** if the cattle are not the property of the owner of the fence, and the damage is done on his land, and the fence was lawful, (1) must be paid to him by the owner of the cattle: Mass. 36,27; Me. 23,4; R.I. 109,1; Ct. 16,3,1,9; N.Y. 3,8,11,3-4; N.J. *Fences*, 12; O. 4251; Ind. 4835; Ill. 54,20; Neb. 1,2,2,19; Del. 57,2; Va. 97,8; 1879, *Special Session*, 31; W.Va. 105,2; Ky. 1882,1053; Tenn. 2252; Mo. 5653; Ark. 3651; Tex. 2432; Ore. 15,4; Nev. 3992; Col. 1885, p. 221, § 3; Wash. 2490; Ida. *ib.* 9,10 and 12; Mon. 1881, p. 48, § 7; Wy. 51,3 and 7; Uta. 399; Ala. 1589; Miss. 975, 984; N.M. 1277; Ariz. 1885,86,4.

But (2) if the fence was not lawful and sufficient, he cannot recover: N.H. 142,13; Mass.; Me.; Vt. 3188; Ct.<sup>a</sup> 16,3,1,10; N.Y. 1,11,44; N.J. *Fences*, 10; Ind. 4847; Mich. 817; Wis. 1391, Amt.; Kan. 40,26; Tenn. 2253; Tex. 2434; Col.; Wy.; Uta. 401; Ga. 1445; Ala. 1587; Fla. 105,2; 1885,3619.

And in one state, he is liable for damage done by him to such cattle in chasing them out: Pa. *Fences*, 1.

But (3) he can recover, whether there is a lawful fence or not, except in counties adopting the fence law (§ 2190): Ind. 4835; Uta. 396; S.C. 1185.

And, also, he may distrain the cattle: Mass., Me., Ky.,<sup>b</sup> Mo.; or impound them: R.I.; N.J.; Ind.; Ill. 54,21; Kan. 40,33; Md. 67,8,7; Ida.; Mon. *ib.* 8. [So, in many other states, by the law of *Estrays*.]

(B) If the cattle belonged to the owner of the fence, and the damage was done on another's land, the owner of the cattle is liable, if he did not keep up a lawful fence; otherwise, not: N.H. 142,13; R.I. 109,18; N.Y. 1838,261; O. 4250; Ind. 4847; Kan. 40,26; Ky. 55,3,2; 55,4,1; Tex. 2432; Ida. 1874-5, p. 742,1; Uta. 401.

*Except*, he is liable for a second breach, whether his fence be lawful or not: Ky.

(C) Any person not maintaining a lawful fence is liable in the same way, although not the owner of the cattle: N.J. *Fences*, 9; O.; Kan. *Cattle*, as the word is used in this section, is specially enacted to include hogs: Ariz. 3372. So, in many other states.

For second or subsequent breaches, the fence being lawful, the owner of the cattle must pay double damages: Del.,<sup>b</sup> Va., W.Va., Ark., Ore., Nev., Ida., Ala., Miss., Ariz.

But for a third breach by cattle of the same owner the owner of the land (1) may distrain: Ore.; or (2) he may sue for treble damages: Ky.; (3) he is entitled to the cattle: Va.,<sup>b</sup> W.Va.;<sup>b</sup> (4) he may kill them: Ark.

NOTES. — <sup>a</sup> Except in particular cases, as where the cattle were unruly, or the trespass voluntary, etc. <sup>b</sup> After notice to the owner of the cattle.

§ 2190. **Local Laws.** In many states (A) the fence law contained in this article only applies to each county upon (1) a majority vote therein: Io. 1508; Va. 97,19 and 23; N.C. 2812; Col. 1469-1470; (2) a two-thirds vote therein: Uta. 398. In Nebraska, it does not apply to those counties where cattle are not prohibited from running at large: Neb. 1,2,2,22. In several, it does not apply in certain specified counties: Va. 97,20-22; Cal. 15316; Ore. 15,7; Col. 1885, p. 222, § 9; Wy. p. 351, § 1; S.C. 1184; Ariz. 3373. In Georgia, it does not apply in counties which vote for no fence law: Ga. 1455.

(B) And in Utah, two thirds of the settlers in any region may petition the county court setting forth that it is better adapted to grazing than to agriculture, and if the court so decide, § 2189, A (3) does not apply, and no damages can be recovered: Uta. 397.

(C) In one, there are laws requiring fencing in specified districts only: N.M. 1278. Compare also § 2181.

§ 2191. **Ditches.** A ditch held in common is to be kept at the expense of the two contiguous proprietors: La. 690.

Every ditch between two estates shall be supposed held in common, unless there be a voucher or proof to the contrary: La. 639.

§ 2192. **Trees.** Every proprietor in the cities, towns, or suburbs of this State is forbidden to plant on the boundary line which separates his estate from that of his neighbor trees which may be of any injury whatsoever to his neighbor.

And if his neighbor suffers any damage from them, he can oblige the owner to have them torn up or the branches of them cut off which extend over his estate.

If the roots only extend themselves on his estate, the neighbor has the right to cut them up himself: La. 691.

## Art. 220. Ways.

§ 2200. **Right of Way.** The right of passage, or of way, is a servitude imposed by law or by convention, and by virtue of which one has a right to pass on foot, on horseback, or in a vehicle, to drive beasts of burden or carts through the estate of another.

When this servitude results from the law, the exercise of it is confined to the wants of the person who has it.

When it is the result of a contract, its extent and the mode of using it is regulated by the contract: La. 702.

§ 2201. **Ways of Necessity.** The owner whose estate is enclosed, and who has no way to the public road, may claim the right of passage on the estate of his neighbors for the cultivation of his estate; but he is bound to indemnify them in proportion to the damage he may occasion.

The owner of the estate which is surrounded by other lands has no right to exact the right of passage from which of his neighbors he chooses.

The passage shall be generally taken on the side where the distance is the shortest from the enclosed estate to the public road.

Nevertheless, it shall be fixed in the place the least injurious to the person on whose estate the passage is granted.

It is not always the owner of the land which affords the shortest passage who is obliged to suffer the right of passage; for if the estate for which the right of passage is claimed has become enclosed by means of sale, exchange, or partition, the vendor, coparcener, or other owner of the land reserved, and upon which the right of passage was before exercised, is bound to furnish the purchaser or owner of the land enclosed with a passage gratuitously, and even when it has not been sold or transferred with the rights of servitude.

A passage must be furnished to the owner of the land surrounded by other lands, not only for himself and workmen, but for his animals, carts, instruments of agriculture, and everything which may be necessary for the use and working of his land.

When the place for the passage is once fixed, he to whom this servitude has been granted cannot change it, but he who owes this servitude may change it from one place to another, in order that it may be less inconvenient to him, provided that it afford the same facility to the owner of the servitude: La. 699-703.

§ 2202. **Roads.** Roads are of two kinds, public and private.

Public roads are those which are made use of as highways, which are generally furnished and kept up by owners of estates adjacent to them.

Private roads are those which are only opened for the benefit of certain individuals to go from and to their homes, for the service of their lands, and for the use of some estate exclusively.



He who from his title as owner is bound to give a public road on the border of a river or stream must furnish another without any compensation, if the first be destroyed or carried away.

And if the road be so injured or inundated by the water, without being carried away, that it becomes impassable, the owner is obliged to give the public a passage on his land, as near as possible to the public road, without recompense therefor.

The action of indemnification granted against the person who claims the passage may be barred by prescription, and the passage shall be continued, although the action in indemnification may be no longer maintainable : La. 704-8.

§ 2203. **Passage.** The right of passage in cities is a servitude by which an owner permits his neighbor to pass through his house or lot to arrive at his own.

This servitude, to be perpetual, must be so expressed in the title; otherwise it ceases with the person who enjoys it and does not pass to his heirs : La. 719.

If the title by which a passage is granted does not designate its breadth, nor the manner in which it is to be used, whether on foot, or horseback, or with carriages, the use which the person to whom the servitude is granted previously made of it will serve to interpret the title.

If there was no such use made of it before, the probable intention of the parties must be considered, and the purpose for which the passage is granted.

If these circumstances can afford no light, it must be decided in favor of the land which owes the servitude, and a foot-passage must be conceded eight feet wide, where it is straight, and ten feet wide where it turns.

If the passage be agreed upon, without the time or the hour be fixed, it is necessary to make a distinction : if the passage be through a place not closed, it may be used at any hour, and even in the night, for at any hour a person may want to pass; but if it be through a place which is closed for the security of the owner, the right of passage can be exercised only at convenient hours, for it would be unreasonable that a yard or house should be left open at all hours of the night : La. 780-1.

§ 2204. **Footways.** In two states, no right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time : R.I. 175,6; Io. 2033. In New Mexico, "all footpaths are prohibited under penalty:" N.M. G. L. 1880,1,1,2.

§ 2205. **The Public Easement.** By taking or accepting land for a highway, the public acquire only the right of way and the incidents necessary to enjoying and maintaining it, subject to the regulations in the code : Cal. 2631.

All trees within the highway, except only such as are requisite to make or repair the road or bridges, are for the use of the owner or occupant of the land : Cal.<sup>a</sup>

NOTE. — <sup>a</sup> Except in certain specified counties.

§ 2206. **Rights of Abutters.** The owner or occupant of land (1) may construct a sidewalk on the highway along the line of his land : Cal. 2632; (2) may plant trees on the side near his land : Cal. 2633. (3) He is presumed to own to the centre of the way, but the contrary may be shown : Cal. 5831; Dak. Civ. C. 267; La.

## Art. 225. Miscellaneous Easements.

§ 2250. **Note.** See §§ 2148,2150-1, for the various kinds allowed.

§ 2251. **Support.** In two states, no owner or tenant of coal land can open or sink any mine or shaft within five feet of the land of another person without such person's written consent : Va. 120,7; W.Va. 144,7.

The right of support is one by which a proprietor stipulates that his neighbor shall be bound to permit that his house or his timbers should rest on the wall of his neighbor.

In these servitudes the owner of the structure subject to them is bound to keep his wall in a condition to bear them, unless the contrary has been agreed upon; but he may relieve himself from this charge by abandoning his wall.

The servitude by which one is permitted to project works over the estate of his neighbor is of the same kind : La. 712.

§ 2252. Every owner is bound so to construct his roofs that the rain falling on them shall not fall on the land of his neighbor, but on his own or the public way.

This falling of water gives rise to the servitude of drip.

The servitude of drip is that by which any one engages to permit the waters from the roof of his neighbor to fall on his estate, or that by which any one obliges himself to suffer the waters from his own roof to fall on the estate of his neighbor : La. 698,713.

§ 2253. **Drainage.** The right of drain consists in the servitude of passing water collected in pipes or canals through the estate of one's neighbor.

This servitude is different from the right of drip, because the charge it imposes is more onerous.

It is much less inconvenient to receive the rain which falls than a body of water which may carry away the land by its violence.

The contrary servitude is the right of preventing this passage of water : La. 714.

**Drains in Swamps.** In most states, persons having swamp lands or lands needing drainage have a compulsory process for the right to cut drains through lands surrounding : N.H. 1883,108,1 ; Mass. 189,1-18 ; Me. 22,43-61 ; 16,17-22 ; Vt. 3225-3238 ; R.I. 69,1-5 ; Ct. 16,12,1,8-10 ; N.Y. 3,8,16,1-14 ; N.J. *Meadows*, 1 and 48 ; and 68 and 98 ; 1881,158 ; 1883,188 ; Pa. *Agriculture*, 1 ; O. 4447,4511,1881, p. 209 ; Ind. 4274 ; 1883,126 ; Ill. 42,2 and 51 ; Wis. 1359 ; Io. 1208 and 1217 ; 1884,188 ; Minn. 124,49 ; 1883,108 ; Kan. 34,2 ; Neb. 1,89, 1 and 4 ; Md. 22,101 ; Del. V. 13, C. 444,1 ; Va. 120,13 ; W.Va. 144,10 ; N.C. 1297 ; Tenn. 2980-1 ; Mo. 5415-6 ; 6207 ; Cal. § 6422, April 1,1872 ; V. 3, § 15144 ; 1885,158 ; Ore. 11,1 ; Nev. 3852 ; Col. 1102 ; Wash. 1883, p. 77 ; Dak. 1883,75 ; Wy. 1882,57 ; S.C. 1562 ; Ga. 1607 ; Fla. 135,1 ; N.M. 17.

There are provisions for drainage, ditches, irrigation, or other similar work, in many states, enabling drainage, etc., companies to enter upon and use the land of others for such purposes : Ct. 16,12,2 ; N.J. 1880,163 ; Ill. Ch. 42 ; Mich. 1691-1740 ; Io. 1884,186 ; Kan. Ch. 34 ; Neb. 1,89, Art. 2 ; N.C. 1315 ; Ark. 4038-4055 ; Cal. ; Nev. 3852-3 ; Ida. 1874-5, p. 829,1-2 ; 1876-7, p. 34,1-2 ; 1880-1, p. 269,11. See also § 1179.

Damages must be paid for such use : N.H. *ib.* 5 ; Mass. 189,14 ; Me. 22,56 ; 17,23 ; Vt. 3229 ; R.I. 69,3 ; Ct. 16,12,1,9 ; N.J. *Meadows*, 5 and 52 and 69 and 99 and 117 ; Pa. *Agriculture*, 6 ; O. 4518-4521 ; Ind. 4277 ; 1883,126 ; Ill. 42,17 and 56 ; Mich. 1703 ; Wis. 1368 ; Io. 1209 and 1222 ; Minn. 124,54 ; Kan. 34,3 ; Neb. 1,89,12 ; Md. 22,107 ; Del. V. 13, C. 444,3 ; Va. 120,14 ; W.Va. ; N.C. 1299 and 1321 ; Tenn. 2982 ; Mo. ; Ore. 11,3 ; Nev. 3853 ; Col. 1117 ; Dak. ; Ida. *ib.* 3 and 6 ; Wy. ; S.C. 1563 ; Ga. ; Fla. 135,4 ; N.M.

§ 2254. **Light and Air.** One neighbor cannot, without the consent of the other, open any window or aperture through the wall held in common in any matter whatever, not even with the obligation, on his part, to confine himself to lights, the frames of which shall be so fixed within the wall that they cannot be opened.

No one shall build galleries, balconies, or other projections on the border of an estate so that they extend beyond the boundary-line which separates it from the adjoining estates : La. 696-7.

We understand by *view* every opening which may, more or less, facilitate the means of looking out of a building.

*Lights* are those openings which are made rather for the admission of light than to look out of.

Servitudes of view are of two kinds, — one which confers the right of full view with the power of preventing one's neighbor from raising any buildings which obstruct it ; and the other, which gives an owner the right of preventing his neighbor from having any view or lights on the side on which their estates unite, or that he exercise these servitudes according to his title.

Servitudes of light are also of two kinds, — one which gives the owner of a house the right of opening windows in a wall held in common, for the admission of light, with the right also of preventing his neighbor from raising any building which can obstruct the admission of light; and the other, which gives the right of preventing one's neighbor from opening his wall or a wall held in common, for the admission of light from a yard or other place, or which limits him to certain lights which are conferred by his title.

The right of obliging one's neighbor to raise his wall to a certain height, and, on the contrary, that of preventing one's neighbor from raising his house beyond a certain height, are also servitudes : La. 715-718.

The right of opening lights or of view, granted indefinitely to him who is about building, gives him the privilege of opening all the windows which may be necessary to light or embellish his house and the building attached to it, to give to the windows the form and size he may think proper to adopt, because such is presumed to have been the intention of the parties.

But after the buildings are all finished, the possession and situation of the ground determine the extent of the servitude, and the owner can neither multiply nor enlarge his windows : La. 782.

In several states, no person by erecting a house or building with windows overlooking the land of another, and the continuance of such windows, can acquire an easement of light and air so as to prevent the erection of a building on such land : Mass. 122,1 ; R.I. 175,5 ; Ct. 18,6,1,19 ; Io. 2032 ; W.Va. 144,13.

§ 2255. **Drawing Water.** The right of drawing water is a servitude by which one suffers his neighbor to draw water from the well or spring he has on his land. The use of this servitude is confined to those who live in the house of the person enjoying the servitude, unless the contrary be expressed in the title.

The right of drawing water from the spring of another is also a servitude.

The right of watering one's animals at the pond or spring of another is also a servitude : La. 720,723,725.

§ 2256. **Aqueducts.** The conducting of water or aqueduct is the right by which one conducts water from his estate through the land of his neighbor by means of an aqueduct or ditch : La. 724.

§ 2257. **Pasturage.** Pasturage is the right of grazing one's cattle on the estate of another : La. 726.

§ 2258. **Telegraph.** In several states, no easement can be acquired by prescription in maintaining telegraph wires and poles : R.I. 175,10 ; Ct. 1881,42 ; N.J. 1884,163 ; Pa. 1883,11 ; Wis. 1885,57.

## **Art. 228. Acquisition of Easements.**

§ 2280. **Who may Acquire.** Those who can establish servitudes on their lands can also acquire servitudes.

There are some persons who cannot establish servitudes who nevertheless can acquire them ; such as those who cannot exercise their rights, — minors, women not authorized, administrators, tutors, husbands ; for the acquisition of a servitude augments the value and convenience of an estate.

He who assumes the quality of owner, and enjoys an estate as such in good or in bad faith, he who acts in the name of the owner, though he have no mandate from the owner, can acquire servitudes, and the person granting them cannot afterwards revoke them, for it is not to the person but to the estate they are granted.

Nevertheless, in all the cases mentioned in the preceding articles, if the minor, the woman not authorized, or the owner find the contract onerous, they can annul it or refuse to execute it by renouncing the servitude.

Even those who are neither owners nor representatives of the owner, and who have not expressly assumed the quality of acting in his name, may acquire a servitude for the benefit of the estate they possess, when such is the condition of the contract they make.



One of the owners of property held in common may stipulate for a servitude for the benefit of the property in common, because the partnership which exists between him and his co-proprietor authorizes him and makes it his duty to ameliorate the property in common.

Nevertheless, the co-proprietors may refuse to avail themselves of this servitude, and allege that the acquisition of the servitude is not an act of mere administration but an innovation on the estate, which ought not to have been made without their consent. But this exception exists only in their favor and cannot be taken advantage of by him who has granted the servitude in order to exonerate himself from his engagement.

The usufructuary may acquire a servitude in favor of an estate of which he has the usufruct if he declare that he acts for the owner, or if he stipulates that the servitude is established in favor of all those who shall possess the estate after him ; but if in the act by which the servitude is acquired he takes merely the quality of usufructuary, without expressing at the same time that he contracts for all those who may succeed him in the possession of the estate, the right terminates with the usufruct, and the owner cannot claim a servitude which has not attached to the estate subject to the usufruct, or which has only attached for the time of the usufruct : La. 759-764.

Continuous and apparent servitudes may be acquired by title or by a possession of ten years.

Continuous non-apparent servitudes and discontinuous servitudes, whether apparent or not, can be established only by a title.

Immemorial possession itself is not sufficient to acquire them.

Immemorial possession is that of which no man living has seen the beginning, and the existence of which he has learned from his elders.

The destination made by the owner is equivalent to title with respect to continuous apparent servitudes.

By destination is meant the relation established between two immovables by the owner of both which would constitute a servitude if the two immovables belong to two different owners.

Such intention is never presumed till it has been proved that both estates, now divided, have belonged to the same owner, and that it was by him that the things have been placed in the situation from which the servitudes result.

If the owner of two estates between which there exists an apparent sign of servitude sell one of those estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist actively or passively in favor of, or upon, the estate which has been sold.

The title by which such servitudes are established as cannot be acquired by prescription, can be replaced only by a title by which such servitude is acknowledged by the owner of the estate which owes the servitude, or by a final judgment condemning him to permit the exercise of the servitude.

When a servitude is established, everything which is necessary to use such servitude is supposed to be granted at the same time with the servitude.

Thus, the servitude of drawing water out of a spring carries necessarily with it the right of passage. But the passage, in this case and in all others in which it is permitted as an accessory to some other servitude, must be made in the way the most direct, the shortest, and the least inconvenient to the estate subject to the servitude : La. 765-771.

**§ 2281. Prescription.** In a few states, no person can acquire by adverse use any easement upon or over the land of another unless such use is continued uninterrupted (1) for twenty years : Mass. 122,2 ; Me. 105,13 ; Ind. 4321 ; (2) for fifteen years : Ct. 1881,161,1. See also in Part IV., *Prescription*.

In Iowa, where title to easements is claimed by reason of adverse possession for ten years, or prescription, the use of the same shall not be admitted as evidence that the person claimed the easement as his right ; but the fact of adverse possession must be proved by evidence distinct from and independent of its use, and that the person against whom the claim is made had express notice thereof ; and these provisions apply as well to public as to private claims : Io. 2031.

**§ 2282. Prescription in Public Ways.** No owner of land adjoining a highway can, by fencing or enclosing any part of it, or occupying it adversely for any length of time, acquire any prescriptive right thereto as against the public : N.H. 76,8.

In some states, the principal provision (§ 2281) is expressly extended (1) to rights of way : Mass. 122,2 ; Me. ; Ct. ; Ind. ; (2) to rights of air or light : Ind.

No right of way can be acquired through unenclosed woodland : Pa. *Ways*, 1. A right of private way over another's land may arise by express grant : Ga. 2235. Or from prescription, in the case of improved lands, by seven years' uninterrupted use : Ga. 731 ; 2235. In wild lands, by twenty years' uninterrupted use : Ga. And also, by implication of law, when such right is necessary to the enjoyment of lands granted by an owner of the servient estate : Ga.

## **Art. 229. Extinguishment.** See also § 2157.

§ 2290. **Non-User.** A right to servitude is extinguished by the non-usage of the same during ten years.

The time of prescription for non-usage begins for discontinuous servitudes, from the day they cease to be used ; for continuous servitudes, from the day any act contrary to the servitude has been committed.

Acts contrary to the servitude are the destruction of works necessary for its exercise ; as the stopping of spouts which carry off rain, or of windows or apertures which are necessary to the exercise of the right of view.

If the owner of the estate to whom the servitude is due is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of non-usage does not run against him as long as this obstacle remains : La. 789-892.

To preserve the right of servitude and prevent prescription from running against it, it is not necessary that it should be exercised exclusively by the owner to whom it is due, or by those who use his rights, or who represent him directly, — as the usufructuary, the lessee or tenant, the attorney in fact or agent. It suffices if the servitude has been exercised by workmen employed by the owner, or by his friends, or those who come to see him.

The servitude is preserved to the owner of the estate to which it is due, by the use which any one, even a stranger, makes of it, provided it be used as appertaining to the estate.

Thus the servitude is preserved to the owner by the use which a possessor in bad faith, who is in possession of the estate to whom it is due, makes of the servitude.

But if any one passes over the land of another, considering the way as public, or as belonging to another estate, the owner of the estate to whom the servitude is due cannot avail himself of the use thus made of the servitude, to protect himself against the prescription which may have been acquired against himself.

Prescription for non-usage does not take place against natural or necessary servitudes, which originate from the situation of places.

The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.

By mode of servitude, in this case, is understood the manner of using the servitude, as is prescribed in § 2303.

If he to whom a servitude is due enjoys a right more extensive than that which is given him by the act establishing the servitude, he will be considered as having preserved his right of servitude ; because the less is included in the greater.

But he cannot thus prescribe for the surplus, and can be compelled to confine himself to the exercise of the servitude granted by his title, unless it be a continuous apparent servitude, which he has acquired by prescription.

If, on the contrary, the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription.

If the owner has merely enjoyed an accessory right, which was necessary to his right of servitude, he will not be considered as having used his right of servitude.

For example, if he who has the right of drawing water from the well of his neighbor has passed often through the land of the latter, and gone to the well without drawing any water during the time required for prescription, he will have lost his right of drawing water without acquiring that of passage, which was merely accessory to the right of drawing water.

If the owner has used another servitude than that granted to him, without using the latter, he may lose this last for non-usage during the time required for prescription, without acquiring that which he has used, if it be a discontinuous or non-apparent servitude.

If the estate in whose favor the servitude is established belongs to several and has never been divided, the enjoyment of one bars prescription with respect to all.

If among the co-proprietors there be one against whom prescription cannot run, as for instance a minor, he shall preserve the right of all the others.

When the estate to which the servitude is due ceases to be undivided, by means of a partition, each of those who were the co-proprietors only preserves the servitude by the use he makes of it, and the others lose it by non-usage during the time required for prescription.

If a servitude be due to several persons, but on different days, as the right of drawing water, he who does not exercise his right loses it, and the estate subject to the servitude becomes free from it, as respects him.

When the prescription of non-usage is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he, or some person in his name, has made use of this servitude as appertaining to his estate during the time necessary to prevent the establishment of the prescription : *La. 793-804.*

**§ 2291. Confusion.** Every servitude is extinguished, when the estate to which it is due, and the estate owing it, are united in the same hands.

But it is necessary that the whole of the two estates should belong to the same owner ; for if the owner of one estate only acquires the other part or in common with another person, confusion does not take effect.

If the union of the two estates be made only under a condition, or if it cease by legal eviction ; if the title be thus destroyed either by the happening of the condition or by legal eviction, the servitudes revive, which, in the mean time, will have been rather suspended than extinguished.

Thus the exercise of redemption, the happening of the condition on which the estate terminates, the eviction from a succession by a nearer heir, the abandonment or relinquishment of an estate on account of mortgages, will revive all the servitudes, active and passive.

Confusion takes place by the simple acceptance of an inheritance, if there be but one heir.

If the heir who has thus accepted an inheritance disposes of any estate belonging to the succession, which is subject to any servitude towards his estate, without any stipulation for the preservation of his right of servitude, the estate thus alienated, which owed the servitude, remains free from it, in consequence of the confusion which had taken effect while the estate remained in his hands.

But if the heir, under a simple acceptance, sell to a person the whole of his rights in the succession he has received, the sale prevents the confusion, and the estate belonging to the succession will continue to have the rights of servitude previously due to it, or be charged with the servitudes imposed upon it, in the same manner as if it had not passed through the hands of the heir, because in this case the purchaser is not presumed to have purchased more or less than all the ancestor possessed.

Confusion does not take effect if the heir has only a temporary possession of the estate subject to the servitude, or enjoys it for the purpose of delivering it to another person to whom it has been bequeathed, or when his right in it terminates at a certain fixed time.

If the heir has accepted the succession under benefit of inventory, the confusion does not take effect ; and if the heir is obliged to abandon the succession at the instance of the creditors, the servitudes resume their former state.

The acquets, which the husband and wife make during the marriage, do not become confused with the private property of each ; and if these acquets are sold during the marriage, the servitudes, active and passive, which existed previous to their being acquired by the husband and wife, continue to exist without any stipulation to that effect.

Except in the cases herein mentioned, and similar cases, services extinguished by confusion do not revive, except by a new contract ; with the exception of continuous and apparent servitudes, with respect to which the disposition made by the owner of both estates is equivalent to a title.

The renunciation or abandonment of the land extinguishes the servitudes charged on it, of whatever nature they may be, because the owner of the estate to which the servitude is due is bound to accept the abandonment, which produces in his hand a confusion which puts an end to the servitude.

It is not necessary, to produce a discharge of the servitude, that the proprietor of the estate



which owes it should abandon the whole estate; it suffices if he abandon the part on which the servitude is exercised.

If a proprietor is bound to support a building or beams of his neighbor on a part of his wall, and to make the repairs necessary to keep up this wall, he may discharge himself from this servitude by abandoning to the owner of the estate to whom the servitude is due, that part of his wall upon which this servitude is exercised: La. 805-815.

**§ 2292. Release.** Servitudes are also extinguished by the renunciation or voluntary release of them by the owner of the estate to which they are due.

This renunciation or release may be express or tacit.

The express release must be made in writing, and is confined to what is clearly expressed in the act containing it, because one is not easily presumed to have renounced his right.

Besides, the owner who makes the release must be capable of disposing of immovables; this release of a servitude being a real alienation.

When the estate to which the servitude is due belongs to several owners, one of them cannot make a release of the servitude so as to discharge the estate owing the servitude without the consent of his co-proprietors.

But the release which he makes will deprive him from the right of personally using the servitude.

The release of the servitude is tacit, when the owner of the estate to which it is due permits the owner of the estate charged with the servitude to build on it such works as presuppose the annihilation of the right, because they prevent the exercise of it; for example, if he should permit the field, through which he has a right to pass, to be closed by a wall.

In order that the tacit release of the servitude be inferred from the permission which the owner of the estate to which it is due has given for the erection of works which prevent the exercise of it, it is necessary: —

1. That the permission of consent for the erection of these works should be given expressly, verbally, or in writing. From the mere sufferance of works contrary to the servitude, the release cannot be presumed, unless it has continued for a time necessary to establish prescription.

2. That the works thus constructed be of a permanent and solid kind, such as an edifice or walls, and that they present an absolute obstacle to every kind of exercise of the servitude: La. 816-820.

**§ 2293. Termination.** Servitudes are also extinguished when they have been established for a certain time only, or under a condition that in a certain event they shall cease; for when the time expires, or the event takes place, the servitude becomes extinguished of right.

Servitudes are, in fine, extinguished by the destruction of the right of him who established them; for no one can transmit to another more right than he has himself; from thence it follows that, if any one establish a servitude on an estate in which he has only a right suspended by a condition, or defeasible at a certain time or in certain cases, or subject to rescission, the servitude becomes extinguished with his right.

It is the same if his title to the estate, charged with the servitude, is annulled by reason of some defect inherent to the act: La. 821-2.

**§ 2294. Prevention of Prescription.** In a few states, any person apprehending the acquiring of an easement by the public may prevent it by posting a notice on the premises: Mass. 122,3; Ct. 1881,61,4; Ind. 4323.

The posting must be for six successive days: Mass.

So, in others, a particular person may be prevented from acquiring an easement by service of a notice upon him: Mass.; Me. 105,13 and 14; R.I. 175,7; Ct. 1881,161,2; Ind. 4322; Io. 2034.

This notice is considered so far a disturbance of the easement or claim as to enable the party claiming it to bring an action and recover full costs: Mass.; Io. 2035.

Such notice must be served by an officer qualified to serve civil process: Mass.; Me.; R.I.; Ct. 1881,161,3; Ind. 4323; Io.; or by any agent of the land-owner: Me.

If such claimant cannot be found, it may be posted on the premises: Ind.

And if any notice be recorded, with a certificate of the officer, in the land record office, it is conclusive evidence of such service or posting: Mass., R.I., Io. In some, it must be recorded: Me.; Ct. 1881,161,3; Ind. 4324; Io.

**Art. 230. Of the Parties.**

§ 2300. **Of the Owner of the Servitude.** He to whom a servitude is due has a right to make all the works necessary to use and preserve the same.

Such works are at his expense, and not at the expense of the owner of the estate which owes the servitude, unless the title by which it is established shows the contrary.

The owner of the estate to which the servitude is due has the right to go on the estate which owes the servitude with his workmen, in the place where it is necessary to construct or repair the works necessary for the exercise of the servitude, to deposit there the materials necessary for those works and the rubbish made thereby, under the obligation of causing the least possible damage and of removing them as soon as possible.

Nevertheless, if in the act establishing the servitude, it is said that the owner to whom it has been granted cannot construct works in order to exercise it, or can only construct them in a certain manner, this agreement must be observed : La. 772-774.

§ 2301. **Of the Estate.** Even in the cases where the owner of the estate which owes the servitude is bound by the title to make the necessary works for the use and preservation of the servitudes, at his own expense, he may always exonerate himself by giving up the estate which owes the servitude to the owner of the estate to which it is due.

If the estate for which the servitude has been established comes to be divided, the servitude remains due for each portion, provided that no additional burden accrue thereby to the estate which is subject to the servitude.

Thus, for instance, in case of a right of passage, all the owners are bound to exercise that right through the same place : La. 775,776.

§ 2302. **Of the Servient Owner.** The owner of the estate which owes the servitude can do nothing tending to diminish its use, or to make it more inconvenient.

Thus he cannot change the condition of the premises, nor transfer the exercise of the servitude to a place different from that on which it was assigned in the first instance.

Yet if this primitive assignment has become more burdensome to the owner of the estate which owes the servitude, or if he is thereby prevented from making advantageous repairs on his estate, he may offer to the owner of the other estate a place equally convenient for the exercise of his rights, and the owner of the estate to which the servitude is due cannot refuse it : La. 777.

§ 2303. **Manner of Use.** On the other hand, he who has a right of servitude can use it only according to his title, without being at liberty to make, either in the estate which owes the servitude, or in that to which the servitude is due, any alteration by which the condition of the first may be made worse.

If the manner in which the servitude is to be used is uncertain, as if the place necessary for the exercise of the right of passage is not designated in the title, the owner of the estate which owes the servitude is bound to fix the place where he wishes it to be exercised : La. 778-9.

**TITLE III. — SUCCESSIONS.****CHAPTER I. — SUCCESSIONS IN GENERAL.****Art. 250. Definitions, etc.**

§ 2500. **Note to Title.** For *Administration*, see Probate Code, Part IV., Division I.

In New Mexico, the laws contained in the treatises of Pedro Murillo de Lorde remain in force, so far as conformable with the State and United States Constitutions : N.M. 1365.

§ 2501. **Definitions.** Throughout this title, except where specially provided otherwise, or restricted by the context, (1) the word *will* includes testaments and codicils. (This is specially provided in some states: Ind. 2611; Ky. 113,1; Mo. 4005; Ore. 64,31; Nev. 832; Col. 3636; Wash. 1337; Dak. Civ. C. 773. And also, in most of the states, it is so provided throughout all the laws, wherever the word *will* occurs. See Glossary.)

(2) The word *executor* includes administrators with the will annexed. (See also Glossary, as before.)

(3) A *will* is the legal expression of a man's wishes as to the disposition of his property after his death: Ga. 2394; N.M. 1377.

(4) The word *devise* is commonly used for convenience instead of "devise or bequeath." See Glossary.

In a few states, a *succession* is defined to be the coming in of another to take the property of one who dies without disposing of it by will: Cal. 6383; Dak. Civ. C. 776; Mon. Prob. C. 531; Uta. 1884,44,2,1.

In Louisiana, succession is the transmission of the rights and obligations of the deceased to the heirs. It signifies also the estates, rights, and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property: La. 871-2.

It signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be: La. 874.

There are three sorts of successions, to wit: testamentary successions, legal successions, and irregular successions.

Testamentary succession is that which results from the institution of heir contained in a testament executed in the form prescribed by law. This sort of succession is treated of under Chapter II.

Legal succession is that which the law has established in favor of the nearest relation of the deceased. See Chapter IV.

Irregular succession is that which is established by law in favor of certain persons, or of the State in default of heirs, either legal or instituted by testament (Art. 115): La. 875-878.

§ 2502. **Legacies.** In a few states, legacies are defined to be (1) either general or specific; and a specific legacy one which operates upon property particularly designated: Cal. 6357; Dak. Civ. C. 755; Mon. Prob. C. 509; Ga. 2458. See also in Part IV., Division I.

But a gift of money, although to be paid from a specified fund, is a general legacy: Ga.

(2) A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid: Cal., Dak., Mon.

## Art. 251. Successions a Vivis.

§ 2510. **Presumption of Death.** In several states, any person remaining beyond sea, absenting himself from the State, or concealing himself, and unheard of (1) for seven successive years, is presumed dead: R.I. 172,5; Ct. 1885,110,155; N.Y. Civ. C. 841; N.J. *Death*, 4; Pa. 1885,122,1; Va. 172,47; W.Va. 1882,160,44; Ky. 37,16; Mo. 279; Tex. 3221; Cal. 11963; Dak. C. Civ. P. 498; Miss. 1648; La.<sup>a</sup> 58.

So, in others, (2) if absent from the State unheard of for five years: Ind.<sup>b</sup> 2232; Ark. 2850; La. 57; (3) or for fifteen years: Vt. 2077; (4) in one other, if absent unheard of for one year, proceedings may be had according to this article, if the judge believe him dead: N.H. 195,16.

See also in Part IV., *Evidence*.

He is so presumed to be dead from the time he was last heard of: Vt.; Ind. 1883, 137.

NOTES. — <sup>a</sup> When such absent person has left a power of attorney; in other cases, five years.

<sup>b</sup> This presumption is not *general*, but only for the purposes of this article.



§ 2511. **Effect.** In such case, (A) the will may be proved: Ct. 1885,110,155; Mo. 279; La. 62.

(B) Proceedings for administration may be had: N.H. 195,16; Vt. 2077; Ct.; N.J. 1885,100,1; Ind. 2232; Mo.; Ark. 217; Pa.

(C) The remainder-man or reversioner of real estate held by him for life may enter and hold it: R.I. 172,5; N.J. *Death*, 4; Dak. C. Civ. P. 498.

So, of real estate held by another for the life of such person disappearing: R.I. So, of personal estate limited after the death of such person disappearing: N.J.<sup>a</sup> 1883,52.

(D) The heirs may be put in possession: N.H. 195,17; Vt.; Ct.;<sup>a</sup> N.J.<sup>a</sup> 1885, 100,3; La. 57,934; Pa.<sup>a</sup> *ib.* 5.

But not until five years from such grant of administration: N.H.

In such case, the heirs or devisees have a process for the sale of the land: N.J.<sup>a</sup> *Death*, 5.

(E) There is a like process for the distribution among heirs or legatees of personalty bequeathed to a person so disappearing for such time: N.J.<sup>a</sup> *Death*, 6.

(F) The putting into provisional possession can be ordered previous to the expiration of the terms before mentioned, when it shall be shown that there are strong presumptions that the person absent has perished: La. 60.

(G) Distribution of the personalty may be made: N.J.<sup>a</sup>

(H) The trustee of an express trust for the benefit of such person may settle his account, and pay over the estate to those entitled, taking refunding bonds: Ct. 1885,110,94.

If the absentee has left a power of attorney, his presumptive heirs cannot cause themselves to be put into provisional possession until seven years shall have elapsed since the last intelligence of him has been received.

It is the same if the power of attorney shall have expired, and in this case the property of the absentee shall be administered as is ordained in the first chapter of the present title: La. 58,59.

The judge, in pronouncing upon this demand, shall take into consideration the motives of the absence and the reasons which may have prevented the absentee from being heard of.

When the presumptive heirs shall have been put into provisional possession of the estate of the absentee, the will made by him, if there be any such will, may be presented or opened at the request of the person interested, and the testamentary heirs, the legatees, donees, as well as those who have any rights to, or claims upon, his property which depend upon the death of the said absentee, may provisionally prosecute their claims, and exercise their rights on the condition of their giving security.

If the testament contain an institution of an universal heir, he shall be preferred to the presumptive heirs, unless they are forced heirs, and shall be put into provisional possession of the estate of the absentee, but on giving security for his administration.

The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself, in preference to any other person, the administration of the estate of his or her absent husband or wife.

If, on the contrary, the husband or wife of the absentee chooses rather to have the community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored.

The wife who elects to have the community continued has, notwithstanding, the right of renouncing it afterwards: La. 61-64.

Such administrator is not *ipso facto* discharged by the return of such person, but must be discharged by the court: Ind. 2233.

The property, rights, obligations, and choses in action of such person are subject to the same liabilities, incidents, rights, management, and disposition as if he were known to be deceased: Ind. 2236.

And all adjudications and accounts of such administrator are valid and binding on the person disappearing, if in good faith and without fraud: Ind.; Mo. 280.

See also the Probate Code, Part IV.

NOTE. — <sup>a</sup> In these cases, a refunding bond is required from heirs, devisees, and legatees.

§ 2512. **Return.** If such person afterwards return (1) he will have no title to the land, if sold, but only a claim against the proceeds: *Vt.* 2077; *N.J. Death*, 5.

(2) He may recover his estate, if not sold, and the rents or profits, with interest: *N.J. Death*, 4; *Ark.* 217; *Tex.* 3221.

(3) He may recover his estate: *R.I.* 172,5; *La.* 65; *Pa. ib.* 5.

(4) "He shall be restored to the rights of which he shall have been deprived by reason of such presumption:" *W.Va.* 1882,160,45; *Miss.* 1648; *Va.* 173,48.

(5) The executor or administrator is not liable in any action for the recovery of estate distributed under § 2511: *Ct.* 1885,110,155; *Pa.*

(6) If the absentee shall reappear after his heirs shall have been put in provisional possession, they shall be bound to return him the annual revenues of his property in the following proportions: —

If he reappear within five years they shall return two thirds.

If he reappear after five and within ten years, one half.

If he reappear after ten years, one third.

But after thirty years' absence, the whole of the revenue shall belong to those who shall have been put into provisional possession: *La.* 69.

§ 2513. **Civil Death.** A person sentenced to imprisonment in the penitentiary or state prison for life is thereafter, in most of the states, deemed civilly dead. See Part V.

§ 2514. **Louisiana Provisions.** It shall be the duty of such as shall have obtained provisional possession, or of the husband or wife who shall have been continued in the administration of the community, to cause an inventory of the movables and credits of the absentee to be made by the recorder or by any notary public duly authorized to that effect by the judge.

The judge shall order, if necessary, that the whole or part of the movables be sold, and in ease of sale, both the amount of the sale and the profits which may have accrued shall be either laid out in the purchase of immovable property or placed at interest in a safe manner.

Those who shall have obtained either the provisional possession or legal administration may petition, for their own security, for the appointment by the judge of two persons well acquainted with such affairs, and sworn by the judge, for the purpose of examining the immovables of the absentee, and reporting their condition; and the report of such persons shall be afterwards approved by the judge, and the expense attending the same shall be paid out of the estate of the absentee.

Those persons who enjoy only in virtue of the provisional possession can neither alienate nor mortgage the immovables of the absentee.

If the absence has lasted thirty years since the provisional possession, or since the time when the husband or wife who held their estate in common shall have taken the administration of the estate of the absentee, or if one hundred years have elapsed since the birth of the absentee, then the sureties shall be discharged, and all such as may have rights may petition for the partition of the estate of the absentee, and cause themselves to be put in absolute possession by the judge.

The succession of the absentee shall be opened from the day of his or her death, duly ascertained, for the benefit of such heirs as were capable of inheriting his estate at the time; and those who shall have enjoyed the estate of the absentee shall be bound to restore the same, with the exception of the profits assigned them by the provisions of § 2512.

If the absentee should reappear, or if his existence should be proved during the provisional possession, then the effect of the judgment which shall have ordered this provisional possession shall cease, without, however, affecting the validity of any such conservatory measures prescribed in the Probate Code as may have been taken for the administration of the estate of the absentee.

If the absentee should reappear, or if his existence should be proved, even after the putting into absolute possession, he shall recover his estate, such as it may happen to be, the price of such part of it as has been sold, or such property as has been bought with the proceeds of his estate which may have been sold.

The children, or direct descending heirs, of the absentee, may likewise, within thirty years, to be computed from the day of the absolute possession, petition for the restitution of his estate, according to the preceding paragraph.

After judgment ordering provisional possession or legal administration, no person who may have rights to exercise against the absentee can prosecute such rights except against those who have been put into provisional possession of the estate, or who shall have been legally appointed administrators of the same : La. 66-75.

§ 2515. **Of the Effects of Absence upon the Eventual Rights which may belong to the Absentee.** Whoever shall claim a right accruing to a person whose existence is not known, shall be bound to prove that such person existed at the time when the right in question accrued, and until this be proved his demand shall not be admitted.

In case a succession shall be opened in favor of a person whose existence is not known, such inheritance shall devolve exclusively on those who would have had a concurrent right with him to the estate, or on those on whom the inheritance should have devolved if such person had not existed.

The provisions of the two preceding paragraphs shall not affect the right of claiming the inheritance and any other rights which the absentee or his representatives or assigns may have ; these shall be extinguished only by the lapse of time which is established for prescription.

As long as the absentee shall not appear, or a suit shall not be brought in his name, those who shall have been put in possession of the inheritance shall have a right to the proceeds by them received *bona fide* : La. 76-79.

## Art. 252. Donatio Causa Mortis.<sup>a</sup>

§ 2520. **Definitions.** A "gift in view of death" is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver : Cal. 6149 ; Dak. Civ. C. 642.

A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be "in view of death;" Cal. 6150 ; Dak. Civ. C. 643.

NOTE.—<sup>a</sup> For the disposable portion (Louisiana law), see §§ 2632, 2633 and Art. 441. The law of such portion applies as well to donations *causa mortis* as to gifts *inter vivos* : La. 1470-1492.

§ 2521. **General Principles.** Donations *causa mortis*, as understood in the common law, are abolished in Louisiana : La. 1570.

§ 2522. **Revocation.** A *donatio causa mortis* may be revoked by the giver at any time ; and is revoked by his recovery from the illness or escape from the peril under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time ; but when the gift has been delivered to the donee, the rights of a *bona-fide* purchaser from the donee before the revocation shall not be affected by it : Cal. 6151 ; Dak. Civ. C. 644.

A "gift in view of death" is not affected by a previous will, nor by a subsequent will, unless it expresses an intention to revoke the gift : Cal. 6152 ; Dak. Civ. C. 645.

§ 2523. **As against Creditors,** a *donatio causa mortis* is treated as a legacy (see Art. 261) : Cal. 6153 ; Dak. Civ. C. 646.

§ 2524. **Execution.** It is necessary of a *donatio causa mortis* that it should be made by a person in his last illness, or in peril of death : Ga. 2668.

It must be intended to be absolute only in the event of the donor's death : Ga. It may be made by parol : Ga.

It must be perfected by actual or symbolical delivery : Ga.

A legacy or a gift in contemplation or fear or peril of death may be satisfied before death : Mon. Prob. C. 519 ; Uta. 1884, 44, 1, 3, 11.

§ 2525. **Confirmation.** No *donatio causa mortis* is valid unless the donee file a petition within sixty days of the decease, and prove actual delivery of the property to himself by two indifferent witnesses : N.H. 193, 17. In Georgia, it may be proved by one witness.



**Art. 255. Successions a Mortuis.**

§ 2550. **Presumptions of Prior Death.** If several persons respectively entitled to inherit from one another happen to perish in the same event, such as a wreck, a battle, or a conflagration, without any possibility of ascertaining who died first, the presumption of survivorship is determined by the circumstances of the fact; in the absence of such circumstances, the determination is guided as follows, viz. ; if those who perished together were under the age of fifteen, the eldest is presumed to have survived; if both were above sixty, the youngest; if some were under fifteen years, and some above sixty, the first shall be presumed to have survived; if those who have perished together were above the age of fifteen years and under sixty, the male must be presumed to have survived (but only where there was an equality of age, or a difference of less than one year, in Louisiana) : Cal. 11963 (40) ; La. 936-9.

If they were of the same sex, the presumption of survivorship, by which the succession becomes open in the order of nature, must be admitted : thus the younger must be presumed to have survived the elder : La. But in California, the older ; and if one be under fifteen or over sixty and the other between those ages, the latter.

See also in Part IV., *Evidence*.

§ 2551. **Date of Succession.** A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

Thus children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they be merely seized of right and not in fact : La. 940-1.

**CHAPTER II. — WILLS.****Art. 260. Of the Testator.****§ 2600. Definitions.**

The name given to the act of last will is of no importance, and dispositions may be made by testament under this title or under that of institution of heir (§ 3025), of legacy, codicil, donation *mortis causa*, or under any other name indicating the last will, provided that the act be clothed with the forms required for the validity of a testament, and the clauses it contains or the manner in which it is made, clearly establish that it is a disposition of last will.

Thus an act of last will by which an individual disposes of his property, or of part thereof, in any manner whatsoever, whether he has instituted an heir or only named legatees, whether he has or has not charged any one with the execution of his last will, is considered as a testament if it be in other respects clothed with the formalities required by law : La. 1570.

A testament is the act of last will clothed with certain solemnities, by which the testator disposes of his property, either universally or by universal title, or by particular title : La. 1571.

By testament is understood the expression of the will of a man or woman who, being in possession of a sound mind and entire judgment, provides, verbally or in writing, for the disposal of his or her property, interests, and rights, with legacies and benefits to his or her heirs after his or her death : N.M. 1377.

All testaments are divided into three principal classes, to wit : —

1. Nuncupative or open testaments.
2. Mystic or sealed testaments.
3. Holographic testaments : La. 1574.

See also Glossary, *Will*.

§ 2601. **Mutual and Conditional Wills.** A testament cannot be made by the same act by two or more persons, either for the benefit of a third person or under the title of a reciprocal or mutual disposition : La. 1572.

A conjoint or mutual will is valid ; but it may be revoked by any one of the testators : Cal. 6279 ; Dak. Civ. C. 689 ; Mon. Prob. C. 441 ; Uta. 1884,44,1,1,9 ; Ga. 2397.

A will, the validity of which is made, by its own terms, conditional, may be denied probate, according to the event, with reference to the condition : Cal. 6281 ; Dak. Civ. C. 690 ; Mon. Prob. C. 443 ; Uta. 1884,44,1,1,11.

§ 2602. **Who may make a Will.<sup>a</sup>** (A) In most states, every male aged twenty-one, and every female aged twenty-one, and unmarried,<sup>a</sup> being of sound mind, may dispose of property, real or personal, by will : N.H. 193,1 ; Mass. 127, 1 ; Me. 74,1 ; R.I. 182,1 ; N.Y. 2,6,1,1 ; N.J. *Wills*, 3 and 26 ; Pa. *Wills*, 1 and 3 ; O. 5914 and 5929 ; Ind. 2556 ; Mich. 5758,5785 ; Wis. 2277,2281 ; Del. 84,2 ; Va. 118,3 ; W.Va. 1882,84,2 ; N.C. 2137 ; Ky. 113,2 ; Tex. 1851,4857 ; Ore.<sup>b</sup> 64, 1 ; 13,75 ; Wy. 1882,107,1 ; S.C. 1853 ; Ala. 2274 ; Miss. 1262 ; Fla. 200,1 ; N.M. 1377 ; Ariz. 1489. Compare also § 6601.

(B) In others, every male as above, and every unmarried female of eighteen : Vt. 2039,2421 ; Ill. 148,1 ; Io. 2237,2322 ; Minn. 47,1 and 4 ; 59,2 ; Kan. 117,1 ; Neb. 1,23,123 ; Md. 49,3 ; Mo. 3960-1 ; Ark. 3464,6490 ; Col. 3481 ; Wash. 1318,2363.

(C) In others, every person, male or female, aged eighteen : Ct. 18,11,1,1,1 ; 1885, 155,130 ; Cal. 6270 ; Nev. 812 ; Dak. Civ. C. 683 ; Mon. Prob. C. 432 ; Uta. 1884, 44,1,2.

(D) In Iowa and Texas, also every married person, or person who has been married, whatever be his or her age. So, of every woman married to a person of full age : Ore. 13,77 ; Wash. 2362.

(E) And in a few states, all women of eighteen, if married : <sup>a</sup> Wis., Kan. So, in Nebraska, all women of sixteen, if married.

(F) In Georgia, every person aged fourteen, male or female : Ga. 2405 and 2406.

(G) Every male of fourteen and female of twelve : N.M. 1378.

(H) In Kentucky, a person under twenty-one may make a will in pursuance of a power specially given to that effect : Ky. 113,3. So, a father under twenty-one may appoint a guardian by will to his child : Ky. See in Part IV., Div. I.

(I) In Tennessee and Idaho, the laws are silent ; presumably any person of full age may make a will. See § 6601.

(J) The minor under sixteen years cannot dispose of any property, — save, however, the dispositions made under a marriage contract : La. 1476.

The minor above sixteen can make a will of the same amount as a person of full age can do, even to the prejudice of the usufruct granted by law during their marriage to the father and mother of the minor not emancipated ; and the usufruct in that case will cease to the advantage of the person in whose favor the minor had disposed of it if the minor dies, being still under the power of his father and mother ; and to make such disposition the minor has no need of the authorization or concurrence of his curator : La. 1477.

Generally, all persons may dispose or receive by donation *inter vivos* or *mortis causa*, except such as the law expressly declares incapable. The incapacities are either *absolute* or *relative* ; *absolute*, which prevent the giving or receiving indefinitely, with regard to all persons ; *relative*, which prevent the giving to certain persons, or receiving from them. It is sufficient if the capacity of giving exists at the moment the donation is made : La. 1470-2.

NOTES. — <sup>a</sup> For wills by married people, see Art. 643 and § 6450. <sup>b</sup> But compare § 6601, the provisions of which seem contradictory.

§ 2603. **Personal Property.** In a few states, a male, or unmarried female (1) of eighteen may make a will in writing of personal property : R.I. 182,7 ; Va. 118,3 ; W.Va. 1882,84,2 ; Mo. 3960-1 ; Ark. 6491 ; Ore. 64,2 ; Ala. 2280.

(2) So, in Colorado, a male or unmarried female of seventeen : Col. 3431.

(3) So, in New York, a male of eighteen, or unmarried female of sixteen : N.Y. 2,6,1,21.

In other states, there is no distinction between written wills of real or personal property.

§ 2604. **Competency.** Generally, a testator must be of sound mind : La. 1475. See § 2602. And specially (1) a person having an insane delusion is incompetent to make a will : Mon. Prob. C. 433 ; N.M. 1378.

(2) Persons under guardianship cannot make a will : N.M. And see also in Part IV., Probate Code.

(3) Persons under guardianship as spendthrifts may not make a will ; but a will made before the order of court is valid : N.M. 1378.

Old age, and the weakness of intellect resulting therefrom, does not of itself constitute incapacity ; but if that weakness amount to imbecility, the testamentary capacity is gone : Ga. 2408. In cases of doubt as to the extent of this weakness, the reasonable or unreasonable disposition of his estate should have much weight in the decision of the question : Ga.

An incapacity to contract may co-exist with a capacity to make a will ; the amount of intellect necessary to constitute testamentary capacity is that which is necessary to enable the party to have a decided and rational desire as to the disposition of his property ; his desire must be decided, in distinction from the wavering, vacillating fancies of a distempered intellect ; it must be rational, in distinction from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard : Ga. 2408.

A deaf, dumb, and blind person may make a will, provided the interpreter and scrivener are both attesting witnesses thereto, and are both examined upon the motion for probate of the same : Ga. 2412. The deaf and dumb from birth cannot make a will unless they can declare it in writing : N.M.

In all cases where an interpreter is necessary to convey to the scrivener or the witnesses the wishes of the testator, such interpreter must be a person competent to be a witness, and must be sworn on the motion for probate, if within the jurisdiction of the court : Ga. 2413.

It is enacted that conviction of crime in no case deprives a person of the power of making a will ; nor does any imprisonment, unless used as duress : Ga. 2411.

But a lunatic may make a will during a lucid interval : Ga. 2407 ; N.M. So, a will made before the insanity is valid : N.M.

A monomaniac may, in Georgia, make a will, if the will is in no way the result of or connected with that monomania.

But in all such cases it must appear that the testament does speak the wishes of the testator, unbiassed by the mental disease with which he is affected : Ga.

Eccentricity of habit or thought does not deprive a person of the power of making a testament : Ga. 2408.

Proof is not admitted of the dispositions having been made through hatred, anger, suggestion, or captation : La. 1492.

§ 2605. **Will Voluntary ; Fraud and Duress.** The statutes of Georgia declare that the very nature of a will requires that it should be freely and voluntarily executed ; hence anything which destroys this freedom of volition invalidates the will : Ga. 2401.

So, in Ohio, a will must be made "not under any restraint." O. 5914.

Fraudulent practices upon the testator's fears, affection, or sympathies invalidate a will : Ga.

So, duress, menaces, or any undue influence whereby the will of another is substituted for the will of the testator : Cal. 6272 ; Dak. Civ. C. 685 ; Mon. Prob. C. 434 ; Uta. 1884,44,1,1,3 ; Ga.

So, of fraud in procuring the will to be made : Ill. 148,2 ; Cal. ; Dak. ; Mon. ; Uta. ; or compulsion : Ill.

In Georgia, a will procured by misrepresentations or fraud of any kind, to the injury of the heirs-at-law, is void : Ga. 2402.

And revocations of wills procured by fraud or duress, as above specified in the several states respectively, will be void in the same way : Cal., Dak., Mon., Uta.

§ 2606. **Error and Mistake.** In Georgia, a will executed under a mistake of fact as to the existence or conduct of the heir-at-law of the testator is inoperative, so far as such heir-at-



law is concerned, and the testator shall be deemed to have died intestate as to him: Ga. 2403.

§ 2607. **Married Women.** For wills by married women, see Art. 648 and § 6450.

§ 2608. **Good in Part.** In Georgia, it is enacted that, if a will be legal in part and illegal in part, that which is legal may be sustained, unless the whole will so constitute one testamentary scheme that the legal alone cannot give effect to the testator's intention; in such case the whole will fails: Ga. 2400.

## Art. 261. Of the Persons who may Take under a Will.<sup>a</sup>

§ 2610. **Generally,** a devise or bequest of real or personal property may be made to any person or corporation capable by law of holding such real or personal estate: N.Y. 2,6,1,3; Ind. 2556; Cal. 6275; Dak. Civ. C. 687; Mon. Prob. C. 437; Uta. 1884,44,1,1,5; Ala. 2275; La. 1470.

For Louisiana, see also § 2602. And also, with regard to the capacity of receiving, it is sufficient if it exists at the moment of the acceptance of the donation *inter vivos*, or at the opening of the succession of the testator. When the donation depends on the fulfilment of a condition it is sufficient if the donee is capable of receiving at the moment the condition is accomplished: La. 1473-4.

**Full Power of Disposition.** It is, in Georgia, provided that a testator may by his will make any disposition of property not inconsistent with the laws, or contrary to the policy, of the state; he may bequeath his entire estate to strangers, to the exclusion of his wife and children, but in such case the will should be closely scrutinized, and upon the slightest evidence of aberration of intellect, or collusion, or fraud, or any undue influence or unfair dealing, probate should be refused: Ga. 2399.

NOTE. — <sup>a</sup> For devises to aliens, see Art. 601.

§ 2611. **Devise to Debtors.** In many states, it is provided that the discharge or bequest in a will of any debt or demand of the testator against any person is not valid as against the creditors of the deceased, but is construed as a specific bequest of such debt or demand; the amount thereof is to be included in the inventory, and shall, if necessary, be applied to the payment of debts of the estate; and if not so necessary, shall be paid in the same manner and proportion as other specific legacies: N.Y. 2,6,3,14; O. 6068; Ind. 2574; Kan. 37,64; Cal. 11448; Ore. Civ. C. 1086; Nev. 592; Wash. 1450; Dak. Prob. C. 118; Ida. Prob. C. 112; Mon. Prob. C. 123; Uta. Prob. C. 4,6; Ariz. 1627. See § 2620, and the Probate Code.

The same law applies if the bequest, etc., be to the executor: Ill. 148,19; Kan.; Cal.; Ore.; Nev.; Col. 3487; Wash.; Dak.; Ida.; Mon.; Uta.; Ariz.

§ 2612. **Devise to Creditors.** In two states, it is enacted that a legacy shall not be deemed satisfaction of a debt due from the testator to the legatee unless such intention is expressed or clearly implied in the will: Del. 89,38; La. 1641.

Nor, in Louisiana, is a legacy made to a servant deemed compensation for wages due.

§ 2613. **Devise to Witnesses.** A devise or bequest in a will to a subscribing witness is, generally, void, unless there are the requisite number of other subscribing witnesses. See § 2649.

§ 2614. **Debts by Executors.** Generally, the naming of a person executor in a will is not to be construed as the discharge or bequest of any debt or claim which the testator had against him: N.H. 196,10; R.I. 185,6; N.Y. 2,6,3,13; N.J. *Executors, etc.* 8; Pa. *Decedents*, 52; O. 6069; Ind. 2572; Ill. 148,19; Kan. 37,65;

Md. 50,139-140; Del. 89,18; Va. 126,13; N.C. 1431; Ky. 39,1,10; Mo. 99; Ark. 95; Tex. 1958; Cal. 11447; Ore. Civ. C. 1085; Nev. 591; Col. 3487; Wash. 1449; Dak. Prob. C. 117; Ida. Prob. C. 111; Mon. Prob. C. 122; Wy. 47,81; Uta. Prob. C. 4,5; S.C. 1890; Ala. 2291; Miss. 2019; Fla. 2,6; Ariz. 1626.

But the same is assets in the hands of the executor like other claims, and he is chargeable with it as for so much cash when it grows due: N.H., R.I., N.Y., N.J., O., Ind., Ill., Kan., Md., Del., Mo., Cal., Ore., Nev., Col., Dak., Ida., Mon., Wy., Uta., S.C., Ariz.

And it is to be included in the inventory: N.Y., Pa., O., Kan., Md., Del., Cal., Ore., Nev., Wash., Dak., Ida., Mon., Uta., Miss., Ariz. He is liable for it like any other debtor of the deceased: Tex., Ore., Wash., Miss.

Unless an intention to release such debt be expressly declared in the will: R.I., N.J., Ill., Ky., Col., S.C., Ala., Fla.

§ 2615. **Illegitimate Children.** In South Carolina, if any person who is an inhabitant of the state, or who has any estate therein, shall beget any bastard child, or live in adultery with a woman, said person having a wife or lawful children of his own living, and shall give, by legacy or devise, or by direct deed, to or for the use and benefit of said woman or his bastard children any larger proportion of the real clear value of his estate, real and personal, after paying of his debts, than one fourth part thereof, such legacy or devise shall be null and void for so much of the amount and value thereof as shall exceed such fourth part of his estate: S.C. 1866,1785.

Natural children or acknowledged illegitimate children cannot receive from their natural parents by donations *inter vivos* or *mortis causa* beyond what is strictly necessary to procure them sustenance, or an occupation or profession which may maintain them, whenever the father or the mother who has thus disposed in their favor leaves legitimate children or descendants.

Those donations shall be reducible in case of excess, according to the rules laid down under the title: *Of Father and Child*.

When the natural mother has not left any legitimate children or descendants, natural children may acquire from her by donation *inter vivos* or *mortis causa* to the whole amount of her succession.

But if she has left them only a part, and has disposed of the rest in favor of other persons, her natural children have no action against her heirs for anything more than so much as is wanting to supply the maintenance that is secured to them by law in case what she has left them be not sufficient for their support.

When the natural father has not left legitimate children or descendants, the natural child or children acknowledged by him may receive from him, by donation *inter vivos* or *mortis causa*, to the amount of the following proportions, to wit, —

One fourth of his property, if he leaves legitimate ascendants or legitimate brothers or sisters or descendants from such brothers and sisters; and one third, if he leaves only more remote collateral relations.

In all cases in which the father disposes, in favor of his natural children, of the portion permitted him by law to dispose of, he is bound to dispose of the rest of his property in favor of his legitimate relations; every other disposition shall be null except those which he may make in favor of some public institution.

Natural fathers and mothers can, in no case, dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance or to procure them an occupation or profession by which to support themselves: La. 1483-1488.

§ 2616. **Concubines.** Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it cannot exceed one tenth part of the whole value of their estate.

Those who afterwards marry are excepted from this rule: La. 1481.

§ 2617. **Devise to Guardians.** The minor who has a right to dispose by donation *mortis causa* cannot make such disposition in favor of his tutor, nor of his preceptors or instructors, whilst he is under their authority.

The minor, even when he becomes of age, cannot dispose of property, either by donation *inter vivos* or *mortis causa*, in favor of the person who has been his tutor, unless the final account of the tutorship has been previously rendered and settled.

The two cases above mentioned do not apply to the relations of the minor who have been his tutors or instructors : La. 1478-9.

§ 2618. **Mortmain.** In Pennsylvania, no real or personal estate can be conveyed or devised to or in trust for any religious or charitable use except by will or deed executed and attested at least one month before the decease of the testator : Pa. *Charities*, 23; *Wills*, 22.

In Georgia, such will must be executed at least ninety days before death : Ga. 2419.

But such conveyance, devise, or bequest is good if made in good faith for an adequate valuable consideration : Pa.

The devise or conveyance is in such case void, and the estate descends as if undevise : Pa. *Religious Societies*, 10. Compare § 1446.

**Devises to Charities.** In New York, no person leaving a husband, wife, child, or parent can devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society or corporation, in trust or otherwise, more than one half his net estate after payment of debts : N.Y. 1860,360,1. Such devise or bequest is valid, but to this extent only : N.Y.

In Georgia, a person leaving issue or a widow cannot so devise more than "one third of his estate : " Ga. 2419.

In several states, a devise or bequest made to charitable, religious, or educational purposes by a testator leaving issue or adopted children or their issue, is void, unless the will were executed (1) at least one year before the testator's death : O. 5915 ; (2) thirty days before (whether the testator leave issue or not) : Cal. 6313 ; Mon. Prob. C. 473.

Such devises must not exceed one third of the estate if he leave heirs ; and in such case a *pro rata* deduction is made ; and all dispositions of property contrary hereto are void, and go to the residuary legatee, next of kin or heirs, according to law : Cal., Mon.

§ 2619. **Devises to Doctors.** Doctors of physic or surgeons who have professionally attended a person during the sickness of which he dies cannot receive any benefit from donations *inter vivos* or *mortis causa* made in their favor by the sick person during that sickness. To this, however, there are the following exceptions : —

1. Remunerative dispositions made on a particular account, regard being had to the means of the disposer and to the services rendered.

2. Universal dispositions in case of consanguinity : La. 1489.

§ 2620. **Wills Fraudulent against Creditors.** [3 & 4 W. & M. C. 14.] In two states, all wills and testaments, limitations, dispositions, or appointments of or concerning real estate, or any rent, profit, or charge of the same, whereof any person at the time of his decease is seized in fee-simple in possession, reversion, or remainder, or has power to dispose of by last will, are fraudulent and void as against creditors : Ill. 59,10 ; S.C. 1867 ; *provided* that where there is any limitation or appointment, devise, or disposition of real estate, for the payment of any real and just debts, or any portion or sum of money for any child or children of any person other than the heir-at-law, according to any marriage contract or agreement in writing *bona fide* made before such marriage, the same and every of them shall be in full force and be holden and enjoyed by such persons until such debt or portion be raised and satisfied accordingly : S.C.

All devises of real estate or any interest therein contrived and made to defraud creditors of their just debts shall be deemed and taken to be null and void only as against such creditors, their heirs and assigns : Tenn. 2432.

And every such creditor has his suit against such devisee, and severally or jointly against him and the heirs and executors in like manner as it could be brought against the heirs-at-law : Ill. 59,11 ; Tenn. 2433.

And if the devisee alien land before action, he is answerable for such debt to the value of the lands so aliened ; but the lands, if in good faith aliened before action brought, are not liable to such execution : Tenn. 2434-5. For other states, see in the Probate Code.



And generally, in all states, property can only be devised or bequeathed subject to the rights of creditors. See Part IV., Division I.

§ 2621. **Effect.** Every disposition in favor of a person incapable of receiving shall be null, whether it be disguised under the form of an onerous contract or be made under the name of persons interposed. In such case, the disposition falls [lapses].

The father and mother, the children and descendants, and the husband or wife of the incapable person shall be reputed persons interposed : La. 1491.

§ 2622. **Unborn Children**, but conceived at the date of the testator's death, take a devise under the will as if living, in Delaware : Del. 84,22 ; La. 1482.

In several states, the same would result from the general provision (§ 6041) mentioned in § 1412, note <sup>a</sup> : Cal., Dak.

A child conceived before, but not born until after, a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class : Cal. 6339 ; Dak. Civ. C. 742 ; Mon. Prob. C. 496 ; Uta. 1884,44,1,2,23.

But in one state, no devise of any estate, except for public or charitable uses, or for the care of cemeteries or graves, can be made to any persons but such as are at the time of the testator's death in being, or to their immediate issue or descendants : Ct. 1885,110,130.

§ 2623. **Aliens.** Donations *inter vivos* and *mortis causa* may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this State : La. 1490. See § 6020.

§ 2624. **Estate in Common.** A devise or legacy given to more than one person vests in them as owners in common : Cal. 6350 ; Dak. Civ. C. 753 ; Mon. Prob. C. 507 ; Uta. 1884,44,1,2,34. Compare also §§ 1371,1373.

## Art. 263. What may be Devised.

§ 2630. **General Provision.** (A) In most states, all property, real or personal, may be devised : N.H. 193,1 ; Mass. 127,1 ; Me. 74,1 ; Vt. 2039 ; R.I. 182,1 and 7 ; N.J. *Wills*, 22 and 9 ; Pa. *Wills*, 1 ; O. 5914 ; Ill. 148,1 ; Kan. 117,1 ; Del. 84, 1-2 ; Mo. 3960 ; Ark. 6490 ; Tex. 4858 ; Cal. 6270 ; Ore. 64,1 ; Nev. 812 ; Col. 3481 ; Dak. Civ. C. 683 ; Mon. Pr. C. 432 ; Wy. 1882,107,1 ; Uta. 1884,44,1,2 ; Miss. 1262 ; Fla. 200,1 ; Ariz. 1492.

(B) So, in others, all property real, or lands, tenements, and hereditaments, or any interest therein (and all property personal) which is descendible to heirs (or which will go to personal representatives) : N.Y. 2,6,1,2 ; Ind. 2556 ; Mich. 5785, 5788 ; Wis. 2277 ; Minn. 47,1 and 4 ; Neb. 1,23,123 and 126 ; Md. 49,1 ; Va. 118, 2 ; W.Va. 1882,84,1 ; N.C. 2140 ; 1884,293 ; Ky. 113,2 ; Cal. 6274 ; Dak. Civ. C. 686 ; Mon. Prob. C. 436 ; Ala. 2274 ; Ariz. 1489.

Whether it be held in possession, reversion, or remainder : Ill., Tex., Col., Miss., Fla.

A testator may bequeath all his personal estate remaining at his decease : Ill. ; Mich. 5788 ; Wis. 2281 ; Io. 2323 ; Minn. ; Neb. ; Va. ; W.Va. ; N.C. ; Ky. ; Tex. ; Col. ; Miss. ; Ariz. 1492. [So, doubtless, in all states.]

So, in many states, of real estate : R.I., Ill., Io., Va., W.Va., N.C., Ky., Tex., Col., Miss. See also § 2634.

A widow may, in many states, devise the crops upon her dower estate. See § 3236.

No will can interfere with the laws against perpetuities, or otherwise create a limitation or estate not authorized by law (see, for other states, §§ 1420,1440) : Md. 49,2.

One may, in most states, devise lands of which he is disseized or to which he has only a right of entry. See §§ 2705,1401.

So, rights of entry for condition broken : N.C. 2140.

In North Carolina, it is expressly provided that all contingent, executory, or future interests in real or personal estate may be devised.

For estates tail, see §§ 1313, 1407.

So, in several states, estates *pur autre vie* may be devised : R.I. 182, 1 ; N.J. *Wills*, 1 ; Pa. ; Ind. 2567 ; S.C. 1855.

Moneys due on life-insurance policies of the testator may, under certain limitations, be bequeathed, though the estate be insolvent : Me. 75, 10. So, in other states ; see in Part III.

Estates for years may be devised : R.I.

Estates in severalty, joint-tenancy, or in common, may be devised : Pa.

Homestead estates may, in a few states, be devised free of debts. But in others, they cannot be devised at all. See in Part IV.

§ 2631. **Exceptions.**<sup>a</sup> But § 2630 does not authorize the testator, (1) to devise the widow's dower estate : Io. 2322 ; Mo. ; Ore. ; Wy. For other states, see in Art. 320.

(2) Nor, in most states, to bequeath personalty so as to interfere with her or the husband's share in lieu of bequest : Io., Wy. For other states, see § 3262.

(3) Nor, in most states, to devise homestead estates : Mass., Io. For other states, see in Part IV.

(4) Nor to devise or bequeath the provision allowed by law to the widow and family : Io., Wy. For other states, see in Part IV., Division I.

(5) Nor, in a few, to devise estates tail : Mass., Md. For other states, see § 1313.

But in one state, testators are expressly authorized to devise in fee estates held by them in tail : R.I. See § 1313, C.

NOTE. — <sup>a</sup> For citations, see last section. For Community Property, see Art. 340.

§ 2632. **The Disposable Part.** In a few states, a testator leaving children is prohibited from devising more than a certain portion of his estate away from them. (See also §§ 2618, 3026.) For New Mexico, see in Art. 340.

In Louisiana, there are laws as follows : —

**Of the Disposable Portion and the Legitime.** Donations *inter vivos* or *mortis causa* cannot exceed two thirds of the property of the disposer, if he leaves, at his decease, a legitimate child ; one half, if he leaves two children ; and one third if he leaves three or a greater number.

Under the name of *children* are included descendants, of whatever degree they be, it being understood that they are only counted for the child they represent.

Donations *inter vivos* or *mortis causa* cannot exceed two thirds of the property, if the disposer, having no children, leave a father, mother, or both.

In the cases above prescribed, the heirs are called *forced heirs*, because the donor cannot deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them.

Where there are no legitimate descendants, and in case of the previous decease of the father and mother, donations *inter vivos* or *mortis causa* may be made to the whole amount of the property of the disposer, saving the reservation made hereafter.

The donation *inter vivos* shall in no case divest the donor of all his property ; he must reserve to himself enough for subsistence ; if he does not do it, the donation is null for the whole.

The legitimate portion of which the testator is forbidden to dispose to the prejudice of his descendants, being once fixed by the number of children living or represented at the death of the testator, does not diminish by the renunciation of one or any of them. The part of those who renounce goes to those who accept.

If the disposition made by donation *inter vivos* or *mortis causa* be of a usufruct, or of an annuity, the value of which exceeds the disposable portion, the forced heirs have the option either to execute the disposition or to abandon to the donee the ownership of such portion of the estate as the donor had a right to dispose of.

The value in full ownership of property which has been alienated, either for an annuity for life or with reservation of a usufruct, to one of those who succeed to the inheritance in the direct

descending line, shall be imputed to the disposable portion ; and the surplus, if any there be, shall be brought into the succession ; but this imputation and this collation cannot be demanded by any of the heirs in the direct descending line who have consented to those alienations.

The disposable *quantum* may be given in whole or in part, by an act *inter vivos* or *mortis causa*, to one or more of the disposer's children or successible descendants, to the prejudice of his other children or successible descendants, without its being liable to be brought into the succession by the donee or legatee, provided it be expressly declared by the donor that this disposition is intended to be over and above the legitimate portion.

This declaration may be made either by the act containing the disposition or subsequently by an instrument executed before a notary public in presence of two witnesses : La. 1493-1501.

§ 2633. **Of the Reduction of Dispositions Inter Vivos or Mortis Causa ; of the Manner in which it is made ; and of its Effects.** Any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that *quantum*.

A donation *inter vivos* exceeding the disposable *quantum* retains all its effect during the life of the donor.

On the death of the donor or testator, the reduction of the donation, whether *inter vivos* or *mortis causa*, can be sued for only by forced heirs, or by their heirs or assigns ; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it.

To determine the reduction to which the donations, either *inter vivos* or *mortis causa*, are liable, an aggregate is formed of all the property belonging to the donor or testator at the time of his decease ; to that is fictitiously added the property disposed of by donation *inter vivos*, according to its value at the time of the donor's decease, in the state in which it was at the period of the donation. The sums due by the estate are deducted from this aggregate amount, and the disposable *quantum* is calculated on the balance, taking into consideration the number of heirs and their qualities of ascendant or descendant, so as to regulate their legitimate portion by the rules above established.

In the fictitious collation of effects given by act *inter vivos* by the deceased, those which have perished by accident in the hands of the donee are not included ; those which have perished through his fault only are to be included.

Donations *inter vivos* can never be reduced until the value of all the property comprised in donations *mortis causa* be exhausted ; and when that reduction is necessary, it shall be made by beginning with the last donation, and thus successively ascending from the last to the first.

When the last donee is insolvent, the heir can, after the previous discussion of his effects, claim from the donee who precedes the last his legitimate, and so on to the one preceding him.

If the donation *inter vivos* subject to reduction was made to one of those who succeed to any part of the estate, the latter is authorized to retain of the property given the value of the portion that would belong to him as heir in the property not disposable, if it be of the same nature.

When the value of donations *inter vivos* exceeds or equals the disposable *quantum*, all dispositions *mortis causa* are without effect.

When the dispositions *mortis causa* exceed either the disposable *quantum* or the portion of that *quantum* that remains after the deduction of the value of the donations *inter vivos*, the reduction shall be made *pro rata*, without any distinction between universal dispositions and particular ones.

Nevertheless, in case the testator has expressly declared that any particular legacy should be paid in preference to the others, that preference shall take place ; and the legacy that is the object of it shall not be reduced, if the value of the others does not fall short of the legal reservation.

Remunerative donations can never be reduced below the estimated value of the services rendered.

Donations by which charges are imposed on the donee can never be reduced below the expenses which the donee has incurred to perform them.

The donee restores the fruits of what exceeds the disposable portion only from the day of the donor's decease, if the demand of the reduction was made within the year ; otherwise, from the day of the demand.



Immovable property that is brought into the succession through the effect of reduction is brought into it without any charge of debts or mortgages created by the donee.

The action of reduction or revendication may be brought by the heirs against third persons holding the immovable property, which has been alienated by the donee, in the same manner and order that it may be brought against the donee himself, but after discussion of the property of the donee.

If the donee has successively sold several objects of real estate, liable to the action of revendication, that action must be brought against third persons holding the property, according to the order of their purchases, beginning with the last, and ascending in succession from the last to the first: La. 1502-1518.

§ 2634. **After-Acquired Property.**<sup>a</sup> In a few states, testators are expressly given the power to dispose of any estate to which they may be entitled at death, though acquired after execution of the will: R.I. 182,1; Va. 118,2; W.Va. 1882,84,1; N.C. 2140; Ky. 113,2. For personal estate, see § 2620.

NOTE. —<sup>a</sup> For the question whether a will executes such power of disposition, see §§ 2308-2310.

## Art. 264. Execution.

§ 2640. **In Writing.** In nearly all states, all wills (except nuncupative; but see § 2703) must be in writing, and (A) signed by the testator: N.H. 193,1; Mass. 127,1; Me. 74,1; Vt. 2042; R.I. 182,1 and 8; Ct. 1885,110,131; N.Y. 2,6,1,40; N.J. *Wills*, 22; Pa. *Wills*, 6; *Decedents' Estates*, 1; O. 5916; Ind. 2576; Ill. 148, 2; Mich. 5789; Wis. 2282; Io. 2326; Minn. 47,5; Kan. 117,2; Neb. 1,23,127; Md. 49,4; 1884,293; Del. 84,3; Va. 118,4; W.Va. 1882,84,3; N.C. 2136; Ky. 113,5; Tenn. 3003; Mo. 3962; Ark. 6492; Tex. 4859; Cal. 6276; Ore. 64,4; Nev. 814; Col.<sup>a</sup> 3482; Wash. 1319; Dak. Civ. C. 691; Ida. Civ. C. 934; Mon. Prob. C. 438; Wy. 1882,107,4; Uta. 1884,44,1,1,6; S.C. 1854; Ga. 2414; Ala. 2294; Miss. 1262; Fla. 200,1; La. 1575,1579,1584; N.M.<sup>a</sup> 1380; Ariz. 1493.

*Except* holographic wills: N.C., Ark., Cal., Dak., Mon., Uta., La. See § 2645.

In a few states, they must be signed "at the end thereof:" N.Y., Pa., O., Minn., Kan., Ark., Cal., Mon., Dak., Uta. In others, they must be "subscribed:" Ct., Ky.

Or, (B) in most states, they may be so signed by some other person; (1) by the testator's express direction, and in his presence: N.H. 193,6; Mass.; Me.; Vt.; R.I. 182,4; Pa.; O.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Del.; Va.; W.Va.; N.C.; Ky.; Tenn.; Mo.; Tex.; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Mon.; Wy.; S.C.; Ga.; Ala.; Miss.; Fla.; N.M.; Ariz.

Or (2) the testator's simple consent is enough, if so signed in his presence: Ind. (3) By the request of the testator, whether in his presence or not: Ark., N.M.

(C) And in others, the will may be so signed by such other person only (1) when the testator is prevented from signing by the extremity of a last sickness: Pa.; (2) when he is unable, or does not know how, to sign: N.M.

Any person capable of making a will may empower any other intelligent and well-qualified person to make his last will and dispose of his property; but in granting said power, the same qualifications required for the validity of a will and said power shall be inserted therein [*sic*]: N.M. 1387. The person receiving said authority shall not go beyond the powers therein specified in reference to the institution of heirs, legacies, and nothing more [*sic*]: N.M. 1388. But in Louisiana, the custom of willing by testament, by the intervention of a commissary or attorney in fact, is abolished. Thus the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator: La. 1573.

No judge of probate can, in New Hampshire, make or draft a will for any other person, but such will is void: N.H. 189,19.

(D) But in New Mexico, a verbal will may be valid (to any extent) "if it be given all the validity possible" by the person executing it: N.M. 1379.

In Pennsylvania, wills may be executed with a mark, if valid in other respects : Pa. *Wills*, 7. Compare also § 1023.

The custom of willing by testament, by the intervention of a commissary or attorney in fact, is abolished.

Thus the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator : La. 1573.

NOTE. — <sup>a</sup> Such signature is only necessary when the will is made in writing. See D.

§ 2641. **Seal.** In a few states, wills must be sealed with the testator's seal : N.H. 193,6 ; Nev. 814.

§ 2642. **Acknowledgment.** In several states, there is a special provision that the testator must either sign or acknowledge his signature in the presence of each (or all ; see § 2644) of the witnesses : N.Y. 2,6,1,40 ; N.J. *Wills*, 22 ; O. 5916 ; Ill. ; Kan. ; Va. ; W.Va. ; Ky. 113,5 ; Ark. 6492 ; Cal. 6276 ; Dak. Civ. C. 691 ; Mon. See also § 2640 for citations.

This would seem to follow, in other states, from the word *attestation* used of the witnesses, or from the common law. In Utah, he must both sign and acknowledge in their presence : Uta. 1884,44,1,1,6.

It is also necessary, in a few states, that the testator should, at the time of subscription or acknowledgment, declare the instrument to be his last will and testament : N.Y., N.J., Ark., Cal., Dak., Mon., Uta.

§ 2643. **Knowledge by Testator.** The code of Georgia provides that a knowledge of the contents of the paper by the testator is necessary to its validity as a will : Ga. 2418. But usually, where he can read and write, his signature, or the acknowledgment of his signature, is sufficient : Ga.

If, however, the scrivener or his immediate relations are large beneficiaries under the will, greater proof will be necessary to show a knowledge of the contents by the testator : Ga.

§ 2644. **Witnesses.** In all states, the will and signature must be attested and subscribed (1) by three witnesses : N.H. 193,6 ; Mass. 127,1 ; Me. 74,1 ; Vt. 2042 ; Ct. 1885,110,131 ; S.C. 1854 ; Ga. 2414 ; Fla. 200,1 ; N.M. 1380 ; (2) by two witnesses : R.I. 182,4 ; N.Y. 2,6,1,40 ; N.J. *Wills*, 22 ; Pa. *Wills*, 6 ; *Decedents' Estates*, 1 ; O. 5916 ; Ind. 2576 ; Ill. 148,2 ; Mich. 5789 ; Wis. 2282 ; Io. 2326 ; Minn. 47,5 ; Kan. 117,2 ; Neb. 1,23,127 ; Md. 49,4 ; 1884,293 ; Del. 84,3 ; Va. 118,4 ; W.Va. 1882,84,3 ; N.C. 2136 ; Ky. 113,5 ; Tenn. 3003 ; Mo. 3962 ; Ark. 6492 ; Tex. 4859 ; Cal. 6276 ; Ore. 64,4 ; Nev. 814 ; Col. 3482 ; Wash. 1319 ; Dak. Civ. C. 691 ; Mon. Prob. C. 438 ; Wy. 1882,107,4 ; Uta. 1884,44,1,1,6 ; Ala. 2294 ; Miss. 1262 ; Ariz. 1493.

In Pennsylvania, such witnesses are necessary to prove the will ; *but they need not sign the will.*

The witnesses must, in most states, sign in the presence of the testator : N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., O., Ind., Ill., Mich., Wis., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Tex., Cal., Ore., Nev., Wash., Dak., Mon., Uta., S.C., Ga., Ala., Miss., Fla., Ariz.

The witnesses must be present, and see and hear the testator speak ; and each of them must understand clearly and distinctly every part of the will : N.M. 1383.

And in several, they must also sign in presence of each other : Vt., Ct., Va., W.Va., Uta., S.C.

In a few, they must sign at the request of the testator : N.Y., Cal., Ark., Dak., Mon., Uta.

They must sign at the end : N.Y., Cal., Ark., Mon., Dak., Uta.

No special form of attestation is necessary : Va., W.Va.

In several states, the witnesses are required, under penalty, to write opposite their names their places of residence, but the neglect of this formality does not invalidate the will, or affect their competency as witnesses : N.Y. 2,6,1,41 ; Cal. 6278 ; Dak. Civ. C. 693 ; Mon. Prob. C. 440 ; Uta. 1884,44,1,1,8.

So, in a few, a person signing the testator's name by his request must add his own as witness : Ark. 6493 ; Cal. ; Ore. 64,5 ; Wash. 1320 ; Dak. ; Mon. ; and state that he subscribed the testator's name at his request : Ore., Wash.

A witness may, in Georgia, attest by his mark, provided he can swear to the same ; but one witness cannot subscribe the name of another, even in his presence and by his express direction : Ga. 2415.

The paper containing the dispositions, or the paper serving as their envelope, must be closed and sealed. The testator shall present it thus closed and sealed to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence. Then he shall declare to the notary, in presence of the witnesses, that that paper contains his testament written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription, which shall be written on that paper or on the sheet that serves as its envelope, and that act shall be signed by the testator and by the notary and the witnesses : La. 1584.

All that is above prescribed shall be done without interruption or turning aside to other acts ; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary, in that case, to increase the number of witnesses.

Those who know not how, or are not able, to write, and those who know not how, or are not able, to sign their names, cannot make dispositions in the form of the mystic will.

If any one of the witnesses to the act of superscription know not how to sign, express mention shall be made thereof.

In all cases, the act must be signed at least by two witnesses : La. 1585-7.

**§ 2645. Holographic Wills.** A holographic will (wholly written and subscribed by testator) need not be attested by any witnesses : Va. 118,4 ; W.Va. 1882,84,3 ; N.C. 2136 ; Ky. 113,5 ; Tenn. 3004 ; Ark. 6492 ; Tex. 1847 ; 4859-60 ; Cal. 6277 ; Dak. Prob. C. 21 ; Civ. C. 691 ; Mon. Prob. C. 439 ; Uta. 1884, 44,1,1,7 ; Miss. 1262. The holographic testament is that which is written by the testator himself. In order to be valid, it must be entirely written, dated, and signed by the testator, but is subject to no other forms : La. 1588.

But in two states, it is not good unless (1) found among the valuable papers and effects of the deceased : N.C., Tenn. ; (2) or lodged in the house of another for safe-keeping : N.C., Tenn.

The name of the testator must be subscribed or inserted : N.C., Tenn.

It must be signed like any will : Ark. ; Cal. ; Uta. ; La. 1584.

It may be made either in or out of the state : Cal., Uta.

And the handwriting of the testator must be proved by three credible witnesses, who believe such will and every part of it to be in his handwriting : N.C., Tenn., Ark. ; by two : Tex. See also Probate Code.

But in other states, such wills may be proved in the same manner as other private writings : Mon. Prob. C. 19 ; Uta.

No such holographic will is good in bar of a will in ordinary form : Ark.

**§ 2646. Competency.** The statute provides, in most states, (A) that the witnesses should be *competent* : Mass. 127,1 ; Pa. *Decedents' Estates*, 1 ; O. 5916 ; Ind. 2576 ; Mich. 5789 ; Wis. 2282 ; Io. ; Minn. ; Kan. ; Neb. ; Va. 118,4 ; W.Va. 1882,84,3 ; Mo. ; Cal. ; Ore. ; Nev. ; Wash. 1319 ; Mon. ; Wy. ; Ga. ; Ariz. In others, (B) that they should be *credible* : N.H. 193,6 ; Me. 74,1 ; Vt. 2042 ; Ill. 148,2 ; Md. 49,4 ; Del. 84,3 ; Ky. 113,5 ; Tex.



4859 ; Col. 3482 ; S.C. 1854 : Miss. 1262. For citations, see also § 2644, and below.

They must, in Texas, be over fourteen in age.

In a few, (C) that they should not be *beneficially interested under the will* : Me. ; N.C. 2136 ; N.M. 1382. "Not interested in such devise : " Tenn. 3003. They must not be heirs : N.M.

Such competency is, generally, required only at the time of attestation, and subsequent incompetency on the part of the witness does not invalidate the will (see in Probate Code) : N.H. 194,12 ; Mass. 127,2 ; Me. 74,2 ; Vt. 2045 ; Ind. ; Mich. ; Wis. 2282 ; Minn. ; Neb. ; Ky. 113,13 ; Cal. 6280 ; Dak. Civ. C. 718 ; Mon. Prob. C. 442 ; Wy. ; Uta. 1884,44,1,1,10 ; Ga. 2416 ; Ala. 2295 ; Ariz.

But in a few states, if a devisee or legatee who is attesting witness die before probate, he is deemed to have been a legal witness within the provisions of law, notwithstanding such legacy or bequest : R.I. 182,17 ; Mo. 4001 ; Ark. 6540 ; Ore. 64,26.

### § 2647. Who are Competent.

In two states, no person is incompetent as a witness because at the time of execution or probate he is member of a corporation to which a devise or legacy is given by the will : N.H. 193,9 ; Ct. 1885,110,132. So, in one other, no person is incompetent as a witness because the will contains a devise or bequest for public or charitable purposes, although he is taxable for such purpose : Del. 84,4.

In several, no person is disqualified as a witness to a will because named executor in it : Va. 118,21 ; W.Va. 1882,84,20 ; N.C. 2146 ; Ky. 113,15. Nor, in one other, because appointed in the will to any office, trust, or duty : S.C. 1857. But he shall not, in such case, be legally entitled to receive any commissions or compensation on account of such office, etc. : S.C.

**Louisiana Law.** The following persons are absolutely incapable of being witnesses to testaments : —

1. Women of what age soever.
2. Male children who have not attained the age of sixteen years, complete.
3. Persons insane, deaf, dumb, or blind.
4. Persons whom the criminal laws declare incapable of exercising civil functions.

Neither can testaments be witnessed by those who are constituted heirs or named legatees, under whatsoever title it may be. Mystic testaments are excepted from this provision.

By the residence of the witnesses in the place where the testament is executed, is understood their residence in the parish where that testament is made ; that residence is necessary only when it is expressly required by law.

The formalities to which testaments are subject by the provisions of the present section must be observed ; otherwise the testaments are null and void : La. 1591-5.

**§ 2648. Devisees and Legatees.** A mere charge on the lands or estate of the testator, or other provision for the payment of debts, does not, in most states, make creditors incompetent as attesting witnesses : N.H. 193,8 ; Mass. 127,2 ; Vt. 2046 ; R.I. 182,16 ; N.J. *Wills*, 5 ; Ill. 148,20 ; Mich. 5791 ; Wis. 2284 ; Minn. 47,7 ; Neb. 1,23,130 ; Del. 84,4 ; Va. 118,20 ; W.Va. 1882,84,19 ; Ky. 113,14 ; Mo. 3998 ; Ark. 6538 ; Cal. 6282 ; Ore. 64,23 ; Nev. 815 ; Col. 3486 ; Wash. 1331 ; Dak. Civ. C. 717 ; Mon. Pr. C. 444 ; Uta. 1884,44,1,1,12 ; S.C. 1858 ; Ariz. 1495.

Nor does it make incompetent the person to whom such charge is made : Mo. 3995.

Nor, in a few, is the husband or wife of such creditor incompetent : Va., W.Va., Ky.

In one, any creditor whose debt is secured by express lien or by operation of law shall be a competent witness to a last will ; but any special provision in favor of such creditor in the will, either by admitting the debt or by providing for its payment or giving it a preference, is void ; and such claim shall stand as though no provision for it had been made : Miss. 1974.

§ 2649. **Renunciation of Legacy.** No legatee is incompetent as a witness who has been paid, or has accepted or released, or shall refuse to accept or release such legacy upon tender, before giving testimony : Mo. 3999 ; Ark. 6539 ; Ore. 64,24.

The credit of such witness is, however, subject to the consideration of the jury : Mo. 4000 ; Ark. ; Ore. 64,25.

He cannot, after giving such testimony, demand or receive such legacy or devise void or which he has refused, etc., as above, or any satisfaction or compensation for the same, except as below provided : Mo. 4002 ; Ark. 6541 ; Ore. 64,27.

If such legatee or devisee attesting the will have died in testator's lifetime or before probate or such receipt or tender or release, he is deemed a legal witness : R.I. 182, 17 ; Mo. 4001 ; Ark. 6540 ; Ore. 64,26.

§ 2650. **Devise to Witness Void.** In nearly all states, a beneficial devise or legacy to a subscribing witness thereto does not invalidate the will nor render the witness incompetent ; but such devise or bequest is void unless there are the requisite number of competent subscribing witnesses without counting him to whom such devise or legacy is made : N.H. 193,8 ; Mass. 127,3 ; Vt. 2046 ; R.I.<sup>a</sup> 182,15 ; Ct. 1885,110,132,3 ; N.Y. 2,6,1,50 ; N.J.<sup>a</sup> *Wills*, 4 ; O. 5925 ; Ind. 2586 ; Ill. 148,8 ; Mich. 5791 ; Wis. 2284 ; Io. 2327 ; Minn. 47,7 ; Kan. 117,11 ; Neb. 1, 23,130 ; Va. 118,19 ; W.Va. 1882,84,18 ; N.C. 2147 ; Ky. 113,13 ; Mo. 3995 and 3997 ; Ark. 6535 ; Tex. 4872 ; Cal. 6282 ; Ore. 64,20 and 22 ; Nev. 815 ; Col. 3485 ; Wash. 1331 ; Dak. Civ. C. 717 ; Mon. Prob. C. 444 ; Wy. 1882,107,4 ; Uta. 1884,44,1,1,12 ; S.C.<sup>a</sup> 1857 ; Ga.<sup>a</sup> 2417 ; Miss. 1973 ; Ariz. 1495.

And in Texas, the will may also be proved by their evidence, corroborated by one or more disinterested and credible persons, and the devise or bequest will not be void : Tex. 4873.

So also, in several, if such devise or legacy is made to the husband or wife of a subscribing witness : Mass. ; Vt. 1884,109 ; Ct. ; Va. ; W.Va. ; N.C. ; Ky. ; S.C.

But in Georgia, such devise or legacy, giving a separate estate to the wife, is good, and the witness competent, the legacy affecting only his credibility.

NOTE. — <sup>a</sup> It seems that in the noted states such devise or bequest may be void whether there are the required number of other subscribing witnesses or not : R.I., N.J., N.C., S.C., Ga.

§ 2651. **Devise to Heir.** (A) In nearly all states, a devise or bequest to a person who would inherit under the laws of descent or distribution does not invalidate the will or render such person incompetent as a witness. But (1) the devise or bequest is void ; and he only takes by descent or distribution such share as does not exceed the devise or bequest : N.Y. 2,6,1,51 ; O. 5925 ; Ind. 2586 ; Ill. 148,8 ; Mich. 5792 ; Wis. 2285 ; Io. 2328 ; Minn. 47,8 ; Kan. 117,11 ; Neb. 1, 23,131 ; Va. 118,19 ; W.Va. 1882,84,18 ; Ky. 113,13 ; Mo. 3996 ; Ark. 6536 ; Tex. 4872 ; Cal. 6283 ; Ore. 64,21 ; Col. 3485 ; Wash. 1331 ; Dak. Civ. C. 718 ; Mon. Prob. C. 445 ; Wy. 1882,107,4 ; Uta. 1884,44,1,1,13 ; Miss. 1973 ; Ariz. 1496.

Or (2) the devise or bequest is good, so far as it does not exceed the share the person would have taken by inheritance : S.C. 1857. These two provisions would seem to be identical in effect.

(B) But in a few, a devise or bequest made to an heir-at-law who is a subscribing witness is not so void ; and the will would therefore seem to be invalid : Vt., Ct., N.J.

(C) The devise or bequest to such heir is not of course void if there be the requisite number of other witnesses, as in § 2644 : Ark. 6537.

The share of such heir will be taken out of the estate devised or bequeathed to him : Ore. ; Wash. 1331 ; but in most states there is contribution by the other devisees and legatees : N.Y., O., Mich., Wis., Minn., Kan., Neb., Mo., Ark., Cal., Dak., Mon., Uta., Ariz. See in Probate Code.

§ 2652. **Form.** In Georgia, it is provided that no particular form of words is necessary to constitute a will : Ga. 2395.

It suffices for the validity of a testament that it be valid under any one of the forms prescribed by law, however defective it may be in the form under which the testator may have intended to make it : La. 1590.

The test of the testamentary character of an instrument is the intention of the maker from the whole instrument, read in the light of surrounding circumstances : Ga.

If such intention be to convey a present estate, though the possession be postponed until after death, the instrument is a deed ; if to convey an interest, accruing and having effect only after his death, it is a will : Ga.

An instrument may have effect in part as a deed and in part as a will, even as to the same property : Ga. 2396.

"All wills, to be valid, must possess uniformity of context in their various parts : " N.M. 1383.

§ 2653. **Law.** In a few states, it is provided that the law existing at the time of the execution governs the making of a will : Mass. 127,4 ; R.I. 182,9 ; Ind. 2613 ; Cal. 6375 ; Mon. Prob. C. 527 ; Wy. 1882,107,16 ; Uta. 1884,44,1,3,19.

So, a will duly executed according to the law of the place where made is regulated as to its execution by the law of such place, notwithstanding the testator subsequently changed his domicile to a place where the will would be void : N.Y. Civ. C. 2612 ; Dak. Civ. C. 697 ; Mon. Prob. C. 447.

The validity and interpretation of wills wherever made are governed, when relating to property within the State, by the laws of the State : N.Y. Civ. C. 2694 ; Cal. 6376 ; Dak. Civ. C. 774 ; Mon. Prob. C. 528-9 ; Uta. 1884,44,1,3,20 (see also § 2657) ; when relating to personal property within it, by the law of the testator's domicile : N.Y. ; Pa. *Wills*, 20 ; Cal. ; Dak. ; Mon.

§ 2654. **Codicils.** In Georgia, it is declared that codicils must be executed with the same formality as the will itself : Ga. 2404.

And that, when admitted to probate, the codicil forms part of the will : Ga. Compare also § 2500.

§ 2655. **Erasures.** Erasures not approved by the testator are considered as not made ; and words added by the hand of another, as not written.

If the erasures are so made as to render it impossible to distinguish the words covered by them, it shall be left to the discretion of the judge to declare if he considers them important, and in this case only to decree the nullity of the testament : La. 1589.

§ 2656. **Wills in Foreign Countries.** (See also the probate of wills already proved abroad, in the Probate Code.) In many states, a will made out of the State, but in the United States, is valid, and will pass real or personal property within the State (A) if it is valid according to the laws of the state or territory where it is made : N.H. 1883,106,1 ; Mass. 127,5 ; Me. 64,12 ; Vt. 2057 ; Ct. 1885, 110,31 ; N.Y. Civ. C. 2611 ; Wis. 2283 ; Md. 49,11 ; 1884,293 ; Ark. 6531 ; Dak. Civ. C. 695 ; Mon. Prob. C. 446 ; La. 1596.

So, as to personalty only : Mo. 3992 ; Ore. 64,17.

So, in several, of wills made in a foreign country : N.H., Mass., Me., Vt., Ct., N.Y.,<sup>a</sup> Wis., Md., Ky., Dak., Mon., La.

In others, it is so valid when made in a foreign country according to its laws only when made by a person who is domiciled out of the State at death : N.Y. ; Va. 118,6 ; W.Va. 1882,84,5 ; Ky. 113,8 ; Mon.

And in a few, such will takes effect only as to personal property : N.Y., Va., Ky.

No will executed out of the State (B) is valid unless executed according to the laws of the home State : R.I. 183,10 ; Tenn. 3025 ; Mo. ;<sup>b</sup> Cal. 6285 ; Ore.<sup>b</sup> 64,17 ; Uta. 1884,44,1,1,14.



(c) Always, of course, if the will be made according to the laws of the home State, it is valid to pass property there : Ill. 148,18; Ark. ; Dak. Civ. C. 696; Ga. 2435.

NOTES. — <sup>a</sup> But this is only true of wills made in Great Britain or Canada. <sup>b</sup> As to wills of realty only.

## Art. 267. Revocation.

§ 2670. **General Principles.** Testaments are revocable at the will of the testator until his decease.

The testator cannot renounce this right of revocation nor obligate himself to exercise it only under certain words and restrictions, and if he does so, such declaration shall be considered as not written : La. 1690.

§ 2671. **Definitions.** The revocation of testaments by the act of the testator is express or tacit, general or particular.

It is express when the testator has formally declared in writing that he revokes his testament, or that he revokes such a legacy or a particular disposition.

It is tacit when it results from some other disposition of the testator, or from some act which supposes a change of will.

It is general when all the dispositions of a testament are revoked.

It is particular when it falls on some of the dispositions only, without touching the rest : La. 1691.

§ 2672. **By Destroying.** No will, devise in a will, or codicil can be revoked except, in nearly all states, by the burning, tearing, cancelling, destroying, or obliterating it (A) by the testator : N.H. 193,14; Mass. 127,8; Me. 74,3; Vt. 2047; R.I.<sup>a</sup> 182,6; Ct. 1885,110,135; N.Y. 2,6,1,42; N.J. *Wills*, 2; Pa.<sup>a</sup> *Wills*, 16; O. 5953; Ind. 2559; Ill. 148,17; Mich. 5793; Wis. 2290; Io. 2329; Minn. 47,9; Kan. 117,37; Neb. 1,23,132; Md.<sup>a</sup> 49,5; Del. 84,10; Va. 118,8; W.Va. 1882,84,7; N.C. 2176; Ky. 113,10; Mo.<sup>b</sup> 3963; Ark. 6494; Tex.<sup>b</sup> 4861; Cal. 6292; Ore.<sup>b</sup> Civ. C. 770; Nev.<sup>b</sup> 819; Col.<sup>a,b</sup> 3484; Wash.<sup>b</sup> 1321; Dak. Civ. C. 702; Mon. Prob. C. 453; Wy. 1882,107,5; Uta. 1884,44,1,1,19; S.C. 1859; Ga. 2473; Ala. 2296; Miss. 1263; Fla. 200,2; Ariz. 1497.

(B) Or, in most states, by some other person (1) in his presence and by his direction : N.H., Mass., Me., Vt., Ct., N.J., Pa., Ind., Ill., Mich., Wis., Minn., Neb., Md., Va., W.Va., N.C., Ky., Mo., Ark., Tex., Cal., Ore., Col., Wash., Dak., Mon., Wy., Uta., S.C., Ala., Miss., Ariz.

(2) "By his direction and consent : " R.I., N.Y., Md., Fla.

(3) In one, by some other person in his *absence* and by his express direction : Del.; (4) *either* in his presence *or* by his direction : O., Kan., Nev.; by his direction (simply) : Io., Ga.

(C) And when done by such other person, the fact of the destruction, with the consent or direction of the testator, must be proved, in several states, by at least two witnesses : N.Y.; Ark.; Cal. 6293; Ore.; Dak. Civ. C. 703; Mon. *ib.* 454; Uta. 1884,44,1,1,20; Ala.

In most states, there is a special provision that such burning, tearing, etc., must be made *with the intention* of revoking it : Mass.; Me.; Vt.; N.Y.; O.; Ind.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Va.; W.Va.; Ky.; Ark.; Cal.; Ore.; Nev.; Dak.; Mon.; Wy.; Uta.; Ga. 2474; Ala.; Ariz.

(D) In Georgia, the cancellation must be in a material part; if in an immaterial part, — such as the seal, — the intention to revoke will not be presumed.

(E) When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will : Io. 2330.

A revocation by obliteration may be partial or total, and is complete if the material part is

so obliterated as to show an intention to revoke; but a part may not be revoked unless the new disposition is legally effected: Dak. Civ. C. 704.

NOTES. — <sup>a</sup> Applies only to wills of real estate; <sup>b</sup> only to written (not nuncupative) wills. But this latter is so, probably, in all states.

§ 2673. **Subsequent Will.** Or, in most states, a will may be revoked (A) by some other writing, signed, attested, and subscribed like a will: N.H.; Mass.; Me.; Vt.; R.I.; N.Y.; N.J. *Wills*, 23; Pa.; <sup>a</sup> O.; Ind.; Mich.; Wis.; Minn.; Kan.; Neb.; Md. 49,5; 1884,293; Del.; Va.; W.Va.; N.C.; Ky.; Ark.; Tex.; Cal. 6292; Ore.; Dak.; Mon.; Uta.; S.C.; Ga. 2472; Ala.; Miss.; Fla.; Ia. 1692; Ariz. 1497; (B) "by a subsequent will or codicil in writing:" N.H.; Me.; Vt.; R.I.; Ct.; N.Y.; N.J.; Pa.; O.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Del.; Va.; W.Va.; N.C.; Ky.; Mo.; Ark.; Tex.; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Mon. Prob. C. 456; Wy.; Uta.; S.C.; Ga.; Ala.; Fla.; Ariz. See also § 2672 for citations.

Or by a subsequent holographic will or writing (§ 2645): N.C. So, in one other; but it seems that such written revocation need be subscribed by the testator only: Md.\*

In a few states, a subsequent valid will acts as revocation of the first one, whether specially so expressed therein or not: Io.; Ga. 2471,2475. The same is perhaps implied in the statutes of other states. But see below, and also § 2676. In Georgia, it is enacted that a revocation may be either express or resulting: the former is where the maker by writing or acts annuls the instrument; the latter results from the execution of a subsequent inconsistent will: Ga. 2471.

But an implied revocation extends only so far as an inconsistency exists between the two wills; and any portion of the first which can stand consistently with the testamentary scheme and bequests made in the last shall remain unrevoked: Cal. 6296; Dak. Civ. C. 706; Mon.; Uta. 1884,44,1,1,22; Ga. 2475; La. 1693.

A revocation made in a posterior testament has its entire effect, even though this new act remains without execution, either through the incapacity of the person instituted or of the legatee, or through his refusal to accept it, provided it is regular as to its form: La. 1694.

(C) In many, it is specially provided that these provisions (§§ 2672,2673) do not prevent the revocation implied in law from a change in the condition and circumstances of the testator (§ 2676): N.H. 193,15; Mass.; Me.; Vt.; R.I.; N.Y.; O.; Mich.; Wis.; Minn.; Kan.; Neb.; Del.; Va.; Ky.; Mo.; Ark.; Nev.; Wash.; Wy.; Ga. 2477; Fla.; Ariz.

NOTE. — <sup>a</sup> See § 2672, note <sup>a</sup>. See also Art. 280, for devises or legacies revoked by other acts *in pais*.

§ 2674. **What Wills may be Revoked.** All wills are declared revocable: Ga. 2470. And even in the case of mutual wills with a covenant against revocation the power of revocation remains: Ga.

The revocation of a will executed in duplicate may be made by revoking *one* of the duplicates: Cal. 6295; Dak. Civ. C. 705; Mon. Prob. C. 455; Uta. 1884,44,1,1,21; Ga. 2473.

#### § 2675. **Parol Revocation.**

A will of personal property may be revoked by words, if they are committed to writing in the testator's lifetime, read to him and allowed, and so proved by three witnesses: Fla. 200,3.

No written will shall be revoked or altered by subsequent spoken words, except the same be in the lifetime of the testator reduced to writing and read over to him and approved, and the same be proved to have been so done by oaths (1) of two witnesses, competent as at common law: Pa. *Wills*, 17; Tenn. 3008; (2) of three such witnesses: N.J.<sup>a</sup> *Wills*, 14; Md. 49,6.

No words spoken shall revoke or annul any will executed duly in writing as required by law: Ill. 148,17; Col. 3484.

A written will can be revoked only by making special mention of it; and in case this should not be done, or should have escaped his memory, he shall refer to it in the following

manner, "that it is revoked, and that it would have been repeated verbatim could he have remembered it:" N.M. 1334.

NOTE. —<sup>a</sup> Only wills of personality can, in the noted states, be so revoked.

§ 2676. **Implied Revocation.** (A) In some states, a will may be entirely revoked by operation of law.<sup>a</sup> Thus, in many, a will by an unmarried woman is deemed revoked by her subsequent marriage: R.I. 182,6; Ct.<sup>b</sup> 1875,84; N.Y. 2,6,1,44; Pa. *Wills*, 19; Ind. 2562; Ill. 39,10; Va. 118,7; W.Va. 1882,84,6; N.C. 2177; Ky. 113,9; Mo. 3965; Ark. 6496; Cal. 6300; Ore. 64,7; Nev. 822; Dak. Civ. C. 709; Mon. Prob. C. 460; Ga. 2477; Ala. 2283.

And it is not revived by her husband's subsequent death: Pa., Cal., Nev., Dak., Mon.

But in Ohio, expressly, a will by such unmarried woman is not so revoked by her subsequent marriage: O. 5958.

(B) So, in a few states, a will by a man is deemed revoked (1) by his subsequent marriage: R.I.; Ct.<sup>b</sup> 1885,110,135; Ill. 39,10; Va.; W.Va.; Ky.; N.C.; Ga.; or (2) by the birth of a child: Ct.<sup>b</sup>

But this section does not apply to a will made in exercise of a collateral power of appointment: Va., W.Va., Ky., N.C.

(C) In several states, a will (when disposing of the whole estate, in New York) is deemed revoked if the testator afterwards marry and leave issue by such marriage at death (or posthumous children; § 2844), unless provision for such issue is made in the will or by settlement, or they are in such way mentioned in the will as to show an intention not to make provision for them; and no other evidence to rebut the presumption of such revocation can be received: N.Y. 2,6,1,43; Mo. 3964; Ark. 6495; Cal. 6298; Ore. 64,6; Dak. Civ. C. 708; Mon. Prob. C. 458; Uta. 1884,44,1,1,24; Ala. 2282. So, in others, any will by a testator having no children at the time, and leaving children at his death: O. 5959; Kan. 117,36.

In one, if any person making a will shall afterwards marry and die, leaving his widow, or issue of such marriage, unless the will shall have been made in contemplation of marriage expressed on its face, and shall contain a provision for future wife, and children, if any, it is deemed revoked for all purposes: S.C. 1860.

(D) So, in several other states, the will of a testator afterwards marrying and leaving a widow is deemed revoked, unless provision is made by marriage settlement or in the will, or she be mentioned therein so as to show an intention not to make such provision: N.Y.; Cal. 6299; Nev. 821; Wash. 1322; Dak.; Mon. Prob. C. 459; Uta. 1884,44,1,1,25; Ala. And no other evidence to rebut this presumption can be received: N.Y., Cal., Nev., Wash., Dak., Mon., Uta.

(E) In other states, a will made when there are no issue living, without any mention of possible issue, is void if the testator leave a legitimate child at death<sup>b</sup> (or posthumous child): Ct. 18,11,6; N.J. *Wills*, 18; Del. 84,11; Va.<sup>b</sup> 118,17; W.Va.<sup>b</sup> 1882,84,16; Ky. 113,24; Tex. 4869; Miss.<sup>b</sup> 1263.

Unless the child is provided for by settlement: Tex.

So, in others; but if such child dies under twenty-one, before marriage or without issue, the will takes effect: Va., W.Va., Ky., Miss.<sup>b</sup> In Virginia and Texas, the will is good unless he die under twenty-one, *and* without issue.

So, the birth of any issue to the testator after a will made with no provision for such event is a revocation: Ind.<sup>c</sup> 2560; Ga. 2477.

And if such child or issue die leaving a widow, she holds such estate for her life; but otherwise, it descends according to the will: Ind. 2561.

(F) The testament falls by the birth of legitimate children of the testator, posterior to its date: La. 1705.



(G) No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances: N.C. 2178.

NOTES. — <sup>a</sup> For other states, and similar cases, — such as that of after-born children, in which the will will be only partially revoked, — see Art. 284. <sup>b</sup> Unless provision is made in the will for such contingency. <sup>c</sup> If such issue survive the testator.

§ 2677. **Effect.** The revocation of a will revokes all its codicils: Cal. 6305; Dak. Civ. C. 714; Mon. Prob. C. 465; Uta. 1884,44,1,1,30.

A revocation made in a posterior testament has its entire effect, even though this new act remains without execution either through the incapacity of the person instituted or of the legatee, or through his refusal to accept it, provided it is regular as to its form: La. 1694.

An express revocation takes effect instantly or independently of the validity or ultimate fate of the will, or other instrument containing it; a resulting revocation takes effect only when the subsequent inconsistent will becomes effectual; and hence, if from any cause it fails, the revocation is not completed: Ga. 2471.

§ 2678. **Revival.** A will or codicil once revoked can be revived by a re-execution thereof, or by a codicil duly executed: Va.<sup>a</sup> 118,9; W.Va. 1882,84,8; Ky.<sup>a</sup> 113,11; Ga. 2478; but only to the extent to which an intention to revive such will is shown: Va., W.Va.

In one state, a parol *republication* in the presence of the original witnesses is good: Ga. 2478.

NOTE. — <sup>a</sup> And in two states, it can be revived in no other way: Va., Ky.

§ 2679. **Implied Revival.** In most states, if a second will be made, the cancelling, destruction, or revocation of it does not revive the first will, unless such intent appear in the terms of the revocation, or the first will be duly republished after such cancelling, etc.: N.Y. 2,6,1,53; O. 5960; Ind. 2559; Kan. 117,38; Mo. 3968; Ark. 6503; Cal. 6297; Ore. 64,13; Nev. 820; Wash. 1328; Dak. Civ. C. 707; Mon. Prob. C. 457; Uta. 1884,44,1,1,23; Ga. 2472; Ala. 2297; N.M. 1385.

The execution of a codicil referring to a previous will has the effect to republish the will, as modified by the codicil: Cal. 6287; Dak. Civ. C. 694; Mon. Prob. C. 448; Uta. 1884,44,1,1,15.

§ 2680. **Revocation by Action.** The same causes which, according to the foregoing provisions of the present title, authorize an action for the revocation of a donation *inter vivos*, are sufficient to ground an action of revocation of testamentary dispositions; *provided*, however, that no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs, nor can they lose their inheritance for any act of ingratitude to the testator prior to his decease. That he has not disinherited them shall be sufficient evidence of his having forgiven the offence.

If the action be founded on a grievous injury done to the memory of the testator, it must be brought within a year from the day of the offence: La. 1710,1711.

## Art. 269. Preservation of Wills.

§ 2690. **Deposit.** In many states, the testator or his agent may deposit his will in the registry of probate <sup>a</sup> in the county where he lives, to be safely kept: N.H. 1883,61,1; Mass. 127,9; Me. 64,2; N.Y. 3,7,3,63; 1882,410,1760,1761; O. 5917; Mich. 5794; Wis. 2291; Io. 2331; Kan. 117,3; Neb. 1,23,133; Md. 49,33; Ky. 113,41; Ark. 6530; Dak. Civ. C. 698; Ariz. 1498.

The register, judge, etc. (see note), on being paid a fee, is bound to receive and keep the will, and (except in Iowa, Maryland, Kentucky, and Arkansas) give a certificate of deposit: N.H., Mass., Me., N.Y., O., Mich., Wis., Io., Kan., Neb., Md., Ky., Ark., Dak., Ariz.

NOTE. — <sup>a</sup> Or, with the clerk of any county: N.Y.; with the clerk of the County Court: Ky., Ark.; with the judge of the County Court: Wis.

§ 2691. **Enclosure.** There is generally a provision that a will so deposited must be enclosed in a sealed wrapper: N.H. 1883,61,2; Mass. 127,10; Me. 64,2; N.Y. 3,7,3,68; O. 5918; Mich.; Wis.; Io.; Kan. 117,4; Neb.; Md. 49,33; Ky. 113,41; Ark.; Dak.; Ariz.

With an indorsement thereon of the name and residence of the testator: N.H., Mass., Me., N.Y., O., Mich., Wis., Io., Kan., Neb., Md., Dak., Ariz.; and of the time of deposit: N.H., Mass., Me., N.Y., O., Mich., Wis., Kan., Neb., Md., Dak., Ariz.; and of the person by whom it is deposited: N.H., Mass., O., Mich., Wis., Kan., Neb., Ariz.; and of the person to whom it is to be delivered after the death of the testator: <sup>a</sup>Mass.; Me.; N.Y. 3,7,7,69; O.; Kan.; <sup>a</sup>Md.; Ky.; <sup>a</sup>Ark.; <sup>a</sup>Dak. <sup>a</sup>Civ. C. 699.

A will so deposited cannot be opened or read: Mass., Me., N.Y., O., Kan., Md., Ky., Ark., Dak.

NOTE. — <sup>a</sup> This provision is not, in the noted states, made indispensable: N.Y., O., Kan.

§ 2692. **Delivery.** During the life of the testator a will so deposited can be delivered only to the testator himself: N.H. 1883,61,3; Mass. 127,11; Me. 64,2; N.Y. 3,7,3,69; O. 5919; Mich. 5795; Wis.; Io.; Kan. 117,5; Neb. 1,23,134; Md. 49,33; Ark.; Dak.; Ariz. 1499.

Or to his order in writing: N.H., Mass., Me., N.Y., O., Mich., Wis., Kan., Neb., Md., Dak., Ariz. Such order must be proved by oath of a subscribing witness: N.H., Mass., Me., N.Y., O., Mich., Wis., Kan., Neb., Dak., Ariz.

After the death of the testator such will is to be delivered to the person named in the indorsement (§ 2691): N.H.; Mass.; Me.; N.Y.; O.; Kan.; Md.; Ky. 113,41; Ark.; Dak.

If there be none, it is delivered to the surrogate: N.Y., Dak.

Otherwise, or if not called for by him, it shall be publicly opened at the first probate court had after notice of the testator's death: N.Y. 3,7,7,70; Mich.; Kan.; Neb.; Ky.; Ark.; Dak. Civ. C. 700; Ariz.

Or, if the jurisdiction of the case belongs to another court, it shall be delivered to the executors or other persons entitled to the custody thereof to be by them presented for probate in such other court: Mass.; Me.; O. 5920; Mich. 5796; Wis. 3784; Kan. 117,6; Ariz. 1500.

And the judge of probate is to give notice to the executor named or persons interested to present it for probate: O.; Mich.; Wis.; Kan.; Neb. 1,23,135; Ariz.

## Art. 270. Nuncupative Wills.

§ 2700. **As at Common Law.** In most states, a nuncupative will may be made by a soldier in actual military service or a mariner at sea: N.H. 193,7; Mass. 127,6; Me. 74,18; Vt. 2044; R.I. 182,10; N.Y. 2,6,1,22; N.J. *Wills*, 16; Pa. *Wills*, 9; Ind. 2578; Mich. 5790; Wis. 2293; Io. 2325; Minn. 47,6; Neb. 1,23,129; Md. 49,11; Va. 118,6; W.Va. 1882,84,5; Ky. 113,7; Mo. 3985; Ark. 6505; Tex. 4866; Cal. 6289; Ore. 64,14; Civ. C. 769; Wash. 1329; Dak. Civ. C. 688; Mon. Prob. C. 450; S.C. 1880; Ala. 2300; Miss. 1269; Ariz. 1494.

In detail, such wills (1) may be made "as before" or "without regard to this title" or "as at common law:" N.H.; Me.; Vt.; R.I.; N.J.; Pa.; Ind.; Mich.; Wis.; Neb.; Md. 1884,306; Va.; W.Va.; Mo.; Ark.; Tex.; Ore.; Wash.; S.C.; Ala.; Miss.; Ariz.

(2) They may be made only of personal property, wages, movables, etc.: N.H., Mass., Me., Vt., R.I., N.Y., N.J., Pa., Ind., Mich., Wis., Io., Minn., Neb., Md., Va., W.Va., Ky., Mo., Ark., Tex., Ore., Wash., S.C., Ala., Miss., Ariz.

(3) The testator must have been in actual contemplation or fear of death, or in expectation of death from an injury received the same day: Cal., Dak., Mon.

The will must have been made within ten days of death, in the presence of two competent witnesses who were called upon to witness, and the words must be reduced to writing and signed by one of the witnesses within sixty days after the speaking: Ky. Nuncupative wills need not be in writing, nor declared or attested with any formalities: Cal. 6288; Dak. Civ. C. 692.

Except as authorized in this article, nuncupative wills are invalid: N.Y., Md.; and so probably in the other states.

§ 2701. **Louisiana Civil Law.** The wills of persons employed in armies in the field, or in a military expedition, may be received by a commissioned officer, in presence of two witnesses.

If the testator is sick or wounded, they may be received by the physician or surgeon attending him, assisted by two witnesses.

These testaments are subject to no other formalities than that of being reduced to writing, and being signed by the testator, if he can write, by the persons receiving them, and by the witnesses.

The testament made in the form above prescribed shall be null six months after the return of the testator to a place where he has an opportunity to employ the ordinary forms.

Testaments made during a voyage at sea may be received by the captain or master, in presence of three witnesses taken by preference from among the passengers; in default of passengers, from among the crew.

The testament made at sea can contain no disposition in favor of any of the persons employed on board the vessel, unless they be relations of the testator.

This testament, like the preceding one, is subject to no other formality than that of being reduced to writing, and being signed by the testator, if he can write, by him who receives it, and by those in whose presence it is received.

The testament made at sea shall not be valid unless the testator dies at sea, or within three months after he has landed in a place where he is able to make it in the ordinary forms: La. 1597-1604.

§ 2702. **By Statute.** (A) In many states, any person may make a nuncupative will of either real or personal property during his last sickness, at home (or at the place where he has resided for ten days immediately before, except in New Hampshire), or at any place if suddenly taken ill while away from home and if he dies before returning: N.H. 193,16; Me. 74,18; N.J. *Wills*, 11; Pa. *Wills*, 8; Wis. 2292; Neb. 1,23,128; N.C. 2148; Tenn. 3006; Mo. 3984; Ark. 6504; Tex. 1849,4862-3; Wash. 1329; Ga. 2479; Ala. 2299; Miss. 1266.

(B) So, in others, any person may make a nuncupative will, but it must be made (1) during the last sickness of the deceased: O. 5991; Ind. 2577; Ill. 148,15; Kan. 117,69; Nev. 816; Col. 3483; S.C. 1876; Fla. 200,10.

And (2) in the house or place where he shall die: S.C.

(3) In Delaware, any person may make a nuncupative during his last illness, valid if he die within three days thereafter or do not recover sufficiently to make an ordinary will: Del. 84,5.

And in others, (4) any person in expectation of immediate death from an injury received the same day: Cal. 6289; Dak. Civ. C. 688; Mon. Prob. C. 450; Uta.<sup>a</sup> 1884,44,1,1,17.

(C) In some, a verbal will may be made by any person, at any time, and if duly made be valid as hereinafter prescribed: Mich. 5790; Io. 2324; N.M. 1379; Ariz. 1494.

(D) The custom of making verbal testaments—that is to say, resulting from the mere deposition of witnesses who were present when the testator made known to them his will, without his having committed it or caused it to be committed to writing—is abrogated.

Nuncupative testaments may be made by public act or by act under private signature: La. 1576-7.

NOTE. — <sup>a</sup> Or within twenty-four hours previously.



§ 2703. **Execution.** In most states, no nuncupative will is valid <sup>a</sup> or effectual to pass any property unless proved by the oath of witnesses who were present and requested <sup>b</sup> by the testator to be witnesses that such was his will. In most of these states, there must be two such witnesses: N.J. <sup>b</sup> *Wills*, 11; Pa. <sup>b</sup> *Wills*, 8; O. <sup>c</sup> 5991; Ind. <sup>c</sup> 2577; Ill. <sup>c</sup> 148,15; Mich. <sup>c</sup> 5790; Io. 2324; Kan. <sup>c</sup> 117, 69; Del. 84,5; N.C. 2148; Tenn. <sup>b</sup> 3006; Mo. <sup>c</sup> 3984; Ark. <sup>c</sup> 6504; Cal. <sup>b</sup> 6289; Nev. <sup>c</sup> 816; Col. 3483; Wash. <sup>c</sup> 1329; Dak. <sup>b</sup> Civ. C. 688; Mon. <sup>b</sup> Prob. C. 450; Uta. <sup>b</sup> 1884, 44,1,1,17; Miss. <sup>c</sup> 1266; Ariz. 1494. And in most of the others, three: N.H. 193, 16; Me. 74,20; Wis. <sup>c</sup> 2292; Neb. <sup>c</sup> 1,23,128; Tex. <sup>c</sup> 1850,4863; S.C. 1876; Ga. <sup>c</sup> 2479; Fla. <sup>c</sup> 200,10; N.M. 1381. But in one, the number is not specified: Ala. <sup>c</sup> 2299.

The witnesses must be present, see and hear the testator speak, and each one of them shall understand clearly and distinctly every part of the will: N.M. 1383. And in Illinois, there must also be two other disinterested witnesses to prove that the same was committed to writing within ten days of the death: Ill. 148,15; and in New Mexico, also two other witnesses possessing the same qualifications to testify to the sanity of the testator.

In two states, all such witnesses as are and ought to be allowed good witnesses upon trial at law by the laws and customs of the state are deemed good witnesses to prove any nuncupative will, or anything relating thereto: N.J. *Wills*, 15; S.C. 1878.

The nuncupative testaments by public act must be received by a notary public, in presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place.

This testament must be dictated by the testator, and written by the notary as it is dictated.

It must then be read to the testator in presence of the witnesses.

Express mention is made of the whole, observing that all those formalities must be fulfilled at one time, without interruption, and without turning aside to other acts.

This testament must be signed by the testator; if he declares that he knows not how, or is not able to sign, express mention of his declaration, as also of the cause that hinders him from signing, must be made in the act.

This testament must be signed by the witnesses, or at least by one of them for all, if the others cannot write.

A nuncupative testament, under private signature, must be written by the testator himself, or by any other person from his dictation, or even by one of the witnesses in presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place.

Or it will suffice if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written, out of their presence, declaring to them that that paper contains his last will.

In either case, the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest, in presence of the testator; it must be signed by the testator, if he knows how, or is able to sign, and by the witnesses, or at least by two of them, in case the others know not how to sign, and those of the witnesses who do not know how to sign must affix their mark.

This testament is subject to no other formality than those above prescribed.

In the country, it suffices for the validity of nuncupative testaments under private signature, if the testament be passed in the presence of three witnesses residing in the place where the testament is received, or of five witnesses residing out of that place, provided that in this case a greater number of witnesses cannot be had: La. 1578-1583.

NOTES. — <sup>a</sup> In the noted states, wills not so executed will yet be valid to pass sums not exceeding (1) \$30: Tex.; (2) \$50: S.C.; (3) \$80: N.J.; (4) \$100: N.H., Me., Pa., Miss.; (5) \$150: Wis., Neb.; (6) \$200: N.C., Wash.; (7) \$250: Tenn.; (8) \$300: Md. <sup>b</sup> Or one of whom was requested, in the noted states; <sup>c</sup> or any person present.

§ 2704. **Must be Written Out.** (A) In most states, all nuncupative wills must be reduced to writing (1) within six days of the time the words are spoken: N.H. 193,16; Me. 74,19; Vt. 2043; N.J. *Wills*, 12; Pa. *Decedents' Estates*, 6;

Wis. 2293; Neb. 1,23,129; Tex. 1849,4865; Ore. 64,15; S.C. 1877; Ala. 2302; Miss. 1267; Fla. 200,11.

(2) Within three days: Del. 84,5; (3) within ten days: O.; Kan.; N.C. 2148; Tenn. 3007; (4) within fifteen days: Ind.; Ark. 6506; (5) within thirty days: Mo. 3986; Cal. 6290; Ore.; Dak. Prob. C. 30; Mon. Prob. C. 41; Uta. 1884,44,1,1,18; Ga. 2480; (6) within twenty days: Ill.; (7) within a reasonable time: Col. 3483; (8) within sixty days: Ky.; (9) at the time of execution: La. 1575.

And when so reduced it must be subscribed by the witnesses: O., Del.

(B) Unless the words be written out as required above, (1) the will is absolutely void: O., Ind., Ill., Kan., Del., Ark., Cal., Ore., Dak., Uta., Ga.

Or, (2) in other states, no testimony can in such event be received to prove such nuncupative will after six months from the time when the words were spoken: N.H., Me., Vt., N.J., Pa., Wis., Neb., Md., N.C., Tenn., Mo., Tex., S.C., Ala., Miss., Fla.

For the time within which such will must be proved, see Part IV., Division I.

§ 2705. **Property Devisable.** Such nuncupative will can dispose, in many states, only of personal property: N.H.; Pa.; O.; Ill.; Kan.; Del.; Col. 3483; Ala. 2298. So, only of personal property and wages: Me., Vt., Md. See also § 2700.

And in several, no nuncupative will (except of a soldier or sailor, in Vermont, Michigan, and Delaware) can be effectual to pass property of a greater value than (1) \$100: Ind.; (2) \$200: Vt. 2043; Del.; Mo. 3984; (3) \$300: Mich. 5790; Io. 2324; Ariz. 1494; (4) \$500: Ark. 6504; Ala.; (5) \$1,000: Cal. 6289; Nev. 816; Dak. Civ. C. 688; Mon. Prob. C. 450; Uta. 1884,44,1,1,17.

But in two states, all property, real and personal, may pass by a nuncupative will properly made and proved: Ga. 2482; N.M. 1379.

So, it would seem, in the states not mentioned above, where the laws are silent; but it may be doubted whether this would follow as to realty.

## Art. 271. Universal Legacies and Disinheritance.

§ 2710. **Louisiana Law.** Testamentary dispositions are either universal, under a universal title, or under a particular title.

Each of these dispositions, whether it be made under the name of institution of heir, or under the name of legacy, shall have its effect, according to the rules hereafter established for universal legacies, for legacies under a universal title, and for particular legacies.

A universal legacy is a testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease.

When at the decease of the testator, there are heirs to whom a certain proportion of the property is reserved by law, these heirs are seized of right by his death of all the effects of the succession, and the universal legatee is bound to demand of them the delivery of the effects included in the testament.

Nevertheless, in the same case the universal legatee will have the enjoyment of the effects included in the testament from the day of the decease, if the demand for the delivery has been made within a year from that period; if not, enjoyment will only commence from the day of the judicial demand, or from the day on which the delivery has been agreed upon.

When, at the decease of the testator, there are no heirs to whom a proportion of his property is reserved by law, the universal legatee, by the death of the testator, is seized of right of the effects of the succession, without being bound to demand the delivery thereof.

When all the forced heirs have been legally disinherited, the heir instituted universally is seized in full right of the succession without being bound to demand the delivery of it, in the same manner as if there were no forced heirs, conformably to what is prescribed above.

The universal legatee who concurs with an heir to whom the law has reserved a certain proportion of the effects of the succession, is bound for the debts and charges of the succession personally for his part and proportion, and in case of mortgage on his part, for the whole; and he is bound to discharge all the legacies, saving the case of reduction: La. 1605-1611.

§ 2711. **Of Legacies under a Universal Title.** The legacy under a universal title is that by which a testator bequeaths a certain proportion of the effects of which the law permits him to dispose, as a half, a third, or all his immovables, or all his movables, or a fixed proportion of all his immovables or of all his movables.

Legatees under a universal title are bound to demand the delivery of the heirs to whom a proportion of the effects is reserved by law ; in default of heirs, of the universal legatees ; and in default of those, of the next heirs in the order established in the title : *Of Successions*.

The legatee under a universal title is bound, like the universal legatee, for the debts and charges of the succession, personally for his part, and in case of mortgage on his portion, for the whole.

When the testator has disposed only of a proportion of the disposable portion, and has done it under a universal title, the legatee under this title is bound to contribute with his natural heirs to the payment of particular legacies.

In no case can the instituted heir, under whatever title he may be, claim the falcidian portion, — that is, the fourth which the law authorized the testamentary heir to retain from the succession, in case more than three fourths of it were absorbed by the legacies ; this right being abolished : La. 1612–1616.

§ 2712. **Particular Legacies.** Every legacy, not included in the definition before given of universal legacies and legacies under a universal title, is a legacy under a particular title.

Every legacy under a particular title gives to the legatee, from the day of the testator's death, a right to the thing bequeathed, which right may be transmitted to his heirs or assigns ; and this takes place as well in testamentary dispositions, universal or under a universal title, as in those made under a particular title.

Nevertheless, the particular legatee can take possession of the thing bequeathed, or claim the proceeds or interest thereof, only from the day the demand of delivery was formed, according to the order hereinbefore established, or from the day on which that delivery was voluntarily granted to him.

The legatee is not bound to demand the delivery of the legacy if the thing bequeathed to him is in his possession at the time of the opening of the succession, but he is bound to give it up for the purpose of contributing to the payment of debts, in case it be liable for any.

Neither is the testamentary executor, who has the seizin of the effects of the succession, and who is at the same time a legatee, bound to demand the delivery of his legacy : he can retain it in his possession subject to the same restitution : La. 1625–1628.

## Art. 272. Disinheritance.

§ 2720. **Louisiana Law.** Forced heirs may be deprived of their legitime, or legal portion, and of the seizin granted them by law by the effect of disinheritance by the testator, for just cause, and in the manner hereafter prescribed.

A disinheritance, to be valid, must be made in one of the forms prescribed for testaments.

The disinheritance must be made by name and expressly, and for a just cause, otherwise it is null.

There are no just causes for disinheritance but those expressly recognized by law in the following articles.

The just causes for which parents may disinherit their children are ten in number, to wit : —

1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent ; but a mere threat is not sufficient.
2. If the child has been guilty, towards a parent, of cruelty, or a crime of grievous injury.
3. If the child has attempted to take the life of either parent.
4. If the child has accused a parent of any capital crime, except, however, that of high treason.
5. If the child has refused sustenance to a parent, having means to afford it.
6. If the child has neglected to take care of a parent become insane.
7. If the child refused to ransom them when detained in captivity.
8. If the child used any act of violence or coercion to hinder a parent from making a will.
9. If the child has refused to become security for a parent, having the means, in order to take him out of prison.
10. If the son or daughter, being a minor, marries without the consent of his or her parents.



The ascendants may disinherit their legitimate descendants coming to their succession, for the first nine causes expressed in the preceding paragraph, when the acts of ingratitude there mentioned have been committed towards them, instead of towards their parents; but they cannot disinherit their descendants for the last cause.

Legitimate children, dying without issue, and leaving a parent, cannot disinherit him or her, unless for the seven following causes, to wit:—

1. If the parent has accused the child of a capital crime, except, however, the crime of high treason.
2. If the parent has attempted to take the child's life.
3. If the parent has, by any violence or force, hindered the child from making a will.
4. If the parent has refused sustenance to the child in necessity, having the means of affording it.
5. If the parent has neglected to take care of the child while in a state of insanity.
6. If the parent has neglected to ransom the child when in captivity.
7. If the father or mother have attempted the life, the one of the other, in which case the child or descendant making a will may disinherit the one who has attempted the life of the other.

The testator must express in the will for what reasons he disinherited his forced heirs, or any of them, and the other heirs of the testator are moreover obliged to prove the facts on which the disinheritance is founded; otherwise it is null: La. 1617-1624.

Parents and ascendants have the right to disinherit their descendants for the following causes: (1) for having laid violent hands upon them, or for accusing them; (2) for having contrived their death in any manner; (3) for having given cause for the great waste of their estate; (4) for having accused them of any crime for which they should suffer death, be disgraced, or banished; (5) for having access to the wife or friend [mistress] of their parent, knowing her to be such; (6) for not furnishing them with the means to free them from prison, being able to do so; (7) for preventing them from making their will; (8) for becoming a common prostitute before arriving at the age of twenty-one, but not if that should happen after that age; (9) when the descendant will not succeed and aid his ancestor who may have become deranged and is roaming about; in this case his property shall revert to the person who may have succeeded and aided him; (10) for not redeeming them from their captivity, being able to do so; (11) for denying their parents: N.M. 1416.

Descendants may disinherit their ancestors (1) for having accused them of a crime punishable with death or banishment; (2) for having contrived their death by poison, etc.; (3) for having carnal intercourse with the wife or friend [mistress; *i.e.*, *amiga*] of the son or grandson; (4) for preventing them from disposing of their property according to law; (5) when the husband desires the death of the wife, and *vice versa*; (6) for not furnishing to their insane descendants their necessary subsistence; (7) for not redeeming them from captivity, being able to do so: N.M. 1412.

Brothers are not direct heirs of the deceased brothers; but should the testator, having no direct heirs, interpose an infamous or degraded person, they may contest the will as null in this portion of it; but shall lose that right (1) if they contrive the death of their brother; (2) for accusing him of a crime punishable with death, or other heavy penalty; (3) if they have caused him the loss of a greater portion of his property: N.M. 1418. A stranger will lose his right to inherit property devised or bequeathed to him by the testator (1) when the testator received his death at the hands or by the advice of any of his associates, and he receive the inheritance knowing the facts, before complaining to the judge that the offender may be punished; but if others should cause his death, he shall receive the inheritance; (2) if he operates under the testament before accusing the offenders, knowing who they are; (3) if the testator received his death by the hands of such person, or by his fault or advice; (4) for having had carnal intercourse with the testator's wife; (5) for endeavoring to annul the will; (6) if by request or order of the testator he delivers the inheritance to a person not allowed to inherit, knowing such person's incapacity: N.M. 1419.

## CHAPTER III.—INTERPRETATION OF WILLS.

**Art. 280. Construction.**

§ 2800. **General Principles.** The rules of interpretation in this article specified are to be observed, unless an intention to the contrary clearly appears in the will: Cal. 6319; Dak. Civ. C. 722; Mon. Prob. C. 476; Uta. 1884,44,1,2,3.

§ 2801. **Parol Evidence.** In construing wills, the court may hear parol evidence of the circumstances surrounding the testator at the time of its execution: Ga. 2457. And also parol evidence to explain all ambiguities, both latent and patent: Ga.

§ 2802. **Ambiguities.** In case of uncertainty arising upon the face of the will (patent ambiguity) as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations: Cal. 6318; Dak. Civ. C. 721; Mon. Prob. C. 475; Uta. 1884,44,1,2,2.

Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument: Cal. 6320; Dak. Civ. C. 723; Mon. Prob. C. 477; Uta. 1884,44,1,2,4.

All parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole: Cal. 6321; Dak. Civ. C. 724; Mon. Prob. C. 478; Uta. 1884,44,1,2,5.

But when there are inconsistent provisions in the same will, the latter ones prevail: Cal.; Dak.; Mon.; Uta.; Ga. 2476.

Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will: Cal. 6323; Dak. Civ. C. 726; Mon. Prob. C. 480; Uta. 1884,44,1,2,7.

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained: Cal. 6324; Dak. Civ. C. 727; Mon. Prob. C. 481; Uta. 1884,44,1,2,8.

They are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative: Cal. 6352; Dak. Civ. C. 728; Mon. Prob. C. 482; Uta. 1884,44,1,2,9; La. 1713.

Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy: Cal. 6326; Dak. Civ. C. 729; Mon. Prob. C. 483; Uta. 1884,44,1,2,10.

Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention: Cal. 6327; Dak. Civ. C. 730; Mon. Prob. C. 484; Uta. 1884,44,1,2,11.

They are not, however, necessary to give effect to any species of disposition by a will: Cal. 6328; Dak. Civ. C. 731; Mon. Prob. C. 485; Uta. 1884,44,1,2,12.

When applying a will it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of a testator as to his intentions cannot be received: Cal. 6340; Dak. Civ. C. 743; Mon. Prob. C. 497; Uta. 1884,44,1,2,24.

NOTE. — <sup>a</sup> See § 1474.

§ 2803. **Intention of Testator.** All courts and others concerned in the execution of wills shall have due regard to the direction of the will, and the true intent and meaning of the testator in all matters brought before them: Mo. 4008; Ore. 64,32; Wash. 1338; Ga. 2456.

And to this end the court may transpose sentences or clauses, change connecting conjunctions, or supply omitted words in cases where the clause, as it stands, is unintelligible or inoperative, and the proof of intention is clear and unquestionable. But if the clause as it stands may have effect, it shall be so construed, however well satisfied the court may be of a different testamentary intention : Ga. 2456.

A will is to be construed according to the intention of the testator ; and when his intentions cannot have effect to their full extent, they must have effect as far as possible : Cal. 6317 ; Dak. Civ. C. 720 ; Mon. Prob. C. 474 ; Uta. 1884,44,1,2,1 ; La. 1712.

A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of, or reference to, its contents in another part of the will : Cal. 6322 ; Dak. Civ. C. 725 ; Mon. Prob. C. 479 ; Uta. 1884,44,1,2,6.

In case of ambiguity or obscurity in the description of the legatee ; as, for instance, when a legacy is bequeathed to one of two individuals bearing the same name, the inquiry shall be which of the two was upon terms of the most intimate intercourse or connection with the testator, and to him shall the legacy be decreed. When, from the terms made use of by the testator, his intention cannot be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention. A mistake in the name of an object bequeathed is of no moment, if it can be ascertained what the thing was which the testator intended to bequeath. If it cannot be ascertained whether a greater or less quantity has been bequeathed, it must be decided for the least : La. 1714-1717.

A general legacy does not embrace the things included under the genus which have been acquired after the death of the testator, though by his order. A general legacy does not embrace the things included under the genus which have been bequeathed in particular to other persons. A disposition couched in terms present and past does not extend to that which comes afterwards. For example, a legacy of all the books a testator possesses does not include those which he has purchased after the date of the testament : La. 1718-1720.

A disposition couched in the future tense refers to the time of the death of the testator. Thus, a legacy of all the furniture there shall be in the house of the testator includes that which he has purchased since the date of the testament as well as the rest. A disposition, the terms of which express no time, neither past nor future, refers to the time of making the will. Thus, when the testator expresses simply that he bequeaths his plate to such a one, the plate that he possessed at the date of the will is only included : La. 1721-2.

When a person has ordered two things which are contradictory, that which is last written is presumed to be the will of the testator in which he has persevered, and a derogation to what has before been written to the contrary : La. 1723.

When the legacy is of an indeterminate thing, the heir is not obliged to give it of the best quality, nor can he offer it of the worst : La. 1640.

§ 2804. **Devise to a Class.** (See also § 2824.) A testamentary disposition to a class includes every person answering the description at the testator's death ; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed : Cal. 6337 ; Dak. Civ. C. 740 ; Mon. Prob. C. 494 ; Uta. 1884,44,1,2,21.

§ 2805. **Conversion.** When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death : Cal. 6338 ; Dak. Civ. C. 741 ; Mon. Prob. C. 495 ; Uta. 1884,44,1,2,22.

§ 2806. **Will Speaks from Death.** The general principle is laid down by the statutes of several states that a will is to be construed, both as to real and personal estate, as if made immediately before the death of the testator : Pa. 1879,101, 1 ; Va. 118,11 ; W.Va. 1882,84,10 ; N.C. 2141 ; Ky. 113,16 ; Tenn. 3035. So,



specially, words of survivorship refer to the death of the testator in order to vest remainders : Ga. 2269.

Unless, in all the above states, a contrary intention appear in the will.

So, specially, the legacy bequeathed shall be delivered with everything that appertains to it, in the condition in which it was on the day of the testator's decease : La. 1636.

Words in a will referring to death or survivorship simply relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession : Cal. 6336 ; Dak. Civ. C. 739 ; Mon. Prob. C. 493 ; Uta. 1884, 44,1,2,20.

§ 2807. **Form of Devise, etc.<sup>a</sup>** In Georgia, it is enacted that no particular words are necessary to a devise or bequest : Ga. 2454.

*Lend* will be construed to mean "give," unless restricted by the context : Ga.

An unconditional gift of the entire income of property or interest accruing from a fund will be construed into a gift of the property or fund, unless the provisions of the will require a more limited meaning : Ga. 2455.

NOTE. — <sup>a</sup> Compare § 1474. For the execution of powers, see § 1658.

§ 2808. **Construction of Devises, etc.** (A) Every devise of real estate is, in most states, construed to convey a fee, or all the estate or interest therein, legal or equitable, which the testator could lawfully convey, *unless* it clearly appear by the will that the testator intended to convey a less estate (see also § 1474) : N.H. 193,4 ; Mass. 127,24 ; Me. 74,16 ; Vt. 2041 ; R.I. 182,5 ; Pa. *Wills*, 10 ; O. 5970 ; Mich. 5786 ; Wis. 2278 ; Minn. 47,2 ; Kan. 117,54 ; Neb. 1,23,124 ; Md. 49,8 ; Del. 84,24 ; N.C. 2180 ; Tenn. 3005 ; Cal. 6311 ; Nev. 830 ; Wash. 1332 ; Dak. Civ. C. 715 ; Mon. Prob. C. 471 ; Wy. 1882,107,2 ; Uta. 1884,44,1,36 ; Ala. 2278 ; Ariz. 1490.

(B) In two others, all devises of land where the words *heirs and assigns* are omitted, and nothing to show that it was intended to convey an estate for life only, and no remainder over after death of the devisee, are construed to create a fee-simple : Mo. 4004 ; Ore. 64,29.

So, in Indiana, every devise in terms denoting the testator's intention to devise his entire interest in all real and personal property : Ind. 2567.

In a devise to a person for life, unless the remainder is especially devised to the heirs of the devisee, it reverts to the heirs of the testator : Wash. 1333.

(C) In several states, a devise of the land of the testator, or his land in a certain place or in possession of a certain person, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it, is construed to include his leasehold estate, or any part of it to which the description extends, as well as freehold estate, unless a contrary intention appear in the will : Va. 118,15 ; W.Va. 1882,84,14 ; Ky. 113,21.

As to whether a devise is good execution of a power, see § 248.

"Dying without issue" in wills. For the interpretation of these words, see § 1415. Rule in Shelley's Case. See § 1406.

§ 2809. **After-Acquired Property.** As a corollary from § 2806, it would seem to follow, in those states where that principle holds, that a will passes all the property, real or personal, which the testator possessed at the time of his death, even if acquired subsequently to the making of the will.<sup>a</sup> (A) And this law is expressly enacted, as to real property, in four states : Md. 49,13 ; Tenn. 3035 ; S.C. 1850.

(B) So, in many others, of all the real estate<sup>b</sup> so acquired subsequently, unless a contrary intention clearly appear in the will : Ct. 1885,110,130 ; N.J. *Wills*, 24 ; Pa. *Wills*, 11 ; Va. 118,2 and 11 ; Tenn. ; Cal. 6312 ; Dak. Civ. C. 719 ; Mon. Prob. C. 472 ; Uta. 1884,44,1,1,37 ; Ga. 2461.

(C) After-acquired *real* property only passes by the will when it appears in the will that such was the testator's intention: N.H. 193,2; Me. 74,5; Vt. 2040; Ind.<sup>a</sup> c 2567; Io. 2323; Cal.<sup>a,c</sup> 6331; Ala.<sup>a,c</sup> 2277. And in others, such must "manifestly and clearly," or "by express terms," appear to be the testator's intention: Mass. 127,25; R.I. 182,1; O.<sup>a</sup> 5969; Mich. 5787; Wis. 2279; Minn. 47,3; Kan.<sup>a</sup> 117,53; Neb. 1,23,125; Del. 84,25; Nev. 831; Wash. 1334; Wy. 1882,107,3; Ariz. 1491.

(D) A devise of residue of the testator's real (or personal) property passes all the real (or personal) property which he was entitled to devise (or bequeath) at the time of his death, not otherwise effectually devised (or bequeathed) by his will: Cal. 6332-3; Dak. Civ. C. 735-6; Mon. Prob. C. 489-490; Uta. 1884,44,1,2,16-17. But in Florida, a testator can only devise real property in possession or remainder or reversion at the time of the execution: Fla. 200,1.

(E) A devise or bequest of all the testator's real or personal property in express terms, or in any terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death: N.Y. 2,6,1,5; Cal.<sup>c</sup> 6331; Dak. Civ. C. 719; 734; Mon.<sup>c</sup> Prob. C. 488; Uta.<sup>c</sup> 1884,44,1,2,15; Ala.<sup>c</sup> 2277.

When the person who has bequeathed the property of an immovable, has afterwards augmented it by new purchases, the property so purchased, though it be contiguous, shall not, without a new disposition, be considered as making part of the legacy. It is otherwise as to improvements or new buildings raised on the ground bequeathed or an enclosure of which the testator has enlarged the area: La. 1637.

NOTES. — <sup>a</sup> The above provisions would seem to hold as to personal property in all the states without exception; and in the states so noted the provision is expressly extended to personal property. <sup>b</sup> But in other states noted, the provision applies to personal property only. See § 2634. <sup>c</sup> As when the testator devises *all* his real estate, in Ind., Cal., Mon., Uta., Ala. This specification would seem to render the law of these states practically identical with those in A, and the limitations in B and C nugatory; for it is obvious that, unless a testator devise or divide *all* his estate, or *all* the residue of it, any estate acquired after the will will pass as intestate estate; not, however, because the will does not speak from the date of death, but because such after-acquired property is *undevise*d, and will therefore pass accordingly. In these noted states, therefore, the law is practically the same as in the states which have enacted the principal provision, A.

§ 2810. **Subsequent Conveyance.** (A) In many states, it is provided that no conveyance or other act subsequent to the execution of a will, by which the testator's estate is altered, but not wholly divested (except such acts of revocation as are described in § 2672 for these states respectively), shall prevent its operation with respect to such interest in the estate comprised in the will as the testator may have power to dispose of by will at the time of his death: N.Y. 2,6,1,47; O. 5956; Ind. 2566; Kan. 117,33; Va. 118,10; W.Va. 1882,84,9; N.C. 2179; Ky. 113,12; Cal. 6303; Dak. Civ. C. 712; Mon. Prob. C. 463; Uta. 1884,44,1,1,28.

But such conveyance is, in several, deemed a revocation of the devise or bequest of the estate affected (1) if it is so expressed in the conveyance: N.Y.; O.; Ind.; Kan.; Cal. 6304; Dak. Civ. C. 713; Mon. Prob. C. 464; Uta. 1884,44,1,1,29.

Or (2) when the provisions of the conveyance are totally inconsistent with the devise or bequest: N.Y.<sup>a</sup> 2,6,1,48; O.<sup>a</sup> 5957; Ind.;<sup>a</sup> Kan.<sup>a</sup> 117,34; Cal.;<sup>a</sup> Dak.;<sup>a</sup> Mon.; Uta.<sup>a</sup>

(3) In any case, even though the subsequent sale or donation be null, and the thing have returned to the testator's possession: La. 1695. And so, also, the sale made by the testator of an object bequeathed, even by act under private signature, after the date of the testament, produces a revocation of the legacy, if the act be entirely written, signed, and dated with his hand: La. 1696.

(B) In many, a charge or incumbrance upon any real or personal estate is not deemed a revocation of any will relating to such estate which has been previ-

ously executed ; but the devises or bequests take effect subject to such charge : N.Y. 2,6,1,46 ; O. 5955 ; Ind. 2564 ; Kan. 117,32 ; Mo. 3967 ; Ark. 6498 ; Cal. 6302 ; Ore. 64,9 ; Nev. 824 ; Wash. 1324 ; Dak. Civ. C. 711 ; Mon. Prob. C. 462 ; Uta. 1884,44,1,1,27 ; Ala. 2288. Unless it appear in the will or instrument that such was the intention of the testator : Ala.

If, after the execution of a will devising any property, the testator make a conveyance of his interest therein, and take back a new estate therein, such new estate shall pass by his will to the person to whom the original estate or interest was devised, unless it appear from either the will or conveyance that the testator intended such conveyance to act as a revocation of the devise : Ind. 2565 ; Ala. 2289.

(C) In many, any bond, contract, agreement, or covenant made by a testator to convey any property devised or bequeathed in his will, previously made, is not deemed a revocation of such devise or bequest, but the property passes under the will subject to such remedies, against the devisees or legatees, on the bond, for specific performance or otherwise, as might be had against the heirs or next of kin, had the property descended to them : N.Y. 2,6,1,45 ; O. 5954 ; Ind.<sup>b, c</sup> 2563 ; Kan. 117,31 ; Mo. 3966 ; Ark. 6497 ; Cal. 6301 ; Ore. 64,8 ; Nev. 823 ; Wash. 1323 ; Dak. Civ. C. 710 ; Mon. Prob. C. 461 ; Uta. 1884,44,1,1,26 ; Ala.<sup>b, c</sup> 2287.

But the purchase-money, when recovered by the executor, shall be paid to the devisees : Ind., Ala.

NOTES. — <sup>a</sup> Except when such conveyance depends on a condition or contingency which is not performed or does not happen. <sup>b</sup> Except when it appears from the contract that it was intended as a revocation. <sup>c</sup> When any part of the consideration remains unpaid at death.

**§ 2811. Ademption of Legacies.** A legacy is adeemed or destroyed whenever the testator, after making his will, delivers over the property or pays the money bequeathed to the legatee, either expressly or by implication, in lieu of the legacy given ; or when the testator conveys to another the specific property bequeathed, and does not afterwards become possessed of the same, or otherwise places it out of the power of the executor to deliver over the legacy. If the testator attempts to convey and fails for any cause, the legacy is still valid : Ga. 2463.

Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing : Cal. 6351 ; Dak. Civ. C. 754 ; Mon. Prob. C. 508 ; Uta. 1884,44,1,2,35.

If the testator exchanges the property bequeathed for other of the like character, or merely changes the investment of a fund bequeathed, the law deems the intention to be to substitute the one for the other, and the legacy shall not fail : Ga. 2464.

The conversion, in whole or part, of money or property, or the proceeds of property devised to one of the testator's heirs, into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise, unless the testator so intended ; but the devisee shall have and receive the value of such devise, unless a contrary intention on the part of the testator appear from the will, or by parol or other evidence : Ky. 50,3,1.

So, the removal of property devised does not operate as ademption, unless such intention appear as above : Ky. 50,3,2.

When the testator has bequeathed a thing belonging to another person, the legacy shall be null, whether the testator knew or knew not that the thing did not belong to him : La. 1639.

**§ 2812. Advancement of Devises.** In three states, a provision for or advancement to any person shall be deemed a satisfaction in whole or in part of a devise or bequest to such person contained in a previous will, if it would so be deemed in case the devisee, etc., were a child, or if it appear from parol or other evidence to have been so intended : Va. 118,12 ; W.Va. 1882,84,11 ; Ky. 113,17.

**§ 2813. Destruction of Legacy.** The legacy falls if the thing bequeathed has totally perished during the lifetime of the testator : La. 1700.

It likewise falls if the thing has perished since his death, without the act or fault of the



heir, although the latter may have delayed to deliver it, when it must equally have perished in the possession of the legatee : La. 1701.

In case of an alternative legacy of two things, if one of them perishes, the legacy subsists as to that which remains : La. 1702.

The legacy of a certain object is extinguished by the loss of the object ; but if the object is only destroyed in part, as if a house bequeathed has been destroyed by fire, the legacy subsists for what remains, — that is, for the land on which it was situated : La. 1643.

§ 2814. **Dispossession.** Notwithstanding the above principles, it is laid down in a few states that when a person devises lands of which he is afterwards disseized, such lands pass to the devisee in like manner as they would have passed to the heirs had the person died intestate : N.H. 193,3 ; Mass. 127,26 ; Me. 74,4. And the devisees have all the remedies for recovery of the lands that the heirs would have had : Mass., Me. Compare also §§ 1401,2630.

§ 2815. **Vesting of Legacies.** In Georgia, words of survivorship are held to refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears : Ga. 2269. See also § 2806.

Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death : Cal. 6341 ; Dak. Civ. C. 744 ; Mon. Prob. C. 498 ; Uta. 1884,44,1,2,25 ; La.<sup>a</sup> 940. When vested, a testamentary disposition cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose : Cal. 6342 ; Dak. Civ. C. 745 ; Mon. Prob. C. 499 ; Uta. 1884,44,1,2,26.

In Maryland, where a bequest of personal property is made to a female, and directed by the will to be paid on her attaining full age, she may demand it on arriving at eighteen or being married : Md. 50,189.

Where an annuity, or the interest, use, rent, or income of property, real or personal, is given by will to, or in trust for, a person for life or until the happening of a contingent event, such person is entitled to receive and enjoy the same from and after the death of the testator, unless otherwise provided in the will : Mass. 136,24 ; La. 1631.

If the person entitled to such annuity, etc., dies, or the event happens during any year, an apportionment is made of such annuity, etc., accrued in the year following such last payment : Mass. 136,25. Compare § 2027.

No suit to recover such annuity, etc., can, however, be brought against the executor until one year from the time his bond was given : Mass.

When a testator bequeaths the use, for life or a term of years, of any live-stock, provisions, wearing-apparel, or other personal property which will necessarily be consumed in the using, such bequest passes an absolute estate in such property : Ct. 1885,110,150. See § 1330.

NOTE. — <sup>a</sup> Except as to particular legatees.

§ 2816. **Interest on Legacies.** Legacies bear interest from the time when they are due and payable (see Probate Code) : Ky. 50,2,2 ; Cal.<sup>a</sup> 6369,6370 ; Dak.<sup>a</sup> Civ. C. 767-8 ; Mon.<sup>a</sup> Prob. C. 521-2 ; Uta.<sup>a</sup> 1884,44,1,3,13-14. So, in case of the bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death : Cal.<sup>a</sup> 6366 ; Dak.<sup>a</sup> Civ. C. 764 ; Mon.<sup>a</sup> Prob. C. 518 ; Uta.<sup>a</sup> 1884,44,1,3,10 ; *Except* that legacies for maintenance or to the testator's widow bear interest from the testator's decease : Cal.<sup>a</sup> Dak., Mon., Uta.<sup>a</sup>

A general legacy bears interest from the expiration of one year after the testator's death : Ga.<sup>a</sup> 2460. The income, profits, or increase of specific legacies, as a general rule, go with the legacy, even though the time of enjoyment or vesting be postponed : Ga. 2459.

NOTE. — <sup>a</sup> Unless otherwise expressly provided by the will.

§ 2817. **Accretion.** The right of accretion relative to testamentary dispositions shall no longer subsist, except as herein.

Accretion shall take place for the benefit of the legatees in case of the legacy being made to several *conjunctly*.

The legacy shall be reputed to be made conjointly when it is made by one and the same disposition without the testator's having assigned the part of such co-legatee in the thing bequeathed.

It shall also be reputed to be made conjointly, when a thing, not susceptible of being divided without deterioration, has been given by the same act to several persons, even separately: La. 1706-8.

**§ 2818. Property Undevised.** Undevised or unbequeathed property is, in most states, distributed like intestate estate under the laws of descent and distribution: Me. 74,2; R.I. 182,13; Ill. 39,12; Mich. 5785,5708; Wis. 2277,2281; Minn. 47,1 and 4; Neb. 1,23,123 and 126; Del. 89,35; Va. 119,1; W.Va. 1882, 94,1; Tex. 1948; Cal. 6270; Col. 3521; Dak. Civ. C. 683; Mon. Prob. C. 432; Uta. 1884,44,1,1,2; Ala. 2281; Miss. 1274; Fla. 2,33; 92,13; La. 1709; Ariz. 1489,1492. Compare also § 3010.

The same law applies to property acquired since the execution of the will, and which does not pass under it, according to the provisions of § 2809: R.I. 187,21. So, of course, in all states.

Or to legacies and devises unaccepted by the legatee: La.

But in Rhode Island, in making the division of undevised property, devises or bequests made in the will to the heirs inheriting such property are to be treated like advancements.

**§ 2819. Devise of Mortgaged Property.** When any person shall have devised his estate, or any part thereof, and any of his real estate subject to a mortgage executed by such testator shall descend to an heir or pass to a devisee, and no specific direction is given in the will for the payment of such mortgage, if such testator shall have charged any particular part of his estate, real or personal, with the payment of his debts, such mortgage shall be considered a part of such debts: Ind. 2573. If the will contain no direction as to what part of his estate shall be taken for the payment of debts, and any part of his personal estate shall be unbequeathed or undisposed of by his will, such mortgage shall be included among his debts, to be discharged out of such estate: Ind.

For other states, see *Payment of Debts* in the Probate Code, Part IV.

If prior to the testament or subsequently the thing has been mortgaged by the testator for his own debt or for that of another, or if it be burdened with an usufruct, he who is to pay the legacy is not bound to discharge the thing bequeathed of the incumbrance, unless he be required to do it by an express disposition of the testator: La. 1633.

Legatees under a universal title and legatees under a particular title benefit by the failure of those particular legacies which they were bound to discharge: La. 1704.

**§ 2820. Devises with Charge.** When any property shall be devised subject to or upon the payment by the devisee to another of a sum of money, or his doing some other thing, the latter shall have a lien on the legacy for the sum so to be paid, or the value of the thing to be done: Ky. 50,2,3.

See also in Probate Code.

**§ 2821. Disclaimer.** A devisee may disclaim by deed acknowledged or proved and recorded in the clerk's office of the county where probate was had, within a year after notice of probate: Ky. 50,2,4.

**§ 2822. Failure or Lapse.** (A) In many states, when a devise lapses by death of the devisee, or is void, or is for any reason incapable of taking effect, the real estate comprised in it passes under the residuary devise, if any: Pa. 1879,101,2; Va. 118,14; W.Va. 1882,84,13; N.C. 2142.

Unless a different disposition is required by the will: Va., W.Va., N.C. And if no such residuary devise, it goes to the heirs-at-law: W.Va.

(B) But in one other, both real and personal estate, in such case, are not included in the residuary devise, but pass like intestate estate, unless a contrary intention appear in the will: Ky. 113,20.

(C) Except as provided in § 2823, if a devisee or legatee dies during the lifetime of

the testator, the testamentary disposition to him fails (unless an intention appears to substitute some other in his place: Cal., Dak., Mon., Uta.): Cal. 6343; Dak. Civ. C. 746; Mon. Prob. C. 500; Uta. 1884,44,1,2,27; La. 1697.

The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder who survive the testator: Cal. 6344; Dak. Civ. C. 747; Mon. Prob. C. 501; Uta. 1884,44,1,2,28.

If a devise be made to two or more persons jointly, and one or more of them die without issue, the part so devised to him does not go to the other joint devisees, but to the heirs-at-law, unless the will otherwise provide: W.Va. 1882,84,12.

Any real estate devised to a person or corporation incapable of taking it descends to the nearest of kin capable of taking; or if he have no heirs competent to take, to the residuary devisee; if none, to the husband or wife; if none, it escheats: Ala. 2276.

Every testamentary disposition made on a condition depending on an uncertain event, so that in the intention of the testator the disposition shall take place only inasmuch as the event shall or shall not happen, is without effect, if the instituted heir or the legatee dies before the accomplishment of the condition: La. 1698.

A condition which, in the intention of the testator, does but suspend the execution of the disposition, does not hinder the instituted heir or the legatee from having a right acquired and transmissible to his heirs: La. 1699.

The testamentary disposition falls, when the instituted heir or the legatee rejects it, or is incapable of receiving it: La. 1703.

Legatees under a universal title, and legatees under a particular title, benefit by the failure of those particular legacies which they were bound to discharge: La. 1704.

§ 2823. **Representation by Legatee's Heirs.** (A) In most states, when a devise or bequest is made to a child or other descendant of the testator, and such descendant die first, leaving issue who survive the testator, such issue take the estate left to the parent or ancestor: N.H. 193,12; Mass. 127,23; Me. 74,10; Vt. 2244; R.I. 182,14; N.Y. 2,6,1,52; N.J. *Wills*, 20; Pa. *Wills*, 14; O. 5971; Ind. 2571; Mich. 5812; Wis. 2289; Io. 2337; Minn. 47,25; Kan. 117,55; Neb. 1,23, 151; Md. 49,7; Va. 118,13; W.Va. 1882,84,12; N.C. 2144; Ky. 113,18; Tenn. 3036,3276; Mo. 3971; Ark. 6502; Tex. 4871; Cal. 6310; Ore. 64,12; Nev. 829; Col. 3489; Wash. 1327; Dak. Civ. C. 716; Mon. Prob. C. 470; Uta. 1884,44, 1,1,35; Ga. 2462; Ala. 2290; Miss. 1265; Ariz. 1505.

So, in two others, but only when the devise or bequest is made to a child or grandchild of the testator: Ct. 1885,110,134; Ill. 39,11; or a brother or sister: Ct. So, in one other, but only when made to a child of the testator: S.C. 1865; 1883,200.

(B) So, in many, when the devise or bequest is made to any relation of the testator, his issue take as above: N.H., Mass., Me., Vt., R.I., O., Mich., Wis., Io., Minn., Kan., Neb., Md., Va., W.Va., Ky., Tenn., Mo., Cal., Ore., Nev., Wash., Dak., Mon., Uta., Ga., Ariz.

So, in one, only when the devise is made to brothers or sisters, or children of deceased brothers or sisters, when there are no lineal descendants of the testator: Pa. *Wills*, 2815.

(C) And in several, the principle is extended to the case of a devise or bequest to any person whatever, and the issue of such person take accordingly: N.H., R.I., Io., Md., Va., W.Va., Ky., Tenn., Ga.

Unless a different disposition is made by the will: N.H.; Mass.; N.J.; Pa.; O.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Va.; W.Va.; N.C.; Ky.; Tenn. 3277; Ariz.

So, (D) when a devise is made to several as a class, or as tenants in common, or as joint tenants, and one or more of the devisees shall die before the testator, and another or others survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by testator: Ky. 50,2,1.

And (E) a devise to children embraces grandchildren, when there are no children, and no other construction will give effect to the devise: Ky.



(F) If such devisee leave no issue, and the devise be of a residuary estate to him or her and other child or relative of the testator, the estate devised passes to such residuary devisee surviving the testator, unless a different disposition is required by the will: O. 5971.

(G) But in two states, such devise or legacy lapsing by death of such child, etc., without issue, is regarded in all respects as intestate estate: Ill., Col.

§ 2824. **Words of Purchase.** A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal" or "personal representatives," "family," "issue," "descendants," "nearest" or "next of kin," of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person according to the laws of descent and distribution: Cal. 6334; Dak. Civ. C. 737; Mon. Prob. C. 491; Uta. 1884,44,1,2,18.

The terms above mentioned are used as words of donation, and not of limitation, when the property is given to the person so designated directly, and not as a qualification of an estate given to the ancestor of such person: Cal. 6335; Dak. Civ. C. 738; Mon. Prob. C. 492; Uta. 1884,44,1,2,19.

§ 2825. **Conditions.** A conditional disposition is one which depends upon the occurrence of some uncertain event by which it is either to take effect or be defeated: Cal. 6345; Dak. Civ. C. 748; Mon. Prob. C. 502; Uta. 1884,44,1,2,29.

A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect: Cal. 6346; Dak. Civ. C. 749; Mon. Prob. C. 503; Uta. 1884,44,1,2,30.

Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfilment is impossible; in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will: Cal. 6347; Dak. Civ. C. 750; Mon. Prob. C. 504; Uta. 1884,44,1,2,31.

Such condition is deemed performed when the testator's intention has been substantially, though not literally, complied with: Cal. 6348; Dak. Civ. C. 751; Mon. Prob. C. 505; Uta. 1884,44,1,2,32.

A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event: Cal. 6349; Dak. Civ. C. 752; Mon. Prob. C. 506; Uta. 1884,44,1,2,33.

For time of payment, see Probate Code.

In Georgia, it is enacted that limitations over<sup>a</sup> upon the marriage of the widow are valid, unless manifestly intended to operate as a restraint upon the free action of such widow in respect to marriage, and not simply prudential provisions for the protection of the interest of children or others in such event; in such cases they are void: Ga. 2272. See § 1364.

In Indiana, a devise or bequest to a wife, with a condition in restraint of marriage, shall stand, and the condition is void: Ind. 2567. In Georgia, a condition *in terrorem* is declared void, unless there is a limitation over to some other person; in which event the latter takes: Ga. 2466.

Conditions impossible are void: Ga.; La. 1519. So, conditions illegal: Ga., La. So, conditions against public policy: Ga., La.

Any testator owning real estate may bequeath it to his children and their issue, whether born before or after the will, and prohibit its alienation during the lives of such children and issue; and the will takes effect accordingly: Ariz. 1517.

For other states, compare §§ 1363,4104.

NOTE. — <sup>a</sup> Whether in a deed or will.

§ 2826. **Election.** In Georgia, the general principle is laid down that a legatee taking under a will must allow, as far as he can, all the provisions of the will to be executed. If he has an adverse claim to the will he will be required to elect whether he will claim under the

will or against it. But the mere fact of being a creditor does not constitute a case of election : Ga. 2465.

§ 2827. **Cy-Près Doctrine.** In Georgia, in all cases of charitable or public devises, where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator : Ga. 2468. See also § 1709.

#### Art. 284. Omissions in Wills.

§ 2840. **Omission of the Widow in a Will made before Marriage.** In many states, the will is absolutely void in such case, because revoked by subsequent marriage ; see § 2676. But in many others, the widow is entitled to her share of the real and personal property as if her husband had died intestate ; and, except as against the widow, the will is good : Pa. *Wills*, 18 ; Del. 84,23 ; see Art. 326. So, in other states, the widow may waive the will and take her dower or intestate share accordingly, see §§ 3262-3.

§ 2841. **Omission of the Widow in a Will made after Marriage.** It is, in two states, specially provided that she shall take her interest, without waiver, as if the husband had died intestate : N.H. 202,8 ; Va.<sup>a</sup> 119,12. And in all other states, she has a remedy by waiving the will, according to Art. 326.

NOTE. — <sup>a</sup> As to personal property only ; in real estate she will take her dower.

§ 2842. **Omission of Children born before the Will.** (A) In many states, when a testator omits to provide in his will for any of his children, or for the issue of a deceased child, they take (subject to the following limitations) the same estate they would have been entitled to had he died intestate : N.H. 193,10 ; Mass. 127,21 ; Me. 74,9 ; Vt. 2242 ; Mich. 5810 ; Wis. 2287 ; Minn. 47,23 ; Neb. 1,23,149 ; Mo. 3969 ; Ark. 6500 ; Cal. 6307 ; Ore. 64,10 ; Nev. 826 ; Wash. 1325 ; Dak. Civ. C. 715 ; Mon. Prob. C. 467 ; Uta. 1884,44,1,1,32 ; Ariz. 1503.

Unless (1) they have been provided for by the testator in his lifetime : Mass. (2) Unless they have had an *equal portion* of the estate bestowed on them in the testator's lifetime by advancement : Me. ; Mo. 3970 ; Mon. *ib.* 469. (3) Unless it appear that the omission was intentional and not occasioned by accident or mistake : N.H., Mass., Me., Cal., Nev., Dak., Mon., Uta. (4) Unless the child be expressly excluded and not merely pretermitted : Mo., Ark., Ore., Wash.

(B) But in a few, they do not take as above unless it appear that the omission *was* made by accident or mistake : Vt., Mich., Wis., Minn., Neb., Ariz.

(C) In two states, when a testator, at the time of executing his will, had a child absent and reported dead, such child takes the same share as if his father had died intestate : O. 5961 ; Kan. 117,39.

But if such child's issue were provided for in the will, he shall, in lieu of the intestate share as above, take such provision or such part thereof as the court think just : O., Kan.

In one, if the testator has a child or grandchild living at his death, whom then, and at the time of execution of the will, the testator believed dead ; or if a child die out of the State without knowledge of the testator, leaving issue of which the testator has no knowledge at such time, and no provision for the exclusion of such child, grandchild, or issue is made by the will, the child, grandchild, or issue shall take as if the testator had died intestate, as a pretermitted child : Ky. 113,19. But the presumption that such pretermittance was the result of mistake on the part of the testator may be rebutted by parol or other proof : Ky.

§ 2843. **Omission of Children born after the Will.** (A) In many states, where a testator has a child born after his making a will, and had no child or issue

born before, the will is absolutely void; and in some other states, the will is absolutely void when both the marriage and the birth of the child were subsequent to the execution of the will. See § 2676.

(B) But in most states, when a child living or leaving issue at the testator's death was born after the execution of the will (there being other children born before in the noted <sup>a</sup> states), such child (whether posthumous or not; see § 2844) or issue (subject to the following limitations) take the share to which they would have been entitled had he died intestate; and the will is otherwise valid: N.H.<sup>b</sup> 193, 10; Mass.<sup>b</sup> 127,21; Me.<sup>b</sup> 74,9; Vt. 2241; R.I.<sup>b</sup> 182,12; N.Y. 2,6,1,49; N.J.<sup>a</sup> *Wills*, 19; Pa.<sup>b</sup> *Wills*, 18; O.<sup>a</sup> 5961; Ill.<sup>b</sup> 39,10; Mich.<sup>b</sup> 5809; Wis.<sup>b</sup> 2286; Minn.<sup>b</sup> 47,22; Kan.<sup>a</sup> 117,39; Neb.<sup>b</sup> 1,23,148-9; Del.<sup>b</sup> 84,12; Va.<sup>a</sup> 118,17-18; W.Va.<sup>a</sup> 1882,84,17; N.C.<sup>b</sup> 2145; Ky.<sup>a</sup> 113,25; Tenn.<sup>b</sup> 3033; Mo.<sup>b</sup> 3969; Ark.<sup>b</sup> 6499, 6500; Tex.<sup>a</sup> 4868,4870; Cal.<sup>b</sup> 6306; Ore. 64,10; Nev.<sup>b</sup> 825; Col. 3488; Wash.<sup>b</sup> 1325; Dak.<sup>b</sup> Civ. C. 715; Mon.<sup>b</sup> Prob. C. 466; Uta.<sup>b</sup> 1884,44,1,1,31; S.C.<sup>b</sup> 1863-4; Ala.<sup>b</sup> 2284; Miss.<sup>a</sup> 1263-4; Ariz.<sup>b</sup> 1502.

Unless (1) they have been provided for by the testator in his lifetime: Mass., N.Y., N.J., Va., W.Va., N.C., Ky., Tenn., Ark., Tex., Dak., Miss.; (2) unless their full share, as in § 2843, was given them by advancement: Mo. 3970; Cal.; Ore. 64,11; Mon. Prob. C. 469; (3) or provision was made in the will: N.H., Me., R.I., N.Y., O., Mich., Wis., Neb., Del., Va., W.Va., Mo., Ark., Tex., Cal., Mon., Uta., S.C., Ala.

And unless (4) it appear that the omission was intentional and not occasioned by accident or mistake: Mass.; Me.; Vt. 2241; N.Y.; Ill.; Mich.; Wis.; Minn.; Neb.; Tenn.; Nev.; Col.; Miss.; Ariz. So, in others, they will inherit as above (5) unless expressly excluded, and not merely pretermitted: N.H., N.Y., N.J., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Wash., Dak., Mon., Uta., Miss.

In determining the share of a child under these last two sections, advancements made to a party interested are to be deemed portion of the whole estate, and charged to the party receiving them: O. 5962; Kan. 117,40; Cal. 6309; Nev. 828; Wash. 1326; Dak.; Uta. 1884,44,1,1,34; N.C. 1483. See § 3162.

(C) If such child die (before receiving his portion, in Alabama) without issue at death, such portion, or so much thereof as has not been received, passes by the will as if such child had not been born: Ala. 2286. So, in others, if he also die unmarried and under age: Va.; W.Va.; Ky. 113,25; see § 2676.

NOTES. — <sup>a</sup> This law applies, in states so noted, only when there are living other children born before such child who was born after the will. <sup>b</sup> But the law is the same, in the states so noted, whether there were other children born before or not. Of course, in the latter case, the effect is like a total revocation of the will; compare § 2676.

§ 2844. **Posthumous Children.** (A) Generally, for purposes of descent or distribution, posthumous children are considered as living at the death of the father, and it follows from this that a posthumous child takes under § 2843, like any other child born after the making of the will; see §§ 1412, note <sup>a</sup>, 1413, 2621, 3023. And in many states, express provision is made to this effect: R.I. 182,12; N.Y. 2,6, 1,49; N.J. *Descent*, 8; Pa. *Wills*, 18; Neb. 1,23,148; Del. 84,22; Va. 118,17; Ky. 113,24-5; Tenn. 3033,3275; Mo. 3969; Ark. 6499; Tex. 4867; Ore. 64,10; Wash. 1325; Uta. 1884,44,1,1,31; S.C. 1846,1863; Ala. 2282; Miss. 1263.

(B) But in other states, there is a slight distinction between the rights of a posthumous child and one born after the will but before the father's death. Thus, in a few, the posthumous child will take his share as if the father had died intestate in all cases; unless (1) provision has actually been made for him in the will or otherwise: N.H. 193,10; Mass. 127,22; Me. 74,8; Io. 2334; (2) unless expressly excluded by the father's will: N.H.



## CHAPTER IV. — INTESTATE SUCCESSION.

**Art. 300. General Principles.****§ 3000. Definitions.**

*Inheritance* is, in two states, defined to mean real estate as defined in § 3010 descended according to this chapter: N.Y. 2,2,27; Ark. 2541.

The person who has become the universal successor of the deceased, who is possessed of all his property and rights, and who is subject to the charges for which the estate is responsible, is called the heir, no matter whether he be such by law, by the institution of a testament, or otherwise: La. 884.

Whenever in this chapter a person is described as "living" or "having died," it means at the time of the death of the intestate from whom the estate descends (allowance being made for posthumous children or a person *en ventre sa mere* at the time, under the rules of §§ 2621, 2844): N.Y. 2,2,28; O. 4178; Ark. 2542; N.M. 1424. Compare § 1415.

*Issue.* This word, in the chapters regulating descent and distribution of intestate property, is expressly declared to mean all the lawful lineal descendants of an ancestor: N.H. 1,19; Mass. 3,3; Me. 1,6; Vt. 8; Wis. 4971; Io. 45; Minn. 4,1; Kan. 104,1; Del. 85,2; Ore. 10,14; Col. 3141; Wash. 3314; Mon. G. L. 145; Ariz. 3.

**§ 3001. When Succession Takes Place.** The common case of succession is from persons dying intestate.

If there is no testament or institution of heir, or if the institution is null or without effect, the succession is then open in favor of the legitimate heirs, by the mere operation of the law: La. 886.

**Art. 301. What Descends.**

**§ 3010. Estate Descendible.** (A) Generally, the real estate and personal estate undivided or unbequeathed by the decedent which he possessed at his death,<sup>a</sup> descends or is distributed (subject to the payment of debts and the widow's or husband's dower or curtesy rights, and the payment of legacies, if any, and administration expenses) as in this chapter provided: N.H. 203,1; Mass. 125,1; Me. 75,1; Vt. 2230; R.I. 187,1 and 9; Ct. 18,11,1,2,5; N.Y. 2,2,1 and 20; N.J. *Descent*, 1; *Orph. Ct.* 146; Pa. *Intestates*, 1; O. 4176; Ind. 2467, 2405,2481; Ill. 39,1; Mich. 5847,5783; Wis. 2276; Io. 2453; Minn. 46,1; Kan. 33,1; Neb. 1,23,40 and 176; Md. 47,1 and 28; Del. 85,33; Va. 119,1 and 10; W.Va. 1882,94,1 and 9; N.C. 1282; Ky. 31,11; Tenn. 3278; Mo. 2161; Ark. 2522; Tex. 1645; Cal. 6384,6386; Ore. 10,1-2 and 14; Nev. 794; Col. 1039; Dak. Civ. C. 777-8; Ida. Prob. C. 315; Mon. Prob. C. 532 and 534; Wy. 42,1; Uta. 1884,44,2,1; Ga. 2570,2483; Ala. 2252; Fla. 92,1; N.M. 1410; Ariz. 1463.

In New Mexico and Louisiana, only the *acquest* property descends. See Art. 340.

And in detail, the following species of property descend accordingly: (1) equitable estates, or the estates of a beneficiary in trust, real or personal: N.Y. 2,2,21; Del. 85,1; Miss. 1272; (2) fees-simple: Md., Del., Ore., Wash., Ariz.; (3) fees-simple conditional: Md.; (4) fees tail general descend in fee-simple (compare § 1313): Md.; (5) estates of inheritance: Miss. 1271.

The succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also the new charges to which it becomes subject: La. 873.

The right of possession which the deceased had, being continued in the person of his heir, it results that this possession is transmitted to the heir with all its defects, as well as all its advantages, the change in the proprietor producing no alteration in the nature of the possession.

Thus the extent of the rights of the deceased regulates those of the heir, who succeeds to all his rights which can be transmitted; that is, to all those which are not, like usufruct, attached to the person of the deceased.

The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was open in his favor: La. 943-4.

(6) In Maryland, the legal estate of a bare trustee of real estate, entitled to no beneficial interest, descends to his heir at common law (*i. e.*, his eldest son, etc.): Md. 47,24. See, for other states, in the Probate Code.

(B) In several states, real estate, under this and the following chapter, is defined to include every estate, interest, and right, legal or equitable, in lands, tenements, and hereditaments: N.Y. 2,2,27; N.C. 1281 (12); Ark. 2180; Ore. 10,14; Col.; Wash. 3302,3314; of which the intestate died seized: Mass.; Minn. 46,1; Ark. 2540; Miss. 1271; Ariz.

In a few states, estates for the life of another descend like other real estate: Mass.; Wis. 2270; Minn.; Neb. 1,23,30; N.C. 1281 (11); Ore.; Wash.; Ariz. For other states, see §§ 1310,1335.

In Ohio, permanent leasehold estates, forever renewable, descend like fees: O. 4181.

In most states, the dower estate, on the expiration of the term of dower, is to be distributed "in the same manner:" R.I. 187,23; Ct. 1885,110,200; Ark. 2593. So, probably, in all. Compare §§ 3106,3110.

In many states, moneys due on life-insurance policies descend in a peculiar manner. See in Part III.

NOTE. — <sup>a</sup> Such estate is generally understood to apply only to *separate* estate held by the intestate (so far as the shares of the husband or widow are concerned): Cal. 6400; Nev. 803; Wash. 3316; 3304; Ida. Prob. C. 324; Mon. Prob. C. 549; Uta. 1884,44,2,17. For *Community Property*, see Art. 340.

§ 3011. **What does not Descend.** The above provisions do not, however, extend (1) to estate otherwise limited by marriage settlement (Art. 644): N.J. *Descent*, 6; Pa.; Mich.; Wis.; Neb.; Md. 47,28; Mo.; Ark.; Cal.; Nev.; Col.; Dak.; Ida.; Mon.; Wy.; Uta. 1884,44,2,3; (2) to homestead estates (see Part IV.): N.H., Mass., Kan.; (3) to articles or property taken for the widow and children's allowance (Part. IV., Division I.): Mich., Io., Kan., Neb., Ore.; (4) to such estates as were determined by the intestate's death: N.Y., Ark.; (5) to estates for the life of another: N.Y., Mich., Ark.; see §§ 1310,1335; (6) to leases for years: N.Y., Ark. (see § 1340); (7) and moneys due on life policies held by the decedent descend in a special manner in a few states; see in Part III.

§ 3012. **Accretion.** The portion of the heir renouncing the succession goes to his co-heirs of the same degree; if he has no co-heirs of the same degree, it goes to those in the next degree.

This right of accretion only takes place in legal or *intestate* successions. In testamentary successions it is only exercised in relation to legacies, and in certain cases.

The accretion operates of full right independently of the will of the person for whose benefit it is, and whether he be ignorant or not of the renunciation which gave rise to it.

He in whose favor the right of accretion exists cannot refuse the portion of the heir who has renounced, and keep that part which has fallen to him in his own right, because he is bound to accept or renounce for the whole.

The rule contained in the preceding paragraph admits of an exception when the heir who has already accepted has caused his acceptance to be rescinded; for in this case his co-heirs may refuse the portion which he has thus abandoned, and release themselves from the debts with which it is incumbered, by abandoning this portion to the creditors.

The accretion is for the benefit of the heirs who have accepted, or who may accept. An heir who has once renounced has no claim to the portion of him who afterwards renounces.

The heirs to whom the portion comes by the renunciation of their co-heirs take it in the same proportion that they do the inheritance.

The partition of it is made among them in their own right or by representation, in the same manner as the succession is divided : La. 1022-8.

Heirs who have embezzled or concealed effects belonging to the succession lose the faculty of renouncing ; and they shall remain unconditional heirs, notwithstanding their renunciation, and shall have no share in the property thus embezzled or concealed.

The faculty of accepting or renouncing a succession becomes barred by the lapse of time required for the longest prescription of the rights to immovables.

So long as the prescription of the right of accepting is not acquired against the heirs who have renounced, they have the faculty still to accept the succession, if it has not been accepted by other heirs, without prejudice, however, to rights which may have been acquired by third persons upon the property of the succession, either by prescription or by lawful acts done with the administrator or curator of the vacant estate.

In like manner, so long as the prescription of renunciation is not determined, the heir may still renounce, provided he has done no act to make himself liable as heir : La. 1029-1031.

The joint heir or legatee has the right of accretion when, in case the heirs are called together for the same object by the testator, the portion belonging to the absent person remains vacant. The following requisites are necessary : (1) that some of the joint heirs or legatees are absent ; (2) that they are called together for the same object [*que los co-herederos ó co-legatarios esten juntos, esto es, llamados a una misma cosa*] ; otherwise the inheritance or legacy of the absentee becomes vacant, and reverts to the legal heirs of the deceased : N.M. 1470.

## Art. 302. Heirs.

§ 3020. **Definitions.** *Direct heirs* are the legitimate children and descendants of the decedent dying intestate : N.M. 1432.

There are three classes of legal heirs, to wit : —

The children and other lawful descendants.

The fathers and mothers and other lawful ascendants.

And the collateral kindred : La. 887.

*Testamentary heirs* are those persons who are appointed by the testator to succeed him after his death in his property and rights : N.M. 1431. *The universal heir* is the person succeeding to all his property ; the person receiving a specified article is a special heir, or legatee : N.M.

There are three kinds of heirs which correspond with the three species of successions described in the preceding articles, to wit : —

Testamentary or instituted heirs ;

Legal heirs or heirs of the blood ; and,

Irregular heirs.

He who is the nearest relation to the deceased capable of inheriting is presumed to be heir, and is called the presumptive heir.

This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it.

Heirs are divided into two classes, according to the manner in which they accept successions left to them, to wit : unconditional and beneficiary heirs.

Unconditional heirs are those who inherit without any reservation, or without making an inventory, whether their acceptance be express or tacit.

Beneficiary heirs are those who have accepted the succession under the benefit of an inventory regularly made.

The person who has become the universal successor of the deceased, who is possessed of all his property and rights, and who is subject to the charges for which the estate is responsible, is called the heir, no matter whether he be such by law, by the institution of a testament, or otherwise : La. 879-884.

The law does not take into consideration the origin nor the nature of the property in order to regulate the succession : La. 885.



§ 3021. **Capacity of Heirs.**<sup>a</sup> The incapacity of heirs is the absence of those qualities required in order to inherit at the moment the succession is opened. He who wants these qualities at this time cannot be the heir.

It is at the moment of the opening of the succession that the capacity or incapacity of the heir who presents himself to claim the intestate succession is considered.

All persons, even minors, lunatics, persons of insane mind, and the like, may transmit their estates *ab intestato* and inherit from others.

The incapacity of heirs is not presumed. He who alleges it must prove it.

In order to be able to inherit, the heir must exist at the moment that the succession becomes open : La. 950-3.

They are called unworthy in matters of succession who, by the failure in some duty towards a person, have not deserved to inherit from him, and are in consequence deprived of his succession : La. 964.

NOTE. — <sup>a</sup> See also § 3135.

§ 3022. **Acceptance by Heir.** The heir or the legatees have the privilege of accepting or refusing the inheritance : N.M. 1420.

Though the succession be acquired by the heir from the moment of the death of the deceased, his right is in suspense until he decide whether he accepts or rejects it : N.M. 1443 ; La. 946.

If the heir accept, he is considered as having succeeded to the deceased from the moment of his death ; if he rejects it, he is considered as never having received it.

The heir who accepts is considered as having succeeded to the deceased from the moment of his death, not only for the part of the succession belonging to him in his own right, but for the parts accruing to him by the renunciation of his co-heirs in the succession of the deceased.

When all the heirs in the nearest degree renounce the succession, which is accepted by those in the next degree, these last are considered as having succeeded directly and immediately to the rights and effects of the succession from the moment of the death of the deceased.

Therefore the heirs, thus succeeding by the renunciation of relations nearer in degree, transmit the succession to their own heirs, if they die before having accepted it, in the same manner as if they had succeeded in the first degree to the deceased.

Natural children and the surviving husband or wife before being put into possession of the estate left to them, are not considered as having succeeded to the deceased from the instant of his death ; but they do not the less transmit their rights to their heirs, if they die before having made their demand to be put into possession. The reason is, that this sort of heirs having only a right of action to cause themselves to be put into possession of successions thus falling to them, this right and this action form a part of their succession, which they transmit to their heirs : La. 946-9.

All the rules relating to the acceptance, renunciation, or partition of successions, the collation of goods and payment of debts, contained in this title, are applicable to testamentary as well as to intestate successions.

No one can be compelled to accept a succession, in whatever manner it may have fallen to him, whether by testament or the operation of law. He may, therefore, accept or renounce it.

It shall not be necessary for minor heirs to make any formal acceptance of a succession that may fall to them, but such acceptance shall be considered as made for them with benefit of inventory by operation of law, and shall in all respects have the force and effect of a formal acceptance.

To be able to accept a succession, it is necessary that the succession should be open by the death of the person who is to be succeeded.

If, therefore, on the false report of the death of a person, his relation, who is to inherit from him, assumes the quality of his heir, and is put into possession of his effects, these acts do not render his relation his heir, even after his death, unless since his death, his relation has continued to act as his heir.

A person cannot accept a succession before it has fallen to him.

Thus, a relation to the deceased in the second degree can neither accept nor renounce the succession, until he who is related in the first degree has expressed his intention on the subject.

And in testamentary successions, the heir *ab intestato* can neither accept nor renounce, until the instituted heir has decided to accept or renounce the succession.

It is not sufficient that the succession be fallen ; it is also necessary, for the validity of the acceptance, that the heir know in a certain manner that it is opened or fallen to him.

Thus, he who is ignorant of the death of the deceased, though the succession be really opened, can neither accept nor renounce it.

If the heir *ab intestato* accepts the succession, under the impression that there is no will, his acceptance is null, if a will be discovered of the existence of which he was ignorant.

He who accepts ought to know under what title the succession is left to him, so that if the instituted heir accepts the succession as coming to him *ab intestato*, the act is null.

It is sufficient to establish the validity of the acceptance, that the heir knows that the succession is opened, and that he is called to it. It is not necessary that he should know what portion of it is left to him.

It is of no moment if he be mistaken as to the degree of relationship which he bears to the deceased, and which gives him the right to inherit from him ; though it may affect the amount of the portion coming to him, his acceptance is not the less valid on that account, since he is an heir.

The acceptance or rejection made by the heir, before the succession is opened or left, is absolutely null and can produce no effect ; but this does not prevent the heir who has thus accepted, from accepting or rejecting validly the succession when his right is complete.

The heir who is instituted under a condition, cannot accept nor renounce the succession, before the condition has happened, or while he remains in ignorance of the condition having happened.

It is the same, if he be ignorant of the institution which is made in his favor.

He who has the power of accepting the entire succession, cannot divide and only accept a part.

The effect of the acceptance goes back to the day of the opening of the succession.

The simple acceptance may be either express or tacit.

It is express, when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.

It is tacit, when some act is done by the heir, which necessarily supposes his intention to accept, and which he would have no right to do, but in his quality of heir.

By the word instrument used in the preceding paragraph is understood any writing made with the intention of obliging himself or contracting as heir, and not a simple letter or note in which the person who is called to the succession may have styled himself the heir. Still less is a verbal declaration binding on him.

It is necessary that the intention should be united to the fact, or rather manifested by the fact, in order that the acceptance be inferred.

The person who is called to the succession, if he dispose of a thing which he does not know to belong to the succession, does not thereby do an act that will make him liable as heir, because such an act does not include the will to accept.

On the other hand, there are some acts which though in reality they are foreign to the succession, nevertheless evidently manifest the will to accept ; as, for example, if the person who is called to the succession possess himself or dispose of effects found in the succession, thinking that they belong to it, he does an act which makes him liable as heir, because his belief that the effects appertained to the succession is sufficient to establish his will to accept.

There are some facts, which necessarily suppose the will of being heir, and others which may be differently interpreted, according to circumstances.

All those acts of ownership, which the person called to the succession can only do in quality of heir, suppose necessarily his acceptance, for to act as owner is to make himself heir.

There is an exception to this rule in those cases in which the acts done are necessary for the preservation of the thing, as is hereafter explained.

The person called to the succession does not commit an act of heir by disposing of property belonging to the succession by another title than that of heir ; as if he should be testamentary executor and heir at the same time, provided that in disposing of the property he does not assume the quality of heir.

With regard to these acts, which may be differently interpreted, according to circumstances, it is necessary to distinguish acts of ownership from acts of administration or ownership or preservation, or preparatory acts, which tend only to ascertain the value of the succession.

The time when these acts are done must also be taken into consideration.

Thus, acts which are merely conservatory, and the object of which is temporary, such as superintendence and administration, do not amount to an acceptance of the inheritance, unless the title and quality of heir should be therein assumed.

The person called to the succession, who does certain acts either from necessity or for the benefit of the succession only, may show what was his real intent by reservations or protestations made before a notary, or inserted in his petition, if there be a judicial proceeding.

Though it may be necessary to sell some of the effects of a succession to prevent loss or waste, the sale of the least article of property belonging to the succession will render the person called to the succession irrevocably the heir, unless he cause himself to be authorized by the judge to make this sale at public auction, on a petition in which he shall allege the necessity there is for making it, and shall protest that he does not mean by this act to do an act that would make him liable as heir.

The person called to the succession does an act which makes him liable as heir if, when cited before a court of justice as heir for a debt of the deceased, he suffers judgment to be given against him in that capacity, without claiming the benefit of inventory or renouncing the succession.

An act of piety or humanity towards one's relations is not considered an acceptance; it is not, therefore, an acceptance to take care of the burial of the deceased or to pay the funeral expenses, even without protestation.

The donation, sale, or assignment which one of the co-heirs makes of his right of inheritance, either to a stranger or to his co-heirs, is considered to be on his part an acceptance of the inheritance.

The same may be said, first, of the renunciation, even if gratuitous, which is made by one of the heirs in favor of one or more of his co-heirs; and second, of the renunciation which he makes in favor of all his co-heirs indistinctly when he receives the price of this renunciation.

Those who are not capable of contracting obligations — such as persons interdicted — cannot accept an inheritance; but the curators of such persons can accept successions falling to those who are under their curatorship by pursuing the formalities prescribed by law.

The acceptance of a succession by a married woman, without the authorization of her husband or of the judge, is not valid.

If the wife should refuse to accept an inheritance, her husband, who has an interest to have it accepted in order to increase the revenues of which he has the enjoyment during the matrimony, may at his risk accept it on the refusal of his wife.

Not only the person who is entitled to an inheritance may accept it, but if he dies before having expressly or tacitly accepted or rejected it, his heir shall have a right to accept it under him.

When several heirs in the same degree are called to a succession, some may accept unconditionally, others under the benefit of an inventory; for the unconditional heir does not exclude the heir under the benefit of inventory.

The heir who is of age cannot dispute the validity of his acceptance, whether it be expressed or tacit, unless such acceptance has been the consequence of fraud practised, or violence exercised against him; he never can urge such claim under pretext of lesion.

Nevertheless, if the heir who has expressly or tacitly accepted the succession has not put himself into possession before he has caused a true and faithful inventory to be made in conformity to that which is prescribed to the beneficiary heir, he can discharge himself from paying the debts of the succession out of his own property by abandoning the effects of the succession to the creditors and legatees of the deceased, and rendering them a faithful account of the same, as well as of the fruits and revenues received by him.

But in order to enjoy this advantage, the heir who has accepted must not have disposed of any of the property, movable or immovable, of the succession, except in the forms prescribed in the case of the benefit of inventory.

He must not have been decreed by a definitive judgment to be the unconditional heir, nor have accepted at the suit of the creditors instituted to oblige him to assume this quality.

The heir who has accepted the succession simply may even be compelled to make an inventory of the succession, and to give security in the same manner as in the case of the benefit of an inventory, if a majority in amount of the creditors of the succession, either present or represented in the parish where the succession is opened, require it. In default of such security, there shall be appointed an administrator to administer the succession, according to the provisions of the section relative to the benefit of inventory.

In obtaining possession of the effects of a succession, the heirs shall not be permitted, under any pretence whatsoever, to have an actual delivery of any property of such succession which may be in suit or to receive any money of such succession when there shall be claims thereon pending in court, unless they previously give bond with good and sufficient security,



if the plaintiffs in such suits require it ; which security shall be one fourth over and above the amount of the claims for money thus claimed, or of the appraised value of the property in suit ; which estimation shall be made by two appraisers appointed by the judge : La. 976-1011.

The effect of the simple acceptance of the succession, whether expressed or tacit, is such that when made by an heir of age, it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally, and out of his own property, as if he had himself contracted the debts, or as if he was the deceased himself, unless before acting as heir he make a true and faithful inventory of the effects of the succession as here above established, or has taken the benefit treated of hereafter : N.M. 1444 ; La. 1012.

The engagement of the heir who has accepted unconditionally is somewhat different with respect to legacies, as shall be hereafter explained : La. 1013.

**§ 3023. Of the Renunciation of Successions.** He who is called to the succession being seized thereof in right, is considered the heir as long as he does not manifest the will to divest himself of that right by renouncing the succession.

A succession can be renounced only under the same circumstances in which it can be legally accepted, according to the rules established in the preceding section.

A succession can neither be accepted nor rejected conditionally.

The renunciation of a succession is not presumed ; it must be made expressly by public act before a notary, in presence of two witnesses.

He to whose share an inheritance falls may refuse it, provided he be capable of alienating ; for the renunciation of an inheritance is in all respects assimilated to an alienation.

Thus a person interdicted cannot make a valid refusal of an inheritance without the authorization of the judge and of his curator.

A woman under the power of her husband cannot renounce the inheritance falling to her share, unless she is duly authorized to that effect by her husband, or, on the refusal of her husband, by the judge.

He who is called to an inheritance may accept or renounce the succession by himself or by an attorney in fact, provided the attorney be specially appointed to that effect.

The creditors of the heir who refuses to accept or who renounces an inheritance to the prejudice of their rights can be authorized by the judge to accept it in the name of their debtor and in his stead, according to the forms prescribed on this subject in the following paragraphs.

In case of this acceptance, if there be a renunciation on the part of the debtor, the renunciation is annulled only in favor of the creditors for as much as their claims amount to, but it remains valid against the heir who has renounced.

If, therefore, after the payment of the creditors, any balance remain, it belongs to his co-heirs who may have accepted it ; or if the heir who has renounced be the only one of his degree, it goes to the heirs who come after him.

If, on the contrary, the heir has only refused to accept, and has not renounced, he can claim the surplus, on accepting the succession, provided his right of acceptance be not prescribed against : La. 1014-1021.

**§ 3024. Of the Benefit of Inventory and the Delays for Deliberating.** The benefit of inventory is the privilege which the heir obtains of being liable for the charges and debts of the succession only to the value of the effects of the succession, by causing an inventory of these effects to be made within the time and in the manner hereinafter prescribed : N.M. 1443-4 ; La. 1054.

By term for deliberating is understood the time given to the beneficiary heir to examine if it be for his interest to accept or reject the succession which has fallen to him.

The heir who wishes to enjoy the benefit of inventory and the term for deliberating is bound, as soon as he knows of the death of the deceased to whose succession he is called, and before committing any act of heirship, to cause the seals to be affixed on the effects of the succession by the proper officer.

In ten days after this affixing of the seals, the heir is bound to present a petition to the judge of the place in which the succession is opened praying for the removal of the seals, and that a true and faithful inventory of the effects of the succession be made as is hereinafter prescribed.

In all cases in which a succession is opened, and the presumptive heirs who are present or represented do not take the necessary measures to cause the seals to be affixed to and an inventory made of the effects of the succession, any creditor of the deceased has the right, ten days after the opening of the succession, to cite the heirs before the judge of the place in which it is opened, in order to oblige them to declare whether they accept or renounce the succession.

If the heirs thus cited declare that they accept the succession, or if they are silent or make default, they shall be considered as having accepted the succession as unconditional heirs, and may be sued as such.

If, on the contrary, the heirs thus cited declare that they wish to take the benefit of inventory, and have the delay for deliberating, the judge shall grant them the delay, and order all proceedings against them, personally or as heirs, to be suspended until the term has expired : La. 1032-1038.

The term given to the beneficiary heir to deliberate whether he will accept or reject the succession shall be thirty days from the day on which the inventory is finished.

If there have been inventories made in different parishes, the term commences from the day the last of them is finished : La. 1050.

At the expiration of the term for deliberating, the creditors and legatees of the succession can compel the heir to decide whether he accepts or rejects the succession ; and they shall present a petition to this effect to the judge of the place where the succession is opened, who shall cause the beneficiary heir to be cited to answer thereto.

If, on this demand, the beneficiary heir declares that he accepts the succession simply, all the effects which compose it must immediately be delivered to him ; but then he becomes responsible for the debts of the succession not only to the amount of the effects thereof, but personally and out of his own property, and the creditors of the deceased can obtain judgment against him.

In case the heir makes default on this demand, he shall be considered an unconditional heir and be bound as such.

But if the heir declares that he is not willing to accept the succession otherwise than under the benefit of an inventory, the person appointed administrator of the estate, whether it was the heir himself or any other individual, shall proceed to the sale of the property of the succession, and to the settlement of its affairs, as prescribed in the Probate Code, Part IV., Division I. The beneficiary heir shall, at the time of such settlement, have a right to be paid, as any other creditor, all debts due him by the deceased, and shall, moreover, be entitled to the balance of the proceeds of the sale of the estate, if any such balance be left after payment of all the debts and charges of the succession.

If, on the contrary, the beneficiary heir renounces in due form, he preserves all the rights he has against the succession, if he is a creditor ; and in case he has been originally appointed administrator of the succession, he shall continue to manage it in this capacity, even if he is not a creditor of the deceased.

If, on the renunciation of the beneficiary heir, the heirs called to the succession on his default accept the succession, they shall be admitted thereto, and they shall have the right to enjoy that part of the term for deliberating which has not expired, should the heir renounce before its expiration.

But if the term has expired, the heirs cannot obtain a prolongation of it, but must immediately decide whether they accept or reject the succession, as is provided for above.

If the heir secrete anything belonging to the succession, or has knowingly and in bad faith failed to include in the inventory any of the effects of the succession, he is deprived of the benefit of inventory.

As soon as the beneficiary heir has renounced in due form, if no heirs present themselves to accept the succession on his default, or if they themselves renounce, the administrator shall cause the immovables and other effects of the succession remaining undisposed of to be sold on the authorization of the judge, and after advertisement during the time and in the manner prescribed by law : La. 1055-1062.

A testamentary inventory is the instrument containing a list of the property belonging to the estate of the deceased, legally and duly made. It must be made (1) by the heir *ad bona* or administrator of the estate, notifying the parties interested in the distribution ; (2) by the guardian and curator ; (3) by the probate judge, in case the person die intestate, and the urgency of the case requires it, until an administrator be appointed : N.M. 1439,1441.

§ 3025. **Constitution of Heirs.** In a few states, any person desiring to make a person his heir-at-law may do so (A) by declaration in writing in favor of such person, acknowledged (1) before any judge, justice of the peace, clerk of court, or court of record : Ark. 2544 ; (2) before the judge of probate : O. 4182. (B) By petition and order of the Superior Court : Wis. 3521.

Such declaration, in order to have any effect, must be recorded (1) in the county where the declarant resides : O. ; Ark. 2545 ; or (2) in the county where the heir resides : Ark.

"A person having no direct heir, although he may have legal heirs, may constitute a stranger his heir, on condition that he be not an infamous or stupid person ; but even in this latter case, married persons may mutually constitute each other heirs." N.M. 1386.

"The testator may appoint either heir as substitute ; so that in case of the absence of the first the substitute may take possession of the inheritance : " N.M. 1433.

§ 3026. **Of Unworthiness of Heirs.** There is this difference between being unworthy and incapable of inheriting that he who is declared incapable of inheriting has never been heir, whilst he who is declared unworthy is not the less heir on that account, if he has the other qualities required by law to inherit. Thus a person unworthy of inheriting remains seized of the succession until he is deprived of it by a judgment which declares him divested of it for cause of unworthiness.

Persons unworthy of inheriting, and, as such, deprived of the successions to which they are called, are the following : —

1. Those who are convicted of having killed, or attempted to kill, the deceased ; and in this respect they will not be the less unworthy, though they may have been pardoned after their conviction.

2. Those who have brought against the deceased some accusation found calumnious which tended to subject the deceased to an infamous or capital punishment.

3. Those who, being apprised of the murder of the deceased, have not taken measures to bring the murderer to justice.

The unworthiness is never incurred by the act itself ; it must be pronounced by the court in a suit instituted against the heir accused of unworthiness after he has been duly cited.

Not denouncing the murder of the deceased shall not be opposed as a cause of unworthiness in the heir, if such heir is the husband or wife of the murderer, or his relation in the ascending, descending, or collateral line down to the third degree inclusively.

If the heir be declared unworthy of inheriting by a definitive judgment, he shall be condemned to deliver to the relations succeeding on his default, or those who have succeeded jointly with him, not only the effects of the succession of which he has had the use since its opening, but all the fruits, revenues, and interest he has derived from such effects since the opening of the succession : La. 965-969.

The sales by an heir are valid, if made without fraud in the purchasers, though they may have been made since the institution of the suit to determine the unworthiness of the heir, if the purchasers had not and could not have been informed of its being instituted.

But in all cases the heir, thus divested of the succession, shall be condemned to restore the price of these sales, with interest from the day of the demand ; and the relations who succeed on his default, after his destitution is pronounced, shall alone have the right to exact and receive the sums remaining due on the price of these sales from the purchasers.

Mortgages stipulated without fraud by the heir, who is afterwards divested for cause of unworthiness, also remain in force in favor of the parties with whom they have been contracted, reserving to the person succeeding to the inheritance his recourse against the unworthy heir.

The destitution pronounced against the heir revives in his favor all the rights and actions which he had against the succession, and which had been for a time extinguished by confusion.

So, in case he had paid any creditors of the succession, he shall be reimbursed, and those who have not been paid have no right of action against him. The rights and actions of the succession against the heir who is divested for cause of unworthiness are also revived.

The children of the person declared unworthy to succeed, being admitted to the succession *ab intestato* in their own name and without the aid of representation, are not excluded by the fault of their father ; but the father cannot claim, in any case, upon the property of that succession the usufruct which the law grants him in certain cases.

The exclusion, either for cause of incapacity or unworthiness, shall not be sued for by others than the relations who are called to the succession in default of the unworthy heir, or in con-



currence with him ; and this kind of suit shall be determined in the same manner as other civil actions.

Suits to establish the unworthiness of heirs cannot be sustained if there has been a reconciliation or pardon on the part of him to whom the injury was done.

If, therefore, a father has full knowledge of an injury done to him by one of his children, and dies without disinheriting him, though he has sufficient time to make his will since he has had this knowledge, he will be considered as having forgiven the injury, and the child cannot be deprived of the succession of his father on account of unworthiness : La. 970-975.

§ 3027. **Establishment of Heirs.** In several states, there is a process by which, in cases of descent of real estate, the heirs-at-law, or any of them, may file a petition with the probate judge, setting forth the death and last residence of the intestate, the number of heirs, their names, ages, and residences, their relation to the deceased, and as nearly as possible describing such real estate and the respective interest of the heirs therein ; and the surrogate or judge may examine witnesses, and then may make a decree or indorsement on the petition, which shall be recorded in the land record office, and be presumptive evidence of the facts therein in all proceedings concerning the succession of such real estate : N.Y. Civ. C. 2654-7 ; N.J. 1880,195 ; Pa. 1883,119 ; Mich. 1883, C. 49 ; Wis. 3873, Amt. ; Cal. 1885,160 ; Minn. 1885,50.

## Art. 310. Course of Descent.

§ 3100. **Note.** The laws of the several states relating to the course of descent of real property, and distribution of personal property, digested in this article, will be found by the following citations. Throughout this article these citations are to be understood as referred to, unless a special citation is made. It is worthy of note that in no two of the states and territories are these laws completely identical. See N.H. 203,1-8 and 202,2 and 9-10 and 16 ; Mass. 125,1 ; 124,1 and 3 ; Me. 75,1-2 ; 103,1 and 14 ; Vt. 2230 ; R.I. 187,1-2 and 4-6 ; 185,4 ; Ct. 1885,110 ; 194-5 ; 198-200 ; N.Y. 2,2,1-8,10-13,16,20 ; N.J. *Descent*, 1-6 ; Pa. *Intestates*, 1-4,6-20,22-24,28-29,31,34 ; O. 4158-4162,4164-8, 4176 ; Ind. 2467-2471,2481-2486,2489-91 ; Ill. 39,1 ; Mich. 5733,5770 ; 1883, 169 ; Wis. 2270, Amt. ; Io. 2453-8,2440 ; Minn. 46,3 ; Kan. 33,8 and 18-21 and 28-29 ; Neb. 1,23,30 ; Md. 47,2-23 ; Del. 85,1-2 ; Va. 119,1 and 9 and 11 ; W.Va. 1882,94,1 ; N.C. 1281 ; Ky. 31,1-2 and 9 ; Tenn. 3268-3272 ; Mo. 2161-2165, 2186,2195 ; Ark. 2528-2534,2522,2599,2591-2 ; Tex. 1645-7,1652 ; Cal. 6386, Amt. Vol. 3 ; Ore. 10,1 ; Nev. 794 ; Col. 1039 ; Wash. 3302 ; Dak. Civ. C. 778 ; Ida. Prob. C. 315 ; Mon. Prob. C. 534 ; Wy. 42,1 ; 1877, p. 35 ; Uta. 1884,44,2,3 ; S.C. 1845 ; Ga. 2484,1764,1761-2 ; 1883,391 ; Ala. 2252-3 ; Miss. 1271,1171 ; Fla. 92,1-5 ; 95,3 and 5 ; La. 902-917,888 ; N.M. 1432,1436-7 ; Ariz. 1463. The laws of New Mexico, in cases where the decedent was married, are peculiar and complicated. They will be found in § 3404.

**Personal Property.** The laws of the states regulating the distribution of personal property belonging to an intestate will be found in the following citations. Throughout this article, when no citation is made, reference is to be had, in the case of personal property, to this section : N.H. 202,7-8 and 15 ; 203,6 ; Mass. 135,3 ; 1882,141 ; 1885,276 ; Me. 75,8-9 ; Vt. 2234 ; R.I. 187,9 ; 184,7 ; Ct. 1885,110,198-200 ; N.Y. 2,6,3,75 and 79 ; N.J. *Orph. Ct.* 147-8 ; Pa. *Intestates*, 1-5,24,28-29,31,15,21 ; O. 4163,6194 ; Ind. 2487-2490 ; Ill. 39,1 ; Mich. 5847 ; Wis. 3935 ; Io. 2436 ; Minn. 51,1 ; Kan. 33,31 ; Neb. 1,23,176 ; Md. 48,1-19 ; 50,92 ; 1882,477 ; Del. 89,32 ; Va. 119,10 ; W.Va. 1882,94,9-10 ; N.C. 1478 ;

Ky. 31,11 ; Tenn. 3278 ; Mo. 2189-2192,2161 ; Ark. 2522,2591-2,2599 ; Tex. 1645-6 ; Cal. 6386 ; Ore. 10,2 ; Nev. 794 ; Col. 1039 ; Wash. 3316 ; Dak. Civ. C. 778 ; Ida. Prob. C. 315 ; Mon. Prob. C. 534 ; Wy. 42,1 ; Uta. 1884,44,2,3 ; S.C. 1845 ; Ga. 2570 ; Ala. 2261,2714 ; Miss. 1273 ; Fla. 92,12-13 ; 95,2 ; La. 902-917 ; N.M. 1436-7 ; Ariz. 1463.

Throughout this article, the sign \* means that there is a distinction made in the cases and in the states noted between the whole and the half blood, and that the provision in question applies to relatives of the whole blood only. And see § 3133. The sign † means that there is a distinction between descent and purchase, by which, if the estate in question was derived by the intestate by descent, devise, or gift of an ancestor or any kinsman, all not of the blood of such kinsman are excluded ; see § 3134. The sign \*\* is used to denote cases where this latter rule modifies the former, by enabling the half blood of the blood of such ancestor to share with the whole blood. See § 3133, E. In cases not noted at all, there is no distinction between the whole and the half blood ; and so also by exception (usually in the case of personal property) in cases marked with this || sign. Provisions thus § marked apply to personal property only ; so ¶ marked, only to realty. The sign ‡ is to refer the reader to §§ 3107-8, there being special provisions as to property not acquired by purchase.

For the general principles bearing on the above, see Art. 313.

§ 3101. **Children Living, Wife or Husband Dead.** (A) In all the states, without exception, the real estate descends to the legitimate children of the decedent living at his death and the issue of deceased children *per stirpes*, in equal shares.

(B) But in many states, if any such child die under age and unmarried or without issue, all the estate descending by gift, devise, or descent from either parent to such child goes (1) to the other children of the same parent and the issue of such as are dead, *per stirpes* ; but if all such other children are dead, to the grandchildren or other issue, *per stirpes* ; or, if all are in the same degree to such deceased child, *per capita* (this last clause is not enacted in New Hampshire) : N.H., Me., Mich., Wis., Minn., Neb., Cal., Ore., Nev., Wash., Dak., Ida., Mon., Uta., Ariz.

(2) To the parent or to the kindred of such parent ; if none such, to the kindred of the other parent, according to the general rules of descent : Ct., Va., ¶ Ky., ¶ Fla., La. See § 3107. But the kindred of one are not so excluded by kindred of the other if the latter is more remote than grandparents, uncles and aunts, and their descendants : Ky.

(3) As if such child had died in the lifetime of such parent : Ct.

Otherwise, the personal estate of an infant is distributed as if he had died after full age : Ky. 31,11.

§ 3102. **Same Case : Personalty.** (A) In most states, the personal property is distributed precisely as the real estate descends, (1) in all cases : Vt., Io., Minn., Kan., Cal., Nev., Col., Dak., Ida., Mon., Wy., Uta., S.C., Ga., Miss., La., N.M., Ariz. (2) Except as to the widow's or husband's share : N.H., Mass., Me., R.I., Ct., Pa., O., Ind., Ill., Mich., Wis., Neb., Va., W.Va., Ky., Mo., Ark., Tex., Ore., Wash., Ala., Fla.

(3) And for other states, see *Dower*, Art. 320, and *Curtesy*, Art. 330. (4) And except as to the half-blood rule (in several states), there being no distinction made in cases of personalty : N.Y. See also § 3133. (5) And in personalty, there is no distinction made whether the property was acquired by the intestate or descended to him from any relative : R.I., O. See also §§ 3107,3134. So, there is no distinction made, as in § 3101 : Va., Ky. And see § 6015.

(B) In other states, there being no widow or husband, the personal property of an intestate, after debts and charges, etc., paid, is distributed to the children

and their descendants, as in §§ 3101, 3103, *per stirpes* : <sup>a</sup> N.Y., N.J., Md., Del., N.C., Tenn.

But descendants of the same degree take personalty, in all cases, in equal shares *per capita* : Md. 48, 1. For other states, see § 3103.

If any child thus inheriting from the father dies intestate during the life of the mother without wife or children, his share goes to his mother, brothers, and sisters, in equal shares : N.C.

NOTE. — <sup>a</sup> So, in all other states, under the provisions of A.

§ 3103. **Children Dead,<sup>a</sup> Grandchildren Living, Wife or Husband Dead.** When all the children are dead, the grandchildren and the issue of deceased grandchildren take, in all the states, (A) *per stirpes*, in all cases, to the remotest degree, in the same manner (§ 3101) : N.H., Vt., R.I., Ct., N.J., Ill., Io., Minn., Kan., Md.,<sup>¶</sup> Del., N.C., Ky., Tenn., Ark., Cal., Col., Wy., S.C., Ga., Ala., Miss. (B) But when all such issue or grandchildren are in the same degree, they take in equal parts *per capita* ; otherwise, *per stirpes*, as in A : Mass., Me., N.Y., Pa., O., Ind.,<sup>b</sup> Mich., Wis., Neb., Va., W.Va., Mo., Tex.,<sup>c</sup> Ore., Nev., Wash., Dak., Ida., Mon., Uta., Fla., La., N.M., Ariz. See § 3138.

(C) But in one state, when there was but one child, and he or she is dead, leaving issue several children, these grandchildren take real estate according to the common law ; *i. e.*, the entire estate goes to the eldest grandson, or, if no grandson, to the granddaughters in coparcenary. See N.J. 4 Griff. Reg. 1250.

NOTES. — <sup>a</sup> See § 3000. <sup>b</sup> Applies to grandchildren only, not to great-grandchildren. <sup>c</sup> The law is, however, ambiguous in wording.

§ 3104. **Same Case : Personal Property.** It descends (except in Maryland) like the realty in § 3103. See §§ 3102–3.

§ 3105. **Children and Wife or Husband Living.<sup>a</sup>**

(A) In many states, the wife takes (1) one third of the real estate remaining, after debts and charges are paid, in fee : N.H.,<sup>b</sup> Ct.,<sup>c, d, e</sup> Cal.,<sup>c, f</sup> Nev.,<sup>c, f</sup> Wash.,<sup>c, f</sup> Dak.,<sup>c, f</sup> Ida.,<sup>c, f</sup> Mon.,<sup>c, f</sup> Uta.,<sup>c, f</sup> S.C.,<sup>b, c</sup> Fla.,<sup>b, f</sup>

(2) In others, she takes one half of such estate in fee : Ind.,<sup>g</sup> Cal.,<sup>c, g</sup> Nev.,<sup>c, g</sup> Col.,<sup>c</sup> Wash.,<sup>c, g</sup> Dak.,<sup>c, g</sup> Ida.,<sup>c, g</sup> Mon.,<sup>c, g</sup> Wy.,<sup>c</sup> Uta.,<sup>c, g</sup> Fla.,<sup>b, g</sup>

(3) In a few, she takes one third of such estate for life :<sup>h</sup> Pa., Tex.<sup>c</sup>

(4) In several, she shares equally in such estate (in fee) with the children and the issue of those deceased, *per stirpes* : Mo.,<sup>b</sup> Ark.,<sup>b</sup> Ga.,<sup>c, d</sup> Miss.<sup>b, d</sup>

*Except* when such shares exceed five in number, she always takes a fifth part : Ga.<sup>b</sup>

(5) In two others, the wife takes one third of all real estate of which the husband was seized at any time during coverture, to which she has made no relinquishment, and which has not been sold under execution, free of all his debts and charges of administration, in fee :<sup>h</sup> Ind.,<sup>f</sup> Io.<sup>c</sup>

*Except* when such real estate exceeds \$10,000 in value, she is only entitled, as against creditors, to a fourth ; or if it exceed \$20,000, to a fifth : Ind.

(6) In one, she takes such third as in (5), but *subject* to the husband's debts : Minn.<sup>c</sup>

(7) So, in one other, she takes one half such estate, as in (6) : Kan.<sup>c</sup>

(B) In other states, she takes her dower estate only ; see Art. 320 : N.H.,<sup>i</sup> Mass., Me., Vt.,<sup>i</sup> R.I., Ct.,<sup>j</sup> N.Y., N.J., O., Ill., Mich., Wis., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo.,<sup>i</sup> Ark.,<sup>i</sup> Ore., Ga.,<sup>i</sup> Ala. For other provisions and citations, see also § 3202.

(C) The other portion of the estate, after the widow's or husband's share is assigned as above respectively, descends, in all states, as in § 3101. And so, in states where the widow takes dower or a life estate (A (3), B), the remainder upon such estate goes to the children, etc., as in § 3101.

**Restrictions.** A widow remarrying cannot alienate such estate, with or without the consent of the husband, if issue are alive by the former marriage, until all the children reach the



age of twenty-one, and join in the conveyance: Ind. 2484. If, during such subsequent marriage, the widow die, such estate reverts to the children by the former marriage: Ind.

If the widow has no children by the decedent, and he left children by a former wife, such widow's share of the real estate descends on her death to them: Ind. 2487.

**Of the Husband.** The husband in such case takes (A) one third the surplus real estate in fee, after paying debts and expenses: N.H.,<sup>b</sup> Ind.

But if the issue left are not his children, and he has no estate by the curtesy, the husband takes one third the real estate of which the wife died seized for his life: N.H.

(B) He shares with the children and their descendants, *per stirpes*: Ga., Fla.

(C) He takes his estate by the curtesy, etc., only (see § 3301): N.H., Mass., Me., Vt., R.I., Ct.,<sup>j</sup> N.Y., N.J., Pa., O., Ill., Mich., Wis., Neb., Md., Del., Va., W.Va., N.C., Ky., Mo., Ore., Ala.

The share of the husband both in real and personal property of the wife is, in all cases, the same as that of a widow in the husband's: Io., Tex., Cal., Wash., Dak., Ida., Mon., Wy., Uta., S.C., Miss. So, in all states so<sup>c</sup> noted, as in this section provided. For such states, therefore, see also above in A.

For New Mexico, see § 3404. So, in Louisiana and Arizona, the widow and husband take no estate, real or personal, except in the community property, as provided by Art. 340.

NOTES. — <sup>a</sup> For Dower, and for the Descent of Community Property, see Chapter V. <sup>b</sup> This share is in lieu of dower or curtesy; see § 3263. <sup>c</sup> Or the husband, if it was the wife who died intestate. <sup>d</sup> This intestate share is not, in these states, as in others, identical with that which she takes upon waiving a will. See § 3262. <sup>e</sup> As to marriages since April 20, 1877, only; but the same law applies to other marriages if the parties enter into a written contract of waiver of their rights as existing before that date, and such contract be recorded in the probate court: Ct. 1885, 110, 195. <sup>f</sup> If there be more than one child, or the issue of more than one child deceased; if there was only one child, see below. <sup>g</sup> If there was only one child surviving or leaving issue. <sup>h</sup> Practically (except in amount) this is dower as at common law, and it may be barred by jointure, etc., as in Chapter V., where further rules relating to this case will be found. <sup>i</sup> But she (or he) may waive such dower, and take her intestate share; see note <sup>b</sup>. <sup>j</sup> As to marriages of date before April 20, 1877, see note <sup>e</sup>.

§ 3106. **Same Case: Personal Property.** (A) **Of the Widow.** (For other states, see § 3102, A.) In most states, (1) one third the surplus personal property goes to the widow (or *husband*, in states noted<sup>c</sup>); the rest to the issue, as in §§ 3102, 3104: N.H.; Mass.; Me.;<sup>c</sup> R.I.; Ct.;<sup>c</sup> N.Y.;<sup>c</sup> N.J.; Pa.; O.;<sup>b</sup> Ind.;<sup>f</sup> Ill.;<sup>c</sup> Mich.;<sup>f</sup> Md.; Del.; Va.; W.Va.;<sup>c</sup> N.C.;<sup>d, e, h</sup> Ky.; Ark.; Tex.;<sup>c</sup> Fla.<sup>b, f</sup> 95, 2.

(2) In others, one half such property to the widow; the rest as above: Ind.,<sup>g</sup> Mich.,<sup>a, c</sup> Ore., Wash.,<sup>c</sup> Ala.,<sup>e, g</sup> Fla.<sup>b, g</sup>

(3) In a few, the widow shares equally with the children, counting the issue of a deceased child as one (*a*) in all cases: Wis., Neb., Tenn., Mo., Ark.,<sup>b</sup> Miss.;<sup>c</sup> (*β*) when there are two children or more: N.C., Ala.

*Except* that, if there are more than four children, the widow always takes a fifth: Ala.

(4) In other states, such personalty goes like the real estate, as in § 3105; see § 3102.

For the widow's temporary allowance of supplies, etc., see in the Probate Code.

(B) **Of the Husband.** (1) In many states, the husband's share of personalty is, in all cases, like the widow's: Me., N.Y., Ill., Minn., Kan., Tex., Cal., Wash., Dak., Ida., Mon., Wy., Uta., S.C., Miss.

(2) And in a few others, his share is like the widow's in this case: Mich. So, in the states above so<sup>c</sup> noted; see A.

(3) But in several, the husband is entitled to all the wife's separate personal property, if she die intestate, though there be children or issue living: R.I., Ct.,<sup>j</sup> N.J., Md., Del., Va., Ky., N.C., Ore.

(4) And in several others, he is entitled to one half such estate; the rest, as in § 3102: Mass., Ala.

(5) In a few, he shares equally with the children and the issue of those deceased, *per stirpes*: Pa., Fla.

(6) In a few others, he takes a third; the rest as before: N.H., Ind.

(7) In one, he takes all such personalty for life; after his death, to the children, etc.: Md. 1882, 477.

(8) In one, it seems he has no share of the wife's personalty not reduced to possession: O. 3109; Wis.; Neb.; Tenn.; Mo.; Ark. But *quære* whether he has not all.

NOTES. — *a, b, c, d, f, g, j* See same notes § 3105. *e* If not more than two children. *h* One third all the personalty of which the husband *died possessed*, "as part of her dower" (*i. e.*, free of debts). *i* One half to the widow, if the whole does not exceed \$400, and one third of the rest.

§ 3107. **No Issue: Wife or Husband Dead.** If there are no descendants living, the estate descends (A) to the father of the decedent, in many states: N.H., Me., Vt., R.I.,<sup>†</sup> N.Y.,<sup>† d</sup> Minn., Neb., Va., W.Va., Ark., Ore., Nev., Col., Dak., Ida., Mon., Fla., Ariz.

(B) To the brothers and sisters and descendants of deceased brothers and sisters, *per stirpes*: Ct.,\*<sup>†</sup> N.J.,\*<sup>† d</sup> O.,\*<sup>†</sup> Md.,\*<sup>† d</sup> Del.,\*<sup>† d</sup> Tenn.,<sup>† d</sup> Ala.,\*<sup>†</sup> Miss.\*

(C) To the father and mother equally: Mass., Mich., Wis., Io., Kan., Ky., Tex., Cal., Wash., Uta., N.M.

(D) To the parents, brothers, and sisters of the deceased and the descendants of them deceased, *per stirpes*<sup>a</sup> (but if only one parent, to him a double portion, in Illinois): Ill., Mo.,\*<sup>†</sup> Wy.,\*<sup>†</sup> S.C.\*<sup>d</sup>

(E) In Utah, it goes all to the mother: Uta.<sup>c</sup> 1884, 44, 2, 18.

(F) In Pennsylvania, to the father and mother, or the survivor of them, for their joint lives: Pa.<sup>†</sup>

(G) In a few others, one half to the father and mother as joint tenants (or, in Louisiana, in equal several shares); the other half to the brothers and sisters and their descendants, as in § 3113: Ind.,\*<sup>†</sup> Tex.,\*<sup>†</sup> La.\*

(H) In one, to the next collateral relation capable of inheriting of the decedent, whether of the paternal or maternal line, with indefinite representation (§ 3137): N.C.<sup>†</sup>

(I) To the father for life: Ark.<sup>†</sup> <sup>c</sup>

(J) In Georgia, to the father (or, if the father be dead, to the mother), brothers and sisters of the whole blood, and paternal brothers and sisters of the half blood, and the children and grandchildren, *per stirpes*, of such brothers and sisters deceased, in equal shares: Ga.\* And if there are no brothers and sisters of the whole or the paternal blood, the half brothers and sisters of the maternal blood inherit, with the father or mother, as before: Ga.

**Descent Distinction.** (See also § 3134, for citations.) In nine states, however, there is a special distinction (for the general distinction, see §§ 3133, 3134) made between cases where the estate was acquired by the decedent himself or (1) by descent, gift, or devise from an ancestor: O., Tenn.

(2) Where it came to the decedent on the part of his mother, or on the part of the father: N.Y.<sup>b</sup> 2,2,29; Ind.; Md.; Ark.<sup>b</sup>

(3) Or, generally, whether it came by descent, devise, or gift from any kindred or ancestors or not: R.I., Ct.

(4) In North Carolina, the distinction is between cases where the inheritance has been transmitted by descent, devise, gift, or settlement from an ancestor to whom the person thus advanced or inheriting was or would have been heir, and all other cases.

Estate acquired by the decedent descends as above, in all states; and so, in Indiana, of estates however acquired, in the case provided for by this section; but estate acquired in the other manners respectively indicated above descends, —

(A) If the intestate was a minor, and left no issue (see § 3101), such estate goes to the next of kin of the blood of such ancestor ; if none, to the next of kin of the intestate generally, in many states.

(B) To the decedent's husband or wife for life ; and if no husband or wife, or at his or her death, to the brothers and sisters of the intestate of the blood of such ancestor and their legal representatives in equal shares, *per stirpes* : O.\*\* In Ohio, if there are no brothers and sisters of the blood of the ancestor from whom the estate came, or their legal representatives, and the estate came by deed of gift from an ancestor who is still living, it goes to such ancestor ; if the ancestor from whom the estate came be dead, it goes to the children of such ancestor or their legal representatives ; if none of these, to the husband or wife, relict of such ancestor, if a parent of the deceased, during the life of such relict ; and if no such husband or wife, or upon his or her death, to the brothers and sisters of such ancestor or their legal representatives ; if none such, to the brothers and sisters of the half blood of the intestate or their legal representatives, although they are not of the blood of the ancestor from whom the estate came ; if none such, to the next of kin of the intestate of the blood of the ancestor from whom the estate came or their legal representatives ; if none such, to the husband or wife of the intestate as an estate of inheritance ; if none such, to the next of kin of the intestate, though not of the blood of the ancestor from whom the estate came ; if none such, to the children of any deceased husband or husbands, wife or wives, whose marriage with the intestate was not annulled prior to his or her death, or their legal representatives ; if no such children or legal representatives living, to the brothers and sisters of any such husband or wife ; if none, to the next of kin of such intestate (but see above) ; if none, escheat.

(C) If the intestate left no issue, such estate goes to the brothers and sisters and their issue of the blood of such ancestor ; if none, to the children of such ancestor and their issue ; if none, to the next of kin of such ancestor ; but if the blood of such ancestor is extinct, then to the brothers and sisters of such person and their representatives ; if none, it descends as in ordinary cases : Ct.†

(D) In New York, if it came on the part of the father, it goes to the father in fee ; if on the part of the mother, to the mother for life, remainder to the brothers and sisters. If there is no father, in the first case, to the mother for life ; and if no mother, in the second case, to the father for life ; remainder in both cases to the brothers and sisters of the intestate of the blood of such parent and their descendants, as hereinafter provided ; if none such, to the mother or father in fee ; if neither mother nor father, to the brothers and sisters of the father, in the first case, or of the mother, in the second case, or their issue ; and in default of such, to the brothers and sisters of the mother, in the first case, or of the father, in the second case : N.Y. 2,2,5 and 10-12.

And if there are no brothers and sisters of either the father or mother or their descendants, the estate descends according to the *rules of the common law* (i. e., to the great-grandfather's eldest male descendant in the line of the eldest sons ; or if no such male descendant, to his sisters, unless the inheritance come on the part of the mother ; but *quære*) : N.Y. *ib.* 16.

(E) In Indiana, the distinction is not made until we reach the case of there being no issue, parents, brothers, or sisters (§ 3121).

(F) And in Maryland, if the estate descended to the intestate on the part of the father, then to the father ; if none, to the brothers and sisters of the blood of such father and their descendants,\*\* equally ; if none such, to the father's father, and if deceased, to his nearest descendants in equal degree equally ; if none, to the father of such grandfather, or his descendants in the same manner, and so on ; if no paternal ancestor, or descendant of such ancestor deceased, to the mother of the intestate ; if no mother, to her descendants in equal degree equally ; if none, to the maternal ancestors and their descendants, in the same manner as above, in the case of the paternal line. If the estate descended on the part of the mother, it goes to her and her kin in the same



manner as above, *mutatis mutandis*; and so, for default thereof, to the father and his kin.

(G) To the next collateral relatives of the intestate of the blood of such ancestor; then to the other kin: R.I., N.C. See also § 3134, for similar provisions in many other states.

(H) So, to the brothers and sisters of such blood; if none, to the parents; if none, to other heirs of the blood of such ancestor, and their descendants: Tenn.

(I) To the father and his heirs, to the exclusion of the mother's, but in the same order as in other cases; and so, if the estate came on the part of the mother, to her and her heirs: Ark. 2531. And in other states, the same would result from § 3134.

NOTES. — <sup>a</sup> But *per capita* if in equal degree, in the noted states; and when division is made *per capita*, the grandmother, or other lineal female ancestor, takes only her share *per capita*. <sup>b</sup> This expression includes every case where the inheritance came to the intestate by gift, devise, or descent from the parent referred to, or from any relative of the blood of such parent: N.Y.; Ark. 2543. <sup>c</sup> This provision directly contradicts another section of the same act; see above, A, C. <sup>d</sup> But no representation is allowed beyond brothers' and sisters' children, in the noted states; see § 3138. <sup>e</sup> In the noted states, if all such relatives are of equal degree to the intestate, they take *per capita*; see § 3137. <sup>f</sup> It may well be doubted whether the common law in such case would mean the English law of primogeniture, or the common law of the state, by which the children, etc., inherit equally.

§ 3108. **Same Case: Personal Property.** (A) In Connecticut, the personal property, when there is no widow nor issue, is distributed as real estate descends in § 3107 respectively.

So, in many other states (except, in some, as to the half blood, etc.), by § 3102, A, B. See § 3102.

(B) In others, in the case here mentioned, it all goes (1) to the father: N.Y., Md., Tenn.; (2) to the father and mother equally: Pa.; (3) to the next of kin in equal degree: N.J.,\* N.C.; and those who legally represent them: N.C.

(4) To the brothers and sisters and their issue by representation: Del.\*\*

§ 3109. **Same Case: Wife or Husband Living.** (A) In several states, there being no issue, the wife (or husband, in the noted <sup>a</sup> states) of the intestate takes all the real estate in fee, subject to debts, etc.: O.; <sup>†</sup><sup>a</sup> Wis.; <sup>a</sup> Kan.; <sup>a</sup> Ore.; Col.; <sup>a</sup> Ga.; <sup>a</sup> Miss.; <sup>a</sup> Fla.,<sup>a</sup> <sup>c</sup> 95,5.

But in Ohio, should such surviving husband or wife marry again, and die intestate and without issue, such estate (real or personal), or estate which came by gift or devise of the former husband or wife, descends to the children of such husband and wife or their issue; if none, then one half to the brothers and sisters of the intestate, and one half to the brothers and sisters of the deceased wife or husband from whom it came: O. 4162; 1881, p. 107.

(B) In two others, three fourths to the widow or husband; the remainder to the father and mother jointly: Ind.,<sup>a</sup> Wy.<sup>a</sup>

(C) In many states, one half such real estate to the widow or husband, the other half as in § 3107 respectively: N.H.,<sup>a</sup> <sup>c</sup> Mass., Vt.,<sup>a</sup> <sup>c</sup> Ct.,<sup>a</sup> <sup>e</sup> Pa.,<sup>c</sup> Ill.,<sup>a</sup> Io.,<sup>a</sup> Mo.,<sup>a</sup> <sup>d</sup> Ark., Tex.,<sup>a</sup> Cal.,<sup>a</sup> Nev.,<sup>a</sup> Wash., Dak., Ida., Mon., Uta., S.C.<sup>a</sup>

Except that all the estate, real or personal, if not over \$2,000 in value, goes to the widow in fee: Vt.,<sup>a</sup> <sup>c</sup> So, in one other, \$1,000: Ind.<sup>a</sup> So, all up to \$5,000: Mass. So, in Wyoming, all up to \$10,000 in value: Wy.<sup>a</sup>

(D) In a few, she takes one half the real estate of which the husband died seized in "dower" (*i. e.*, for *life*): Me.,<sup>a</sup> <sup>b</sup> Del., Ark. See Art. 320.

(E) In a few others, all such real estate to the widow for life; remainder to the father, etc.: Mich., Neb., Ariz.

(F) In Rhode Island, the court may make such an allowance of real estate as is suitable, not needed for debts, etc., to the widow in addition to dower (compare Part IV., Division I.): R.I.

(G) But in others, she merely takes her dower or other estate, as in § 3105: Mass.,<sup>b</sup> Vt.,<sup>i</sup> Ct.,<sup>j</sup> N.Y., N.J., Minn., Md., Va., W.Va., N.C., Ky., Tenn., Ala.

(H) She takes all the real estate which came to the husband in right of the marriage: Mo.

**The Husband's Share in Intestate Realty.** (A) If the wife die intestate without issue, the husband, when entitled to curtesy, has in addition her real estate in fee to the value of \$5,000: Mass. (B) In many states, he has curtesy, etc., only, as in § 3105: N.H., R.I., Ct.,<sup>j</sup> N.Y., N.J., Pa.,<sup>g</sup> Mich., Neb., Md., Va., W.Va., Ore. So, in other states, when the laws are silent as to this case. (C) But in a few states, he has, in lieu of curtesy, (1) all the wife's estate to the value of \$2,000, and half the excess, in fee: Vt.;<sup>c</sup> (2) half the real estate of which she died seized, subject to debts: N.H.<sup>c</sup> If not entitled to curtesy, he has half her real estate for life: Mass.; Del. V. 14, C. 550,5.

The remainder, after such widow's or husband's share, goes, as a rule, as if there were no widow or husband (§ 3107); but not so, in Indiana and Wyoming. See above.

NOTES. — <sup>a</sup> Or the husband takes the same, if it is the wife who has deceased. <sup>b</sup> If the estate is solvent, only. <sup>c</sup> In lieu of dower or curtesy, as in § 3105, note <sup>b</sup>. <sup>d</sup> See also § 3110. <sup>e,f,j</sup> See § 3105; same notes. <sup>g</sup> He has such curtesy although no issue was born; see § 3201. <sup>h</sup> In lieu of the intestate share above provided.

§ 3110. **Same Case: Personalty.** If there are no issue, (A) all surplus personalty goes, in most states, to the widow (or husband, in states so <sup>a</sup> noted): <sup>b</sup> Ill.,<sup>a</sup> Neb., W.Va.,<sup>a,b</sup> Tenn., Tex.,<sup>a</sup> Ore.,<sup>a</sup> Wash.,<sup>a</sup> Miss., Fla.<sup>c</sup>

(B) In other states, it goes like realty in the same case, respectively (§ 3109): Ind.,<sup>a</sup> Wy.,<sup>a</sup> N.M. So, in other states, by § 3102, A.

(C) In many, the widow takes half the personalty: N.H.,<sup>a</sup> Me.,<sup>a</sup> R.I., Ct.,<sup>a</sup> N.Y.,<sup>a</sup> N.J., Pa., Md., Del., Va.,<sup>b</sup> N.C., Ky., Mo.,<sup>a,c</sup> Ark., Ala.

When a husband shall die leaving issue, but not by his last marriage, the widow may, in lieu of dower, take her real estate and personal property that came to him in her right by the marriage or by her consent in writing, subject to the husband's debts: Mo. 2191.

But in two others, *all* the personal property acquired by the husband by reason of his marriage with the widow, and remaining in kind at death, goes to her, not subject to his debts: Va., Mo. See also Art. 340.

(D) In Massachusetts, all to the widow up to \$5,000, and half the excess above \$10,000.

(E) In Michigan, all to the widow up to \$1,000, and half the excess.

**Husband.** (F) In several states, the husband takes all the surplus: Mass.; R.I.; N.J.; Pa. *Marriage*, 16; Md. 1882,477; Va.; W.Va.; Ky. In the states noted <sup>a</sup>, he has a share like the widow's, as above. In Michigan, he takes half the surplus. For other states, see § 3106.

The remainder after such widow's or husband's share goes (1) as if there were no widow or husband (see §§ 3102,3108): N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., Io., Md., N.C.; (2) it goes to the father, or, if he be dead, to the mother, brothers, and sisters, and their issue, if deceased, in equal shares: Mich.

NOTES. — <sup>a</sup> See § 3109, note <sup>a</sup>. <sup>b</sup> Either by the surviving widow or a previous wife, in the noted states. If he left issue by another wife, the widow takes, in Virginia, as in § 3106. <sup>c</sup> In lieu of dower; see § 3105, note <sup>b</sup>.

§ 3111. **No Issue, no Widow or Husband, Father or Mother Dead.** In the states enumerated in § 3107, C, F, G, (A) if such mother be dead, all the estate so given to the father and mother goes (1) to the father: Mass., Pa., Ind., Mich., Wis., Io., Kan., Ky., Cal., Wash., Uta., N.M.; (2) in the states under § 3107, C, G, A, the brothers and sisters and descendants take the share of the father or mother if either be dead: Tex.\*;

and if no brothers and sisters, etc., the whole to the father: Tex.\*; (3) one fourth to the father, remainder to the brothers and sisters, etc.: La.\* 911.

(B) And in states mentioned under § 3107, A, C, F, G, and I, if the father be dead, (1) his share goes to the mother: Mass., Pa., Ind., Wis., Io., Kan., Ark.,<sup>a</sup> Cal., Col., Wash., Uta., N.M.; but in others, (2) in such case it goes in equal shares to the mother, brothers and sisters, and children of those deceased, *per stirpes*: N.H., Me., Vt., R.I.,<sup>†</sup> Neb.,\* Va.,\* W.Va.,\* Tex.\* (see § 3137), Ore., Nev.,\* Dak.,\* Ida.,\* Mon.,\* Fla.,\* Ariz.\*\* And if there are no such brothers and sisters, *all* goes to the mother to the exclusion of their issue, if any: Me., Mich., Minn., Neb., Cal., Ore., Nev., Dak., Ida., Mon., Ariz.<sup>†</sup>; (3) and in others, half goes to the mother, half to the brothers, etc., as in (2): Mich.,\* Ky.\*; (4) to the mother for life, and then to such brothers and sisters and descendants of deceased brothers and sisters (see § 3138) as may be living at the mother's death, in equal shares, *per stirpes*: N.Y.,<sup>†</sup> Ark.<sup>†</sup>; (5) one third to the mother, remainder to the brothers and sisters and their issue in equal shares: Minn.\* 1885,118; (6) one fourth to the mother, remainder to the brothers and sisters, etc.: La. (See under A, 3.) For Georgia see § 3107, J.

(7) The partition of the half, the three fourths, or the whole of a succession falling to brothers and sisters, as mentioned in §§ 3107,3111-3114, is made in equal portions, if they are all of the same marriage; if they are of different marriages, the succession is equally divided between the paternal and maternal lines of the deceased; the german brothers and sisters take a part in the two lines, the paternal and maternal brothers and sisters each in their respective lines only; if there are brothers and sisters on one side only, they inherit the whole succession to the exclusion of all other relations of the other line.

In all these cases, the brothers and sisters of the deceased, or their descendants, inherit in their own right or by representation, as is regulated in the section which treats of representation: La. 913.

NOTE. — <sup>a</sup> Whether for life or in fee is not clear; see below (4) and § 3107, note c.

§ 3112. **Same Case: Personal Property.** The wife or husband and father being dead, and there being no issue, (A) it goes in equal shares to the mother, brothers and sisters, and their descendants, if deceased, *per stirpes*: Md.,|| Tenn. So, in many other states, under the provisions of § 3102, A.

(B) To the mother: Pa.; (C) as in § 3111, respectively: Mich. If the mother be dead, it goes to the father: Pa.; (D) to the mother, brothers and sisters, and their issue, by right of representation, in equal shares: N.J.\*

§ 3113. **No Issue, Widow or Husband, nor Father and Mother.** (For other states, see §§ 3107,3111; there is no special provision for this case.) (A) In such case, real estate descends, in most states, to the brothers and sisters and the issue of brothers and sisters deceased, *per stirpes*: Mass., Vt., N.Y.,<sup>†</sup> Pa.,\*\* <sup>a,f</sup> Ind.,<sup>†</sup> Ill., Wis.,\* Minn.,\* Neb.,\* Ky.,\* Ark.,<sup>†</sup> Cal.,\* Col.,\* Wash., Dak.,\* Ida.,\* Mon.,\* Uta.,\* S.C.,\* <sup>h</sup> Ga.,\* La., Ariz.<sup>†</sup>

And if all such collaterals are in the same degree, they take *per capita*, in equal shares: Mass., N.Y., Pa.<sup>a,f</sup>

(B) In New Mexico,<sup>g</sup> the paternal and maternal grandparents inherit. If no grandparents, "the carnal brothers and their children, *per stirpes*; in the absence of the foregoing, the children of the brothers of the mother alone and their children shall become heirs as the nearest branch."

(C) It descends as if the parents had outlived the intestate and died each in the possession or ownership of his or her portion; and so on through ascending ancestors and their issues: Io., Kan.

NOTES. — <sup>a</sup> But if there are no brothers and sisters of the whole blood or their legal representatives, to the brothers and sisters of the half blood and their legal representatives: Md. <sup>b</sup> Under the pro-



visions of § 3107. <sup>c</sup> See § 3107, note <sup>c</sup>. <sup>d</sup> Representation is not, however, allowed beyond brothers' and sisters' children ; or <sup>e</sup> grandchildren. See § 3137. <sup>f</sup> But in spite of note <sup>d</sup>, if there are no nephews and nieces, the other issue of brothers and sisters, nearest of kin, take in preference to other kindred. <sup>g</sup> " Provided, that if consanguineous brothers and their children appear in conjunction with those of the mother alone, the first shall inherit the property of the father, while the latter inherit that of the mother ; the remaining property to be divided between them with due equality : " N.M. <sup>h</sup> If there are no brothers and sisters of the whole blood, their issue *per stirpes*, equally with brothers and sisters of the half blood.

§ 3114. **Same Case: Personalty.** (A) To the brothers and sisters and the issue of such as are deceased, *per stirpes*, as in § 3113: Pa.,|| Tenn.<sup>a</sup>

(B) So, in many other states, under § 3102, A.

(C) To the next of kin in equal degree and their legal representatives: N.Y.||

NOTE. — <sup>a</sup> See § 3113, note <sup>d</sup>.

§ 3115. **No Issue nor Father or Mother.** In such case, half the real estate goes to the husband or wife ; the other half as if no husband or wife (§ 3113): Uta., S.C.

In Louisiana and other states, it descends as in § 3113 respectively. In others, the widow's or husband's share as in § 3109 ; remainder as in § 3113, there being no special provision for this case.

In Indiana, all to the widow or husband.

§ 3116. **Same Case: Personalty.** (A) In several states, all goes to the widow or husband : Ind.

In New York, if there be no father nor mother, the widow has half the personal estate, as in § 3110, and all the remaining half up to \$2,000 ; the excess of such remaining half above \$2,000 goes to the brothers and sisters and their representatives: N.Y. But if there be only no father, the excess of the remaining half above \$2,000 goes in equal shares to the mother, brothers and sisters, and representatives of deceased brothers and sisters: N.Y.

In others, it goes as in § 3110, respectively. So, in others, as to the widow's or husband's share ; remainder as in § 3114, there being no special provision for this case. So, in others, as in § 3115, respectively ; see § 3102, A.

§ 3117. **No Issue, Husband, or Widow, nor Brother and Sister<sup>a</sup> or their Issue.** All realty goes (A) to the father, as in § 3107, A: N.J.,<sup>a</sup> O.,<sup>b</sup> Md.,<sup>b</sup> Del.,<sup>b</sup> N.C., S.C.,<sup>a</sup> Ga., Ala. And if no father, (1) to the mother for life ; remainder as in § 3121: N.J. ; (2) to the mother in fee: O.,<sup>b</sup> Md.,<sup>b</sup> Del.,<sup>b</sup> N.C., Ala.

(B) To the father and mother in equal shares: Ct.,<sup>†</sup> Tenn., Miss., La.

(C) To the father and mother and the survivor of them in fee: Pa., Ind., Miss. If no father, to the mother, as in § 3111: S.C.,<sup>a</sup> Ga., Ala.

But real estate derived from the side of the mother descends as if the father were dead: N.J. (D) To the brothers and sisters of the half blood and their issue (see also § 3134): O., Md., Del.

NOTES. — <sup>a</sup> *i. e.*, of the whole blood, in Connecticut, New Jersey, Ohio, Maryland, Delaware, South Carolina. <sup>b</sup> When there are no brothers and sisters of the half blood ; see below.

§ 3118. **Same Case: Personalty.** (A) To the father ; if he be dead, to the mother: N.Y., Md., Tenn.

(B) As in § 3117: Del.

§ 3119. **No Issue, Father and Mother, nor Brother and Sister, or their Issue.**

(A) In such case all realty descends to the husband or wife surviving, in fee: Mo., Tex., Cal., Nev., Wash., Dak., Ida., Mon., Uta.

(B) Half to the widow or husband, half to the next of kin, as in § 3121: S.C.

(C) All to the next of kin, as in § 3121: La. So, in many states, where there is no special provision.

(D) If there be a mother, but no father, descendant, brother, sister, or their issue, half goes to the mother, half to the widow : N.Y.

(E) "The nearest relations inherit, without any preference being given to those having a double tie of relationship, to the eighth degree of civil computation : " N.M.

(F) To the ascendants, excluding all collaterals : La. 905.

If there are ascendants in the paternal and maternal lines in the same degree, the estate is divided into two equal shares, one of which goes to the ascendants on the paternal, and the other to the ascendants on the maternal side, whether the number of ascendants on each side be equal or not. In this case the ascendants in each line inherit by heads.

But if there is in the nearest degree but one ascendant in the two lines, such ascendant excludes all other ascendants of a more remote degree, and alone takes the succession.

Ascendants, to the exclusion of all others, inherit the immovables given by them to their children or their descendants of a more remote degree who die without posterity, when these objects are found in the succession.

If these objects have been alienated, and the price is yet due in whole or in part, the ascendants have the right to receive the price. They also succeed to the right of reversion on the happening of any event which the child or descendant may have inserted, as a condition in his favor, in disposing of those objects : La. 906-8.

§ 3120. **Same Case: Personalty.** (A) All personalty goes to the widow or husband surviving : Mich., Md., Mo., Tex.

(B) If there be no parent, descendant, brother or sister, nephew or niece, all the personalty goes to the widow or husband, to the exclusion of grand-nephews, etc. : N.Y.

(C) For Indiana, see § 3116.

(D) In one, if there are no descendants, father, mother, brother, or sister of the whole blood or their children, or brother or sister of the half blood, one half to the widow or husband, the other to the lineal ancestor; if no such ancestor, two thirds to the widow, one third to the next of kin : S.C.

§ 3121. **No Issue, Father or Mother, Brother and Sister, or their Issue, nor Husband or Wife.** (A) The estate goes to the next of kin, according to the civil law, in equal degree, except that when there are two or more in the same degree, those claiming through the nearest ancestor are to be preferred : Mass., Me., Pa.,\*† Mich.,\* Wis.,\* Minn.,\* Neb.,\* Del.,\*†<sup>d</sup> Cal.,\* Ore., Nev.,\* Wash.,\* Dak.,\* Ida.,\* Mon.,\* Uta.,\* Ala.,\* Ariz.\*†

(B) To the next of kin : N.H., Vt.,<sup>b</sup> Ill.,<sup>b</sup> Miss.,\*<sup>b</sup> La.\* The next of kin in equal degree take equal shares, if more than one.

(C) In four states, if there is no father, mother, brother, sister, or descendant thereof, the inheritance is divided, one half going to the paternal, the other half to the maternal, kindred, in the following order, viz. : (1) to the grandfather ; (2) to the grandmother and the uncles and aunts on the same side, and their descendants, if deceased, in equal shares, *per stirpes* ; (3) to the great-grandfathers, or great-grandfather, if but one ; (4) to the great-grandmothers or great-grandmother, and brothers and sisters of grandfathers and grandmothers, and the descendants of such of them as are deceased, in equal shares, *per stirpes* ; (5) and so on, passing to nearest lineal male ancestors, and, for want of them, to nearest lineal female ancestors in the same degree and descendants of such male and female ancestors ; (6) if no such maternal kindred or paternal kindred, both halves go to the paternal or maternal kindred respectively ; (7) if no such kindred, to the husband or wife ; if the husband or wife be dead, to his or her kindred, as if such husband or wife had survived the intestate, and died entitled to the estate : R.I.,† Va.,\*<sup>c</sup> W.Va.,\* Fla.\*

(D) To the brothers and sisters of the half blood, and their issue ; if none, to the next of kin in equal degree : Ct.,†<sup>b</sup> N.J.,†<sup>a</sup> Pa.,†<sup>a</sup> O. †<sup>d</sup> See also § 3133.

(E) To the grandfathers, grandmothers, uncles, and aunts of the deceased, and their descendants if deceased, *per stirpes* ; and so on, passing to the nearest lineal ancestors and their descendants, if deceased, *per stirpes* : Mo.,\* Ark.,\*†<sup>c</sup> Col.,\* Wy.\*

(F) To the brothers and sisters both of the father and mother of the intestate and their issue in equal shares, in the same manner as if they had been brothers and sisters of the intestate; if none, it descends according to the common law: N.Y.\*†

(G) But in two states, if the parents are dead, the estate descends as if they had outlived the intestate and died seized; and so on through ascending ancestors: Io., Kan.\*

(H) In Indiana, one half to the paternal kin, one half to the maternal kin, viz.: (1) to the grandfather and grandmother equally; if one be dead, the entire one half to the survivor; if both are dead, (2) to uncles and aunts and their descendants, *per stirpes*; (3) to the next of kin, in equal degree of consanguinity among the paternal kin; if no kin at all on one side, all to the other side: Ind.\*‡ 2471.

(I) In Maryland, if no father nor mother, to the paternal grandfather; if none such, to his descendants in equal degree equally; if none such, to the maternal grandfather; if none such, to his descendants, and so on, alternating the next male paternal ancestor and his descendants and the next maternal ancestor and his descendants, and giving preference to the paternal ancestor and his descendants: Md.\*‡ 47,22.

(J) To the grandfather and grandmother equally; if either be dead, all of such moiety to the survivor; if none, to the uncles and aunts and their descendants; if none, to the great-grandparents and their descendants; and so on, to the nearest lineal ancestors and their descendants in the same way; and if no such kindred to one of the parents, the whole goes to the kindred of the other: Ky.\*

(K) In Tennessee, if father, mother, brothers and sisters, and their descendants are dead, in equal moieties to the heirs of the father and mother in equal degree, or representing those in equal degree, to the deceased; if those heirs, or those whom they represent, are not of equal degree, heirs nearest in blood are preferred: Tenn.‡

(L) First, to the brothers and sisters, and their descendants, of the father; next, to those of the mother: Ark.\*† c 2532.

(M) In Texas, one half to paternal kin, one half to maternal kin, viz.: (1) to grandfather and grandmother equally; if either is dead, one half to the survivor and one half to the descendants of the grandfather or grandmother deceased; if none such, all to the surviving grandfather or grandmother; if no grandfather or grandmother, the whole to descendants; and so on, passing in line male to the nearest lineal ancestors and their descendants: Tex.\*

(N) To the "lineal ancestor," if none, to the next of kin, but in this case, if there be a widow or husband, she takes two thirds: S.C.\*

(O) To the first cousins, uncles, and aunts, in equal shares; and in default of these, to the next of kin: Ga.

(P) To the nearest relations, up to the eighth degree, without any preference being given to those having a double tie of relationship: N.M.

NOTES. — <sup>a</sup> *Provided*, that if the estate came to the intestate from an ancestor, all not of the blood of such ancestor are to be excluded; see § 3134. <sup>b</sup> No representation being allowed among collaterals, after the case of brothers' and sisters' children, etc.; see § 3113, notes <sup>d,f</sup>. <sup>c</sup> But in Arkansas, § 2532 of Mansfield's Digest is absolutely contradictory to this, which is contained in § 2522. <sup>d</sup> So, in these others, representation is allowed indefinitely; *i. e.*, the estate goes to the next of kin and the issue of such as have deceased. <sup>e</sup> See § 3107, note <sup>e</sup>.

§ 3122. **Same Case: Personalty.** It goes to the next of kin in equal degree: N.J.,\*† Pa.,†|| Del.,\*† Tenn.‡

If no collaterals, to the grandfather or grandfathers equally; and a grandmother, if her husband be dead, takes his share; if none such, nor relative within the fifth degree (according to the common law), escheat to the State: Md.|| <sup>a</sup>

NOTE. — <sup>a</sup> See § 3113, note <sup>a</sup>.

§ 3123. **No Kindred.** In this case, all real estate descends, as a rule, (A) to the husband or widow in fee: Mass.; Me.; Vt.; R.I.; Pa.; Ill.; Mich.; Io.; Minn.; Neb.; <sup>a</sup> Md.; Va.; W.Va.; N.C.; <sup>a</sup> Ky.; Tenn.; Ark.; S.C.; Ala.; Fla.; La. <sup>a</sup> 917; Ariz. <sup>a</sup>



But if deceased was more than once married, to the wife living and the representatives of the wives dead, in equal shares: Io. So, to the heirs of all the wives by right of representation, if all are dead: Io., Md.

And if the intestate had more than one husband or wife, and all died before him, the estate is equally divided among the kindred of the several husbands or wives in equal degree equally: Md.

(B) To the widow for life: Del. Or to the husband his curtesy, as before: Del. (C) In others, it escheats; see Art. 115. (D) In others, the remainder after the widow's or husband's share escheats: N.H., Del., Ore., N.M.<sup>b c</sup> But *quare* whether the widow, etc., would not take all.

(E) And in several, if such husband or widow be dead, to his or her kindred, in like manner as if such husband or widow had died entitled to the estate by purchase: R.I., Md., Va., W.Va., Ky., Fla. See also *Community Property*, Art. 340.

In Ohio, real estate descends, if no such next of kin or widow, in all cases to the children and issue of any deceased wife or husband whose marriage with the intestate was not annulled prior to his death; if none such, to the brothers and sisters of such husband and wife; if none such, to the next of kin of the intestate: O. 4161.

When the deceased has left neither lawful descendants nor lawful ascendants nor collateral relations, the law calls to his inheritance either the surviving husband or wife or his or her natural children, or the State, in the manner and order hereafter directed.

Natural children are called to the legal succession of their natural mother when they have been duly acknowledged by her, if she has left no lawful children or descendants, to the exclusion of her father and mother and other ascendants or collaterals of lawful kindred.

In case the natural mother has lawful children or descendants, the rights of the natural children are reduced to a moderate alimony, which is determined by the rules established in the title: *Of Father and Child*.

Natural children are called to the inheritance of their natural father who has duly acknowledged them when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State.

In all other cases they can only bring an action against their natural father or his heirs for alimony, the amount of which shall be determined as is directed in the title: *Of Father and Child*.

Bastard, adulterous, or incestuous children shall not enjoy the right of inheriting the estates of their natural father or mother in any of the cases above mentioned, the law allowing them nothing more than a mere alimony.

If a married man has left no lawful descendants nor ascendants nor any collateral relations, but a surviving wife not separated from bed and board from him, the wife shall inherit from him to the exclusion of any natural child or children duly acknowledged.

If, on the contrary, it is the wife who died without leaving any lawful descendants, ascendants, or collateral relations, her surviving husband not separated from bed and board from her shall not inherit from her, except in case she should leave no natural child or children by her duly acknowledged: La. 917-920, 924.

NOTES. — <sup>a</sup> *The husband* is not mentioned in the statute. <sup>b</sup> Subject to the rights of illegitimate children, if any, as in § 3151. <sup>c</sup> Escheat takes place if there are no kin within the eighth degree; see § 3121.

§ 3124. **Same Case: Personalty.** (A) It all goes to the husband or widow, as in § 3123, A: Mass., N.Y., Pa., Ill., Neb., Md., Del., Va., W.Va., Ark., S.C. § 3123, E, applies also to personal property. (B) The balance, after such widow's share, or husband's share, escheats, as in § 3123, D: N.H. See, for other states, § 3120.

§ 3125. **No Kindred, nor Husband or Widow.** In this case, (A) the estate escheats as in § 1151: N.H.; Mass.; Me.; Vt.; Pa.; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Neb.; Del.; Va.; W.Va.; Ark.; Cal.; Ore.; Nev.; Wash.; Dak.; Ida.; Mon.; Uta.; Ala.; La. 929. See, however, § 3123, E. So, in

many other states, under §§ 1151, 1157, the laws of descent being silent on the point.

(B) In a few others, it goes to the deceased wife's or husband's kin in like manner as if such widow or husband had survived the intestate and then died ; Mo., Fla.

(C) But if the decedent was a widow or widower, and the estate, or any part of it, had been common property of the intestate and his or her deceased spouse while alive, such property goes to the father of such deceased spouse, or, if he be dead, to the mother ; if both are dead, to the brothers and sisters of such deceased spouse and their issue by right of representation : Cal., Uta.

§ 3126. **Personalty.** The estate escheats, as in § 1157 : N.H., Mass., Vt., R.I., Pa., O., Ind., Ill., Mich., Wis., Io., Del., Va., W.Va., Ark., Cal., Ore., Nev., Wash., Dak., Ala., La. See also § 3125, A, § 3123, E, § 3124, A.

In Maryland, it escheats when there is no widow or husband, nor kindred within the fifth degree (canon law ; see § 3139).

§ 3127. **Cases Unprovided for.** In all cases not provided for by statute, the estate, real or personal, descends, in two states, (1) according to the common law : N.Y. 2,2,16 ; Ark. 2534. (2) To the next of kin, without regard to the distinction of descent and purchase : Pa. *Intestates*, 30.

### Art. 313. General Principles relating to Descent and Distribution.

§ 3130. **Tenure.** For tenure, whether coparcenary or in common, see also § 1375.

In a few states, all estate descends "in parcenary : " O. 4158 ; Del. 85,1 ; Va. 119,1 ; W.Va. 1882,94,1 ; Ky. 31,1 ; Mo. 2161 ; Ark. 2522 ; Col. 1039 ; Wy. 42,1 ; Fla. 92,1.

In a few others, it always descends "in common : " N.J. *Descent*, 1 ; Pa. *Intestates*, 33 ; Ind. 2469-2470 ; S.C. 1845.

*Except*, in some states, when it descends to parents of the intestate (see § 3107) : Ind. ; Ark.<sup>a</sup> 2535.

NOTE. —<sup>a</sup> These Arkansas provisions are directly contradictory ; but the later one probably controls.

§ 3131. **Law Governing.** The real estate of a decedent who was an inhabitant of another state or country, situated in the State, descends according to the laws of the State ; but the personalty is to be distributed according to the laws of such foreign state or country : Mass. 138,1 ; Me. 65,36 ; Pa. *Intestates*, 39 ; Ind. 2405.

This is probably the law in many other states. See also in Probate Code.

But in one other, personalty situated in the State descends according to its laws, regardless of marital rights accrued in other states, and notwithstanding the domicile of the deceased may have been in such State, and whether the heirs or next of kin are in the State or not : Miss. 1270.

Descent and distribution is, generally, according to the law in force at the time of the decedent's death : Ind.

§ 3132. **Primogeniture and Sex.** (A) *Primogeniture* is, in a few states, expressly abolished in all cases : N.C. 1281(2) ; S.C. 1844 ; La. 893. Compare also § 402.

(B) And so, in some, no difference of sex is known in the laws of succession : N.C., La. In Tennessee, "absolute equality shall be observed in the division of estates of deceased persons, except where a will has been made, and its provisions render equality impossible : " Tenn. 3280.

§ 3133. **Half Blood.** (A) In a few states, the half-blood rule is abolished, for all cases and in all purposes ; and there is no distinction as to the descent of real or personal estate between children or kin of the half and whole blood : Mass. 125,2 ; Me. 75,2 ; Vt. 2231 ; Ill. 39,1 ; Kan. 33,29 ; Del.<sup>a</sup> 85,1 ; N.C. 1281(6) ; Ore. 10,6 ; Wash. 3307. So, perhaps, where the laws are silent : N.H., R.I., Io.

So, in several others, as to personalty only : N.Y. 2,6,3,75 ; Pa. *Intestates*, 21 ; Md. 48,12.

(B) In several others, collaterals of the half blood inherit only half as much as those of the whole blood ; and if all the collaterals inheriting are of the half blood, the ascending kindred [ancestors], if any, have double portions (*i. e.*, the half-blood collaterals sharing with them take each only half so much) : Va. 119,2 ; W.Va. 1882,94,2 ; Ky. 31,3 ; Mo. 2164 ; Tex. 1648 ; Col. 1041 ; Wy. 42,3 ; Fla. 92,4 ; La. 913.

(C) In two states, kindred of the half blood take real or personal property next after kindred of the whole blood of the same degree : Ct.\*\* 1885,110,200 ; Miss. 1271.

So, in a few others, brothers and sisters of the half blood take estate after those of the whole blood ; but for other cases, see also in E and F : N.J.<sup>b</sup> *Descent*, 5 ; Pa. ; <sup>a, b</sup> O. 4159 ; Md.\*\* <sup>a, b</sup> 47,20 ; Del. ; S.C. 1845. Specially, in South Carolina, if there are no brothers and sisters of the whole blood, their issue share equally with brothers and sisters of the half blood ; if no brothers and sisters of the half blood, the issue of the brothers and sisters of the whole blood take it all in preference to the issue of brothers and sisters of the half blood.

Except, in Connecticut,† New Jersey,\*\* and Pennsylvania,\*\* brothers and sisters of the half blood do not take until after the parents.

(D) In Georgia, brothers and sisters of the half blood on the paternal side inherit equally with the whole blood ; if no brother and sister on the paternal side, the half blood on the maternal side inherits ; thereafter there is no distinction between paternal and maternal kin.

(E) In many other states, the half-blood distinction is abolished as to estate first purchased by the intestate ; but of estate which came to him by descent, devise, or gift of an ancestor (§ 3107), all kindred of the half blood who are not of the blood of such ancestor are absolutely excluded : N.Y.<sup>b</sup> 2,2,15 ; N.J. ; <sup>a, b</sup> Mich. 5776 *a* ; Wis. 2272 ; Minn. 46,7 ; Neb. 1,23,33 ; Ark. 2533 ; Cal. 6394 ; Nev. 797 ; Dak. Civ. C. 787 ; Ida. Prob. C. 318 ; Mon. Prob. C. 543 ; Uta 1884, 44,2,11 ; Ala. 2256 ; Ariz. 1467. See § 3134, for citations. For special cases, see in § 3107.

So, in Indiana ; but when there are no kindred of the half blood of the blood of such ancestor, other kindred of the half blood inherit as if of the whole blood. So, in Alabama ; but the half blood not of the blood of such ancestor are only excluded as against the blood of the same degree ; but take in preference to whole blood of a more distant degree : Ala. 2256.

(F) Estate acquired by descent or gift from an ancestor (§ 3107) descends to the half blood, if of the blood of such ancestor, equally with the whole blood : O., Md. ; it only descends to other half blood of the intestate after brothers and sisters of such ancestor and their issue (see § 3107) : O. 4153.

NOTES. — <sup>a</sup> Except the case of brothers and sisters ; see C. <sup>b</sup> Applies to real property only, in the noted states.

### § 3134. **Descent and Purchase.**

In many states, the common-law rule is partially kept up, by which estates descend according to the blood of the first purchaser. See § 3107, for the special provisions.

(A) Thus, in many states, there is a general provision that when the estate came to the intestate by descent, devise, or gift from a parent or other kindred, it



will descend to collaterals [or, in New Jersey and Indiana, to ascendants], only to those next of kin of the intestate of the blood of the person from whom such estate came: N.J. *Descent*, 6; Pa. *Intestates*, 27; N.C. 1281; Ariz. 1467. Compare § 3133, E, which provision is generally ambiguous in all the state laws, and may perhaps apply to kin who are not of the half blood.

(B) But in Texas, it is specially enacted that there is no distinction between property derived by descent, etc., from the father or that which may have been derived by descent from the mother; and all the estate vests at death of the intestate as if he had been the original purchaser thereof: Tex. 1647; and so, in all states where no special distinction is made by this section or § 3107.

(C) For other states, where such kindred not of the blood of the ancestor inherit only after other kin, see § 3107: R.I., O., Md., N.C.

(D) So, in others, the brothers and sisters and their issue of the blood of such ancestor inherit before other brothers, kin, etc.: Del. See § 3133, C.

**Reversion to Donor.** In Indiana, an estate which has come to the intestate by gift or conveyance, in consideration of love and affection, shall, if the intestate die without issue at death, revert to the donor, if living, saving the husband's or wife's curtesy or dower and a lien for cost of improvements thereon: Ind. 2473.

§ 3135. **Persons not in Esse**, but conceived at the time of the testator's death, (A) inherit as if born at the time: N.Y. 2,2,18; 2,6,3,75; Pa. *Intestates*, 32; Va. 119,8; W.Va. 1882,94,8; N.C. 1281(7); La. 954. So, in other states, by the general provision (see §§ 1412, note <sup>a</sup>, 2621,3136, C): Mass., N.J., Mich., Wis., Cal., Dak. See also § 3136, C, which provision is practically identical in effect.

Nevertheless, if the child conceived is reputed born, it is only in the hope of its birth; it is necessary then that the child be born alive, for it cannot be said those who are born dead have ever inherited.

When the child is born alive, though it may have been extracted by force from its mother's womb, and may have lived but an instant, provided the fact of its living be ascertained, it inherits the successions opened in its favor since its conception, and transmits them accordingly.

There are two things to be proved in order to vest the child with the right of inheriting: one, that the child be conceived at the moment of the opening of the succession; the other, that the child be born alive.

In order to ascertain if the child has been conceived in marriage, and can inherit from the husband deceased after its conception, reference must be had to the rules concerning the filiation of legitimate children established in the title: *Of Father and Child*.

In all cases in which the husband cannot by law contest the legitimacy of the child, born before the hundred and eightieth day of marriage, he will have a right to the succession of this child and to those successions which fall to this child in the same manner as if the child had been regularly legitimated.

If the mother marry again within two months after the death of her husband, and a child is born five months after the second marriage, if the child be born capable of living, it is considered the issue of the first marriage, and is admitted to the succession of the first husband.

In the calculation of the number of months necessary for a child to be considered as born capable of living, thirty days are counted for each month, and the day begun is counted for a whole day, because it is for the interest of the child.

Though in general it is incumbent on those who allege incapacity to inherit to prove it, nevertheless those who claim rights under the child on account of its having survived are bound to prove that it was conceived at the time the succession was opened, and that it came into the world alive.

With regard to the proofs necessary to establish the existence of the child at the moment of its birth, it must not be determined that it was born alive by the simple palpitations of its members, but by its respiration, or by other signs which demonstrate its existence: La. 955-963.

But in others, (B) no right of inheritance shall accrue to any person (other than the children of the intestate, etc.; see below) unless they be born at the time of the intestate's death: R.I. 187,3; O. 4179; Md.<sup>a</sup> 47,25; 48,15; Mo. 2162; Ark. 2523; Tex. 1650; Col. 1040; Wy. 42,2; Ala. 2257; Fla. 92,2.

But descendants of the intestate begotten before his death, but born thereafter, inherit as if born in his lifetime: O., Md., Mo.,<sup>a</sup> Tex., Col.,<sup>a</sup> Wy. See also § 2844. Compare this case with that under § 3136, B.

NOTES.—<sup>a</sup> The word *posthumous* in the statute is probably improperly used as meaning a relation *en ventre sa mere* at the time of the intestate's death. The distinction must be carefully borne in mind, as it is rather confusing.

§ 3136. **Posthumous Children** of the intestate inherit as if living at his death, in all states: Mass. 125,6; R.I. 187,3; N.Y. 2,2,18; 2,6,3,75; N.J. *Descent*, 7; O. 4179; Ind. 2467; Ill. 39,9; Mich. 5784; Wis. 2275; Minn. 46,15; Kan. 33,30; Neb. 1,23,41; Md. 47,25; Del. 84,22; Ky. 31,7; Mo. 2162; Ark. 2523; Tex. 1650; Cal. 6403; Ore. 10,14; Nev. 804; Col. 1040; Wash. 3315; Dak. Civ. C. 12 and 793; Ida. Prob. C. 325; Mon. Prob. C. 552; Wy. 42,2; Uta. 1884,44,2,19; Ga. 2484; Ala. 2257; Fla. 92,2; La. 954; Ariz. 1475. (B) And so, in many states, of all posthumous descendants of the intestate: Mass.; N.Y.; N.J.; O.; Mich.; Wis.; Minn.; Md.; Del. 85,2; Mo.; Tex.; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Ida.; Mon.; Wy.; Uta.; Ga.; Ariz.; La. (C) And in many, there is a general rule that in all cases of descent, direct or collateral, posthumous children take both realty and personalty as if living at the death of the parent whom they represent: Mass.; N.J. *Descent*, 9; Mich.; Wis.; Minn.; Neb.; Del.; Cal.; Ore.; Nev.; Wash.; Dak.; Ida.; Mon.; Uta.; Ga.; La.; Ariz.

The same would follow, in other states, from the provisions of § 3135, A: N.Y., Pa., Va., W.Va., N.C. And so, in others, from the general provisions regarding posthumous children in § 6041: La.

In several, such relative or descendant must be born within ten months of the death of the intestate, in order to inherit from him under this provision or § 3135: Va., W.Va., N.C., Ky.

§ 3137. **Per Stirpes; Per Capita.** (A) In a few states, there is a general rule that whenever those entitled to real or personal property by descent are all in the same degree of kindred to the intestate, they take in equal shares *per capita*: N.Y. 2,6,3,75; 2,2,7; Pa. *Intestates*, 33; 1885,172; Va. 119,3; W.Va. 1882,94,3; Mo. 2165; Tex. 1652. For special cases, see Art. 310, *passim*.

But if not in the same degree, they take *per stirpes*: N.Y.; Pa.; Va.; W.Va.; Mo.; Ark. 2530; Tex.

(B) The "next of kin" inheriting take *per capita* in all cases, except (1) grandchildren of brothers and sisters take *per stirpes*: Pa. *Intestates*, 26; so, (2) children of uncles and aunts: Pa. This seems contradictory with the provision in A, above.

Inheritance or succession by right of representation takes place when the descendants of any person deceased take the same share in the estate of the decedent that their parents would have taken if living: Mass. 125,6; Mich. 5784; Wis. 2275; Minn. 46,15; Neb. 1,23,41; Del. 85,2; Cal. 6403; Ore. 10,14; Nev. 804; Wash. 3315; Dak. Civ. C. 793; Ida. Prob. C. 325; Mon. Prob. C. 552; Uta. 1884,44,2,19; La. 894.

§ 3138. **Representation.** (A) In several states, both as to real and personal estate, there is a general provision<sup>a</sup> that the descendants of any person deceased shall inherit (*per stirpes*) the estate which such person would have inherited had

he survived the intestate: R.I. 187,5; Kan. 33,29, Del. 89,32-3; 85,2; N.C. 1281 (3); Ky. 31,2; Fla. 92,5. See also § 3103.

This is, in effect, the case in others: Va.; W.Va.; Tenn. 3271; Mo. 2161; Ark. 2530-1. See above. (B) So, in a few others, as to the next of kin or collaterals: N.Y. 2,2,9 and 14; O. 4158-9; Fla.

So, in others; but no representation among collaterals is allowed, except in the case of the descendants of brothers and sisters of the intestate: Vt.; Ct. 1885, 110,200; N.J. *Descent*, 2 and 6; Ill. 39,1; Ala. 2254; Miss. 1271.

And in others, there is no representation among collaterals beyond the degree of brothers' and sisters' children: N.Y.<sup>b</sup> 2,6,3,75; N.J.<sup>b</sup> *Orphans' Court*, 147; Pa. *Intestates*, 25; Md. 47,27; Tenn.<sup>b</sup> 3279; S.C. 1845; Ga. 2484; or grandchildren: N.H. 203,3; 1883,72; Md.;<sup>b</sup> Ga. The same would follow in all cases where *kin* is determined by the civil law,<sup>c</sup> as in § 3139, A.

Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented.

Representation takes place *ad infinitum* in the direct descending line.

It is admitted in all cases, whether the children of the deceased concur with the descendants of a pre-deceased child, or whether, all the children having died before him, the descendants of the children be in equal or unequal degrees of relationship to the deceased.

Representation does not take place in favor of the ascendants, the nearest relation in any degree always excluding those of a degree superior or more remote.

In the collateral line, representation is admitted in favor of the children and descendants of the brothers and sisters of the deceased, whether they come to the succession in concurrence with the uncles and aunts, or whether, the brothers and sisters of the deceased having died, the succession devolves on their descendants in equal or unequal degrees.

In all cases in which representation is admitted the partition is made by roots; if one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the branch take between them by heads.

Persons deceased only can be represented; persons alive cannot.

One who has renounced the succession of another may still enjoy the right of representation with respect to that other.

Thus it is not necessary that the children who succeed by representation should have been heirs of their father or mother. Although they should have renounced their succession, they are nevertheless competent to represent them in the succession of their grandfather or other ascendants.

When a person has been disinherited by his father and mother, or excluded from the succession by reason of unworthiness, his children cannot represent him in the succession of their grandfather or other ascendants, if he is alive at the time of opening the succession; but they can represent him if he died before: La. 894-901.

NOTES. — <sup>a</sup> See, for special cases, in Art. 310, *passim*. For definitions, see Glossary. <sup>b</sup> As to the distribution of personal estate only. <sup>c</sup> In one state, indefinite representation is allowed; but *kin* are determined according to the canon law, which makes the provision to a certain extent identical with the law of the other states: N.C.

§ 3139. **Next of Kin.** It is enacted, in most states, that the next of kin shall be determined according to the rule of the civil law:<sup>a</sup> Mass. 125,2; Me. 75,2; Vt. 2231; Ct. 1885,110,200; Pa. (by judicial decision); Ill. 39,1; Mich. 5776a; Io. 45; Wis. 2272; Minn. 46,7; Neb. 1,23,33; Del. 85,2; 5,1; Ore. 10,6; Nev. 797; Wash. 3307; Ida. Prob. C. 318; S.C. 1845; Ala. 2255; Miss. 1271; La.; N.M. 1437; Ariz. 1467.

This law would perhaps follow in all states from the use of the phrase *next of kin*, which is properly used only in connection with personal property. See note.

(B) In a few others, it is expressly enacted that degrees of relationship are computed according to the common law (that is, *canon law*):<sup>b</sup> Md. 48,17; N.C. 1281(6); Ga. 2484. So, probably, in states where the laws are silent.



So, in Georgia, according to the canon law as practised in the English courts, July 4, 1776. But there is, in Georgia, no distinction between paternal and maternal kindred, after half brothers and sisters, etc. (§ 3107).

*Next of kin* is, in New York, defined to mean those, other than the widow, entitled to share in the distribution of intestate personalty : N.Y. Civ. C. 1870.

*Kindred* and *kin* are further declared, in several states, to mean kindred by blood : O. 4158-9 ; Del. 5,1 ; N.M. 973. Presumably this follows everywhere from the use of the word ; for *kindred* does not mean *affinity*.

The degree of kindred is established by the number of generations, and each generation is called a degree : Cal. 6389 ; Dak. Civ. C. 782 ; Mon. Prob. C. 538 ; Uta. 1884,44,2,6 ; La. 889 ; N.M.

The series of degrees forms the line ; the series of degrees between persons who descend from one another is called direct or lineal consanguinity ; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity : Cal. 6390 ; Dak. Civ. C. 783 ; Mon. *ib.* 539 ; Uta. 1884,44,2,7 ; La. 890 ; N.M.

In the collateral line, the degrees are counted by generations, from one of the relations up to the common ancestor and down to the other relation, the ancestor being counted but once, the decedent excluded, and the relation included ; thus, uncle and niece are related in the third degree : Cal. 6393 ; Dak. Civ. C. 786 ; Mon. Prob. C. 542 ; Uta. 1884,44,2,10 ; La. 892 ; N.M. 975.

The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestor with those who descend from him ; the second is that which connects a person with those from whom he descends : Cal. 6391 ; Dak. Civ. C. 784 ; Mon. Prob. C. 540 ; Uta. 1884,44,2,8 ; La. 890 ; N.M. 974.

In the direct line there are as many degrees as there are generations ; thus the grandson is in the second degree to the grandfather : Cal. 6392 ; Dak. Civ. C. 785 ; Mon. Prob. C. 541 ; Uta. 1884,44,2,9 ; La. 891 ; N.M.

Probably in all the states wherein the "next of kin," or degrees of relationship are computed, for purposes of descent of real estate, according to the civil law, there is no representation among collaterals, as in § 3138. But not so, in one state : Del. 89,32.

And in all the states computing according to the common (*i. e.*, canon) law, there is indefinite representation among collaterals ; it is so enacted in a few. See § 3138, B.

In Delaware, those collaterals claiming through the nearest common ancestor are to be preferred : Del. 5,1. See also §§ 3107,3109,3121, A.

*Affinity*. The relation of affinity is that caused by marriage. Its computation is "in the same order as in relation by consanguinity." It extends "only to the eighth degree of civil computation, if by legitimate matrimony ; and only to the fourth, if without matrimony." Only the man and woman married or cohabiting are individually connected by affinity with the blood relations of the other, and *vice versa*. This relationship is "only valid for the civil purposes which may be explained in the laws and acts of individuals of the human race : " N.M. 976.

NOTES. — <sup>a</sup> See Stimson's "Law Glossary," *Degree*. <sup>b</sup> At common law, this was the case with regard to personal property ; but not to determine the heirs of real estate. It seems to have amounted to much the same thing in practice ; as representation of ancestors was allowed in the latter case, but not in the former. Compare § 3138, B.

**§ 3140. Foreign Intestates.** All personal or real property situated in the State shall be distributed according to the laws of the State regardless of all marital rights which may have accrued in other states and notwithstanding the domicile of the deceased may have been in another state, and whether the heirs or persons entitled to distribution be in this State or not ; and the widow shall take her share in the personal property according to laws of this State : Miss. 1270 ; La. 1220.

**Art. 315. Illegitimate Children.\***

§ 3150. **Definition.** For what children are illegitimate, see § 6630. It will there be seen that in many states children illegitimate when born may be legitimated by subsequent marriage or adoption. Such children are of course legitimate for all purposes of inheritance, and are not referred to in this article. So also many statutes provide that an illegitimate child shall be heir of a parent who acknowledges him. For all these, see in Art. 663.

Articles 310 and 313, of course, apply only to legitimate relations, in all states. And see Pa. *Intestates*, 36; Ga. 1800.

**Note to Article.** \* This article applies commonly to the inheritance both of real and personal property, but in states and cases so noted, to personal property only.

§ 3151. **Inheritance by Bastards.** (A) In a few states, illegitimate children are heirs of the mother, and inherit real and personal estate in default of lawful issue: N.Y. 1855,547; N.J.\* *Orph. Ct.* 147; N.C.<sup>a</sup> 1281(9).

(B) In most states, they inherit the mother's estate with the legitimate children, share and share alike: N.H. 203,4-5; Mass. 125,3; Me. 75,3; Vt. 2232; R.I. 187,7; Pa. *Intestates*, 40; O. 4174; Ind. 2474; Ill. 39,2; Mich. 5773 *a*; Wis. 2274; Io. 2465; Minn. 46,5; Kan. 33,22; Neb. 1,23,31; Md. 47,30; 48,16; Va. 119,5; W.Va. 1882,94,5; N.C.<sup>c</sup> 1486; Ky. 31,5; Tenn. 3274; Mo. 2169; Ark. 2524; Tex. 1657; Cal. 6387; Ore. 10,4; Nev. 795; Wash. 3305; Dak. Civ. C. 780; Ida. Prob. C. 316; Mon. Prob. C. 536; Wy. 42,7; Uta. 1884,44,2,4; Ga. 1800; Ala. 2258; Miss. 1275; Fla. 92,8; N.M. 1435; Ariz. 1464. (C) In many states, they both inherit from the mother and represent her so as to inherit from her kin share and share alike with the legitimate children: Mass., R.I., Pa., O., Ind., Ill., Va., W.Va., Mo., Ark., Tex., Miss., Fla. But in many others, (D) bastards do not *represent* the mother so as to claim any intestate estate from her kindred, either lineal or collateral: Me.; Mich.; Wis.; Minn.; Neb.; N.C.; Ky.; Cal.; Ore.; Nev.; Wash.;<sup>d</sup> Dak.;<sup>d</sup> Ida.;<sup>d</sup> Mon.;<sup>d</sup> La. 921; Ariz.

(E) So, in Mississippi, illegitimate children inherit from other children of the mother and her kindred, and their children and descendants inherit from brothers and sisters of their father and mother whether legitimate or illegitimate, and from their grandparents; but such children of illegitimate persons do not inherit from any ancestor or collateral kindred if there be legitimate heirs of such ancestor, or collateral kindred, in the same degree, to whom the estate would otherwise descend: Miss. 1275. (F) Natural children inherit from the mother in preference to her husband if she leave no kindred lineal or collateral: La. 924. (G) The child legitimated by subsequent marriage of its parents only takes those successions which are opened since such marriage: La. 954. Natural children are called to the legal succession of their natural mother, when they have been duly acknowledged by her, if she has left no lawful children or descendants to the exclusion of her father and mother and other ascendants or collaterals of lawful kindred. In case the natural mother has lawful children or descendants, the rights of the natural children are reduced to a moderate alimony, which is determined by the rules established in the title: *Of Father and Child*. Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the state. In other cases, they can only bring an action against the natural father and his heirs for alimony: La. 918-9.

NOTES.—<sup>a</sup> As to real property only. <sup>b</sup> Such child must have been duly "acknowledged," to inherit from such parent. <sup>c</sup> As to personalty only. <sup>d</sup> Unless legitimated before the death of the person from whom such estate descends.

§ 3152. **Inheritance from the Father.** In Louisiana, a bastard inherits from its father who had been a married man, when such father left no kin nor widow, but does not

represent him so as to claim from his relations: La. 924. In Indiana, if a man die intestate without heirs resident in the United States at his death, or legitimate children capable of inheriting without the United States, his real and personal property descends to illegitimate children resident in the United States as if legitimate: Ind. 2475. *Provided* such children were acknowledged by the intestate in his lifetime; and testimony of the mother of such children is not sufficient to establish the fact of such acknowledgment: Ind.

In New Mexico, natural children, in the absence of legitimate, are heirs to their father's estate in preference to the ascendants, etc.: N.M. 1435.

In Iowa, bastards inherit from the father whenever their paternity is proven during his life: Io. 2466.

**§ 3153. Inheritance by and from Bastards.** In North Carolina, bastards born of the same mother are considered legitimate as among themselves and their representatives, so far as affects the distribution of personal property and descent of real estate; that is, in case one of them die without issue, his personal estate is distributed among those persons who would be his next of kin, had he and the other bastards all been born in lawful wedlock; and his real estate descends to the brothers and sisters and their issue, as if legitimate, and in default thereof to the mother, as in Art. 310: N.C. 1281, 1487.

In three other states, bastards inherit from each other, children of the same mother, as if legitimate (as to real or personal property): O. 1883, 81; Md. 47, 30; Ky. 31, 5; Ga.

**§ 3154. Inheritance from Bastards.** If they have lawful issue, such issue inherit from them as if they were legitimate, in all the states. So, in Illinois (and probably in all), the share of the husband or widow is the same, if they leave issue: Ill. 39, 2.

If they have no lawful issue and die intestate, their estate goes (A) to the widow or husband and to the mother and her kin as if the intestate were legitimate, so far as the mother's side is concerned: N.H. 203, 4; Mass. 125, 4; Me. 75, 4; Vt. 2232; R.I. 187, 7; N.Y. 2, 6, 3, 75; 2, 2, 14; N.J. *Descent, App.* 1; *Orph. Ct.* 147; Pa. *Intestates*, 40; O. 4174; Ind. 2477; Mich. 5774a; Wis. 2273; Io. 2465; Minn. 46, 6; Kan. 33, 22; Neb. 1, 23, 32; Md. 47, 30; Del. V. 11, C. 243; Va.; W.Va.; Ky. 31, 5; Tenn. 1885, 34; Mo.; Ark.; Tex.; Cal. 6388; Ore. 10, 5; Nev. 796; Col. 1048; Wash. 3306; Dak. Civ. C. 781; Ida. Prob. C. 317; Mon. Prob. C. 537; Wy. 42, 10; Uta. 1884, 44, 2, 5; Ga. 1800; Ala. 2259; Fla.; Ariz. 1465. For other citations, see § 3151.

*Except* that (1) all the estate goes to the widow or husband, if any, in preference to the mother and her kin: Ill., Ore., Nev., Wy., Ga.

And (2) if the bastard leave husband or widow, he or she shares equally with the mother, or her descendants or heirs: Me. (3) If no issue, or widow or husband, half goes to the mother, and half to her descendants or kindred: Col., Wy.

(4) If no issue, or widow or husband, in four states, (a) to the mother and his uterine brothers and sisters, legitimate or not, and their descendants, one half to the mother, the other half to her children and their descendants, in equal shares *per stirpes*. If none such, to the next of kin of the mother according to the civil law: Ill., Col., Wy.

But in others, (β) his mother and illegitimate and uterine brothers and sisters inherit his real or personal estate equally, and the issue of such deceased brothers and sisters *per stirpes*: Ga.

(B) In Louisiana, the estate of bastard deceased without issue descends to the father or mother who has acknowledged him, or in equal parts to both, if both have acknowledged him: La. 922. If the father and mother have died, to his natural brothers and sisters, or their descendants: La. 923.

In Georgia, if a bastard dies intestate leaving no widow or lineal descendant, or mother or uterine brother or sister or descendant of uterine brother or sister, the brothers and sisters uterine who are legitimate, and the issue of such deceased, *per stirpes*, may inherit; in default of such persons, the inheritance goes among the maternal kindred of the intestate bastard as in other cases of descent: Ga. 1801.



§ 3155. **Inheritance through Bastards.** The lawful issue of a bastard represent it and take by descent any estate which the parent might have taken if living: N.H. 203,4; Mass. 125,3; Ill.

### Art. 316. **Advancements.**

§ 3160. **Definitions.** An advancement is defined to be any provision by a parent made to, and accepted by, a child or descendant out of his estate, either in money or property, during his lifetime: Pa. *Intestates*, 35; O. 4169; Del. 85,6; N.C. 1281(2); Ga. 2579. But in several states, a portion given by will is also deemed an advancement, and will be so considered in distributing any estate as to which the deceased may have died intestate: Va. 119,14; W.Va. 1882,94,13; Ky. 31,15; Tenn. 3281.

In one other, any indebtedness of the heir may be taken into consideration in the distribution of the estate like an advancement: N.H. 203,10.

In two states, an estate or interest given by a parent to a descendant by virtue of a beneficial power, or a power in trust with right of selection, is deemed an advancement: N.Y. 2,1,2,127; Tenn. 3283.

In Virginia, a provision for an advancement to any person shall be deemed a satisfaction in whole or in part of a devise or bequest to such person contained in a previous will, if it would be deemed such in case the devisee, etc., were a child of the testator; and whether he be a child or not, it shall be so deemed in all cases in which it shall appear from parol or other evidence to have been so intended: Va. 118,12.

A portion given in trust for the benefit of a child is an advancement as if given directly: Ga. 2581. See also § 2818.

#### § 3161. **What is not an Advancement.**

Maintaining, educating, or giving money to a child under majority without any view to a portion or settlement in life, is not deemed an advancement: N.Y. 2,6,3,78; 2,2,26; Ind. 2408; Md. 48,7; Ky. 31,15; Mo. 2167; Ark. 2539; Col. 1043; Wy. 42,5; Ga. 2579; Ala. 2267.

Donations from affection and not made with a view of settlement nor intended as advancements, shall not be accounted for as such: Md., Ga., Ala.

Nor shall the support of a child under the parental roof, although past majority, nor the expenses of education, be held as advancements unless charged as such by the parent: Md.; Ga. 2579.

§ 3162. **Proof of Advancement.** That is an advancement (A) which is expressed in the gift or grant to be so made: N.H.<sup>a</sup> 203,11; Mass. 128,3; Me. 75,5; Vt.<sup>a</sup> 2246; Ill. 39,7; Mich. 5780; Wis. 3959; Minn. 46,11; Neb. 1,23,37; Cal. 6397; Ore. 10,10; Nev. 800; Wash. 3311; Dak. Civ. C. 790; Ida. Prob. C. 321; Mon. Prob. C. 546; Uta. 1884,44,2,14; Ariz. 1471. (B) When the conveyance or delivery was charged by the intestate in writing: N.H., Mass., Me., Vt., Mich., Wis., Minn., Neb., Cal., Ore., Nev., Wash., Dak., Ida., Mon., Uta., Ariz. So, when a note or memorandum of it was made by him or his order: N.H., Me.

It is sufficient (as to personal estate) if it was delivered expressly for that purpose in the presence of two witnesses who were desired to take notice thereof: N.H., Vt., R.I.

(C) When it was acknowledged in writing as such by the person advanced: N.H.,<sup>a</sup> Mass., Me., Vt., Ill., Mich., Wis., Minn., Neb., Cal., Ore., Nev., Wash., Dak., Ida., Mon., Uta., Ariz.

In two states, when a parent dies intestate who had in his lifetime given personal property to children, or put them in actual possession of it, each such child shall give to the executor, etc., an inventory on oath, stating particulars of property so received in the lifetime of the parent, and, in default thereof, is entitled to no distributive share: N.C. 1484,1485; Ala. 2269,2272. So, if the person advanced be dead, his legal representatives: Ala. 2270.

NOTE. — <sup>a</sup> As when the consideration be expressed to be *for love and affection*, etc. But see § 3161.

§ 3163. **General Law.** When the parent dies intestate who has made advancements to the children (or other heirs; see below), (A) if such advancements in all exceed the distributive share of the heir so advanced in both real and personal property, such heir (or his representative in the distribution, if deceased) shall receive nothing further from the estate, but need refund no part of the property advanced: N.H. 203,9; Mass. 128,1 Me. 75,6; Vt. 2247; R.I. 187,18; Ct. 1885,110,198; N.Y. 2,2,23; N.J.<sup>a</sup> *Descent*, 1; Pa. *Intestates*, 35; O. 4169-70; Ind. 2407,2479; Ill. 39,4; Mich. 5777*a*; Wis. 3957; Io. 2459; Minn. 46,8-9; Kan. 33,26-7; Neb. 1,23,34-5; Md.<sup>a</sup> 47,31; 48,7; Del.<sup>a</sup> 85,6; W.Va. 1882,94,13; N.C.<sup>a</sup> 1281(2); Ky. 31,15; Tenn. 3281; Mo. 2166; Ark. 2536-7; Tex. 1651; Cal. 6395-6; Ore. 10,7-9; Nev. 798-9; Col. 1042,3624; Wash. 3308; Dak. Civ. C. 788-9; Ida. Prob. C. 319-320; Mon. Prob. C. 544-5; Uta. 1884,44, 2,12-13; S.C. 1849; Ga. 2582; Ala. 2262-3; Miss. 1276; Fla. 92,6; Ariz. 1468-9.

(B) And if such advancements are not equal to such shares, (1) the child advanced shall have so much of the estate as shall make all the shares equal (*i. e.*, in addition, without coming into hotchpot): N.H. *ib.* 9-10; Mass.; R.I.; Ct.; N.Y. *ib.* 24; Ind.; Mich. 5778*a*; Wis.; Del.; N.C.; Ky.; Ark.; Cal.; Ore.; Nev.; Wash. 3309; Dak.; Ida.; Mon.; Uta.; Ga.; Ariz. (2) He takes his share of the estate, real and personal, as if no advancement were made, but only if he come into hotchpot: Md.<sup>a</sup> 47,31; Va.; W.Va.; Mo.; Tex.; Col.; Miss.; Fla. (C) And if the advancement exceed the share in either real or personal property, the person advanced shall not refund any, but shall receive so much less of the other property, personal or real respectively, in distribution as will make his aggregate share equal to the rest: Mass. *ib.* 2; Me. 75,7; Vt. 2248; N.Y. 2,6,76-7; O. 4171; Ill. 39,6; Mich. 5779*a*; Wis. 3958; Minn. 46,10; Neb. 1,23,36; N.C.; Tenn. 3282; Ore.; Wash. 3310; Ala. 2264; Ariz. 1470.

(D) So, in states where the foregoing applies only to realty, if a child has been advanced in personalty by portion equal to his intestate share of personalty, he receives no personalty by distribution, but need refund no part of the advancement; if the advancement is not equal to such share, he has so much of personalty as will make all the shares of personalty equal: N.J. *Orph. Ct.* 147; Md. 48,7; N.C.

(E) In Wyoming, "where any of the children of the intestate shall have received in his lifetime any real or personal estate by way of advancement, and the other heirs desire it to be charged to him, the probate judge shall cite the parties to appear before him, shall hear proof upon the subject, and shall determine the amount of such advancement to be thus charged:" Wy. 42,4.

NOTES. — <sup>a</sup> As to real property only. <sup>b</sup> *i. e.*, he may do either, under (1) or (2).

§ 3164. **Advancement to Ancestors.** So, in most states, as to all the above provisions, of his representatives in distribution if the person advanced have deceased: Me. 75,7; Vt. 2249; N.Y.; N.J.; Ind.; Ill. 39,8; Mich. 5782; Wis. 3960; Minn. 46,13; Neb. 1,3,39; Va.; W.Va.; N.C.; Cal. 6399; Ore. 10,12; Nev. 802; Wash. 3313; Dak. Civ. C. 792; Ida. Prob. C. 323; Mon. Prob. C. 548; Uta. 1884,44,2,16; Ga.; Ala. 2266; Ariz. 1473.

§ 3165. **Hotchpot.** In a few states, when an advancement is brought into reckoning for the purpose of determining the children's shares, the widow's share is not thereby increased; but she has her share only in the actual surplus in possession of her husband at his death: Mass. 128,6; Md. 48,7; Del. 85,6; Ky. 31,16; Ore. 10,3; Wash.<sup>a</sup> 3317.

But expressly otherwise, in two states: N.C. 1483; Ga.

NOTE. — <sup>a</sup> As to personalty only.

§ 3166. **Descent of Advanced Property.** If the decedent leave an estate which came to him as an advancement from the father, who is living, such estate descends to him if there are no issue nor widow nor husband: Uta. 1884,44,2,18.

§ 3167. **Value of.** The above memorandum (§ 3162) is not conclusive as to the valuation of the property unless inserted or referred to in the advancer's will: Ga. 2580. In most states, the value of an advancement is deemed to be that, if any, which was (1) acknowledged by the child or heir by an instrument in writing or receipt: Mass. 128,4; Me. 75,6; Vt. 2250; N.Y. 2,2,25; O. 4172; Ill. 39,5-6; Mich. 5781; Wis. 3959; Minn. 46,12; Neb. 1,23,38; Ark. 2538; Cal. 6398; Ore. 10,11; Nev. 801; Wash. 3312; Dak. Civ. C. 791; Ida. Prob. C. 322; Mon. Prob. C. 547; Uta. 1884,44,2,15; Ala. 2265; Ariz. 1472. Or (2) expressed in the conveyance or charge thereof by the intestate: Mass.; Me. 75,6; Vt.; O.; Ill.; Mich.; Wis.; Minn.; Neb.; Cal.; Ore.; Nev.; Wash.; Dak.; Ida.; Mon.; Uta.; Ala.; Ariz.

(3) So, in one other, it may be the value expressed by the intestate at the time of delivering it before two witnesses: Vt.

Every advancement is estimated at its value at the time of advancement: Mass.; Me.; Vt.; N.Y.; O.; Ind. 2480; Ill.; Mich.; Wis.; Minn.; Neb.; Md. 47,31; Ky. 31,15; Ark.; Tex.; Cal.; Ore.; Nev.; Wash.; Dak.; <sup>a</sup> Ida.; Mon.; Uta.; Ga. 2583; Ala.; Miss. 1276; Fla. 92,6; Ariz. Unless a value is so agreed upon at the time of acceptance, or otherwise determined as above: Mass., Me., Vt., R.I., N.Y., O., Ill., Mich., Wis., Minn., Neb., Ark., Cal., Ore., Nev., Wash., Dak., Ida., Mon., Uta., Ala., Ariz.

No interest is charged upon the value of the advancement until the time of the first distribution of the estate, from which date advancements are reckoned, with regard to interest, in the same manner as an equal amount of the estate received at that time: Ga.

The improvements of real estate advanced, made by such child or children, are not to be considered in computing the value: S.C. 1849.

§ 3168 **Advancements to Other Heirs.** A portion given to the children of a deceased child is an advancement to that distributive share of the estate: Me. 75,5-7; R.I. 187,18; Ga. 2581. So, in most states, a portion given to any descendant, to a child or the issue of children: Mass. 128,1 and 5; Me. 75,5; Vt. 2246; Ind. 2407; Wis. 3956; Neb. 1,23,34; Md.<sup>a</sup> 47,31; Del.<sup>a</sup> 85,6; Va. 119,14; W.Va. 1882,94,13; Ky. 31,15; Cal. 6395; Col. 3624; Wash. 3308; Dak. Civ. C. 788; Ida. Prob. C. 319; Mon. Prob. C. 544; Uta. 1884,44,2,15; S.C. 1849; Ala. 2262. So, a portion given to an heir of deceased, or any person through whom such heir claims: N.H. 203,9. Otherwise, or in other states, an advancement can be made to children only: N.C. 1281 2). See also § 3160.

NOTE. — <sup>a</sup> As to real property only.

§ 3169. **Partitions made by Parents among their Descendants.** Fathers and mothers and other ascendants may make a distribution and partition of their property among their children and legitimate descendants, either by designating the *quantum* of the parts and



partitions which they assign to each of them, or in designating the property that shall compose their respective lots.

These partitions may be made by act *inter vivos* or by testament.

Those made by an act *inter vivos* can have only present property for their object, and are subject to all the formalities and conditions of donations *inter vivos*.

Those made by testament must be made in the forms prescribed for acts of that kind, and are subject to the same rules.

If the partition, whether *inter vivos* or by testament, has not comprised all the property that the ascendant leaves on the day of his decease, the property not comprised in the partition is divided according to law.

If the partition, whether *inter vivos* or by testament, be not made amongst all the children living at the time of the decease and the descendants of those predeceased, the partition shall be null and void for the whole. The child or descendant who had no part in it may require a new partition in legal form.

Partitions made by ascendants may be avoided when the advantage secured to one of the co-heirs exceeds the disposable portion.

The child who objects to the partition made by the ascendant must advance the expenses of having the property estimated, and must ultimately support them and the costs of suit, if his claim be not founded.

The defendant in the action of rescission may arrest it by offering to the plaintiff the supplement of the portion to which he has a right.

The rescission of the partition does not carry with it the nullity of a donation made as an advantage : La. 1724-1733.

## Art. 317. Civil Law of Collations.

§ 3170. **What Collation is, and by whom it is Due.** The collation of goods is the supposed or real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession.

Children or grandchildren coming to the succession of their fathers, mothers, or other ascendants must collate what they have received from them by donation *inter vivos*, directly or indirectly ; and they cannot claim the legacies made to them by such ascendants unless the donations and legacies have been made to them expressly as an advantage over their co-heirs, and besides their portion.

This rule takes place whether the children or their descendants succeed to their ascendants as legal or as testamentary heirs, and whether they have accepted the succession unconditionally or with the benefit of inventory.

The obligation of collating is founded on the equality which must be naturally observed between children and other lawful descendants who divide among them the succession of their father, mother, and other ascendants ; and also on the presumption that what was given or bequeathed to children by their ascendants was so disposed of in advance of what they might one day expect from their succession.

Collation must take place whether the donor has formerly ordered it or has remained silent on the subject ; for collation is always presumed where it has not been expressly forbidden.

But things given or bequeathed to children or other descendants by their ascendants shall not be collated, if the donor has formally expressed his will that what he thus gave was an advantage or extra part, unless the value of the object given exceed the disposable portion ; in which case the excess is subject to collation.

The declaration that the gift or legacy is made as an advantage or extra portion may be made not only in the instrument where such disposition is contained, but even afterwards, by an act passed before a notary and two witnesses.

The declaration that the gift or legacy is intended as an advantage or extra portion may be made in other equivalent terms, provided they indicate in an unequivocal manner that such was the will of the donor.

If, upon calculation of the value of advantages thus given, and of the other effects remaining in the succession, such remaining part should prove insufficient to give to the other children their legitimate portion, the donee would then be obliged to collate the sum by him received, as far

as necessary to complete such portion, though he would wish to keep the donation and renounce the inheritance ; and in this calculation of the legitimate portion the property given or bequeathed by the ascendants, not only to their children, but even to all other persons, whether relations or strangers, must be included.

The obligation of collating is confined to children or descendants succeeding to their fathers and mothers, or other ascendants, whether *ab intestato* or by virtue of a testament.

Therefore this collation cannot be demanded by any other heir, nor even by the legatees or creditors of the succession to which the collation is due.

Such children or descendants only are obliged to collate who have a right to a legitimate portion in the succession of their fathers, or mothers, or other ascendants.

Therefore natural children, inheriting from their mother or father in the cases prescribed by law, are not liable to any collation between them, if they have not been expressly subjected to it by the donor, because the law gives them no right to a legitimate portion in their successions.

If children, or other lawful descendants holding property or legacies subject to be collated, should renounce the succession of the ascendant from whom they have received such property, they may retain the gift or claim the legacy to them made without being subject to any collation.

If, however, the remaining amount of the inheritance should not be sufficient for the legitimate portion of the other children, including in the succession of the deceased the property which the person renouncing would have collated had he become heir, he shall then be obliged to collate up to the sum necessary to complete such legitimate portion.

To make legitimate descendants liable to collation as prescribed in the preceding paragraphs, they must appear in the quality of heirs to the succession of the ascendants from whom they immediately have received the gift or legacy.

Therefore grandchildren to whom a gift was made or a legacy left by their grandfather or grandmother, after the death of their father or mother, are obliged to collate when they are called to the inheritance of the grandfather or grandmother jointly with the other grandchildren, or by representation with their uncles or aunts, brothers or sisters of their father or mother, because a legitimate portion is due to them in the estate of their grandfather or grandmother, on which it is presumed that their grandfather or grandmother had intended to make the gift, or leave the legacy by anticipation.

But gifts made or legacies left to a grandchild by his grandfather or grandmother during the life of his father are always reputed to be exempt from collation, because while the father is alive there is no legitimate portion due to the grandchild in the estate of his grandfather.

The father inheriting from the grandfather is not liable to collate the gifts or legacies left to his child.

In like manner, the grandchild, when inheriting in his own right from the grandfather or grandmother, is not obliged to refund the gifts made to his father, even though he should have accepted the succession ; but if the grandchild comes in only by right of representation, he must collate what had been given to his father, even though he should have renounced his inheritance.

What has been said in the four preceding paragraphs of grandchildren inheriting from their grandfather or grandmother must be understood of the great-grandchildren and other lawful descendants called to inherit from their ascendants, either in their own name or by right of representation : La. 1227-1241.

**§ 3171. To whom the Collation is Due, and what Things are Subject to it.** The collation is made only to the succession of the donor.

Thus, in case of a father having alone settled a dowry on one of his children, the collation is only due to his succession. But if the father and mother have jointly settled the dowry, the collation is to be made by halves to each of their successions, conformably to the rules established in the title : *Of the Marriage Contract* (Art. 643).

Collation is due for what has been expended by the father and mother to procure an establishment for their legitimate descendant coming to their succession, for the settlement of dowry, or for the payment of his debts.

Neither the expenses of board, support, education, and apprenticeship are subject to collation, nor are marriage presents which do not exceed the disposable portion.

The same rule is established with respect to things given by a father, mother, or other ascendant by their own hands to one of their children, for his pleasure or other use.

The heir is not bound to collate the profits he has made from contracts made with his ascendant to whom he succeeds, unless the contracts at the time of their being made gave the heir some indirect advantage.

Also, no collation is due for a partnership made without fraud with the deceased, if the conditions of the partnership are proved by an authentic act.

The advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation. Thus, when a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, or has spent money to improve his son's estate, all that is subject to collation.

The obligation of collation does not exclude the child or descendant coming to the succession of his father, mother, or other ascendant, from claiming wages which may be due to him for having administered the property of the ascendant, or for other services.

Immovable property given by a father, mother, or other ascendant to one of their children or descendants, and which has been destroyed by accident while in the possession of the donee, and without his fault, previous to the opening of the succession, is not subject to collation.

If, on the contrary, it is by the fault or negligence of the donee that the immovable property has been destroyed, he is bound to collate to the amount of the value which the property would have had at the time of the opening of the succession : La. 1242-1250.

### § 3172. How Collations are Made. Collations are made in kind or by taking less.

The collation is made in kind when the thing which has been given is delivered up by the donee to be united to the mass of the succession.

The collation is made by taking less when the donee diminishes the portion he inherits in proportion to the value of the object he has received, and takes so much less from the surplus of the effects (of the succession which is carried into effect), as is explained in the chapter which treats of partitions.

In the execution of the collation it must first be considered whether the things subject to it are movables or immovables.

If an immovable has been given, and the donee hath it in his possession at the time of the partition, he has the choice to make the collation in kind or by taking less, unless the donor has imposed on him the condition of making the collation in kind ; in which case it cannot be made in any other manner than that prescribed by the donor, unless it be with the consent of the other heirs, who must be all of age, present or represented in this State.

The donee who collates in kind an immovable which has been given to him must be reimbursed by his co-heirs for the expenses which have improved the estate, in proportion to the increase of value which it has received thereby.

The co-heirs are bound to allow to the donee the necessary expenses which he has incurred for the preservation of the estate, though they may not have augmented its value.

As to works made on the estate for the mere pleasure of the donee, no reimbursement is due to him for them ; he has, however, the right to take them away, if he can do it without injuring the estate, and leave things in the same situation they were at the time of the donation : La. 1251-1258.

Expenses made on immovable property are distinguished by three kinds : necessary, useful, and those for mere pleasure.

Necessary expenses are those which are indispensable to the preservation of the thing.

Useful expenses are those which increase the value of the immovable property, but without which the estate can be preserved.

Expenses for mere pleasure are those which are only made for the accommodation or convenience of the owner or possessor of the estate, and which do not increase its value.

The donee, who collates in kind the immovable property given to him, is accountable for the deteriorations and damage which have diminished its value, when caused by his fault or negligence.

If within the time and in the form prescribed in the chapter which treats of partitions, the donee has made his election to collate in kind the immovable property which has been given to him, and it is afterwards destroyed, without the act or fault of the donee, the loss is borne by the succession, and the donee shall not be bound to collate the value of the property.



If the immovable property be only destroyed in part, it shall be collated in the state in which it is.

But if the immovable property is destroyed after the donee has declared that he wishes to collate by taking less, the loss is his, and he is bound to take less from the succession, in the same manner as if the property had not been destroyed.

When the collation is made in kind, the effects are united to the mass of the succession free from all charges created by the donee, but creditors holding mortgages may intervene in the partition, and make opposition to the collation which may injure their rights.

In the case mentioned in the preceding paragraph, if the property mortgaged, which has been collated in kind, falls by the partition to the donee, the mortgage continues to exist thereon as if it had never been collated; but if the donee receives for his portion other movables or immovables of the succession, the creditor shall have a privilege for the amount of his mortgage on the property which has thus fallen to his debtor by the partition.

When the gift of immovable property, made to a lawful child or descendant, exceeds the portion which the ascendant could legally dispose of, the donee may make the collation of this excess in kind, if such excess can be separated conveniently.

If, on the contrary, the retrenchment of the excess over and above the disposable portion cannot conveniently be made, the donee is bound to collate the excess by taking less, as is hereafter prescribed for the cases in which the collation is made of immovable property given him otherwise than as advantage or *extra portion*.

The donee, who makes the collation in kind of the immovable property given to him, may keep possession of the same until the final reimbursement of the sums to him due for the necessary and useful expenses which he has made thereon, after deducting the amount of the damage the estate has suffered through his fault or neglect, as is before provided.

When the donee has elected to collate the immovable property given him, by taking less on the part which comes to him from the succession, the collation must be made according to the value which the immovable property had at the opening of the succession, a deduction being made for the expenses incurred thereon, in conformity with what has been heretofore prescribed.

If the donee has voluntarily alienated the immovable property which has been given him as an advantage or extra portion, if he has permitted it to be seized and sold for the payment of his debts, or if it has been destroyed by his fault or negligence, he shall not be the less bound to make the collation of it, according to the value which the immovable would have had at the time of the opening of the succession, deducting expenses, as is provided in the foregoing paragraph.

But if the donee has been forced to alienate the immovable property, he shall be obliged to collate by taking less the price he has received from this sale and no more.

As, for example, if the donee shall be obliged to submit to a sale of the immovable for some object of public utility, or to discharge a mortgage imposed by the donor, or because the immovable was held in common with another person who has prayed for the sale in order to obtain a partition of it.

If the immovable property which has been given has been sold by the donee, and afterwards is destroyed by accident in the possession of the purchaser, the donee shall only be obliged to collate by taking less the price he received for the sale.

When the collation is made by taking less, the co-heirs to whom the collation is due have a right to require a sale of the property remaining to the succession in order to be paid from the proceeds of this sale not only the collation which is due to them, but the part which comes to them from the surplus of these proceeds, unless they prefer to pay themselves the amount of the collation due to them by taking such movables and immovables of the succession as they may choose, according to the appraisement in the inventory, or the appraisement which serves as a basis to the partition.

If the co-heirs to whom the collation is made by taking less wish that the effects of the succession be sold in order that they may be paid what is due them, they are bound to decide thereon in three days from their being notified of the motion of the donee to that effect, before the judge of the partition; otherwise they shall be deprived of this right, and shall be considered as having consented to receive payment of the collation due them in effects and property of the succession, or otherwise, from the hands of the donee.

When the co-heirs, thus notified, require the sale of the effects of the succession to pay

themselves the collation due them, the sale shall be made at public auction, in the same manner as when it is necessary to sell property held in common in order to effect a partition.

If, on the contrary, the co-heirs to whom the collation is due prefer to be paid the amount thereof in property and effects of the succession, or are divested of their right to require the sale of these effects, they shall be paid the amount of the collation in movables, immovables, and other effects of the succession, in the same manner as is prescribed in the chapter which treats of *partitions*.

But in no case will these heirs be obliged to receive in payment credits of the succession.

If there are no effects in the succession, or not sufficient to satisfy the heirs to whom the collation is due, the amount of the collation, or the balance due on it, shall be paid them by the heir who owes the collation.

This heir shall have one year to pay the sum thus by him due, if he furnish his co-heirs with his obligation payable at that time, with eight per cent interest, and give a special mortgage to secure the payment thereof either on the immovable property subject to the collation, if it is in his possession, or, in want thereof, on some other immovable property which may suit the co-heirs.

If the heir who has been allowed to furnish his obligation as mentioned in the preceding paragraph fails to fulfil his engagement at the expiration of the year granted to him, the heirs in whose favor this obligation has been made, or their representatives, have a right to cause the property mortgaged to them to be seized and sold, without any appraisalment, and at the price offered at the first exposure for sale.

If the property thus seized and sold is the same which was subject to the collation, the co-heirs seizing, or their representatives, shall be paid the amount of their debt due for the collation, by privilege and in preference to all the creditors of the donee, even to those to whom he may have mortgaged the property for his own debts or engagements previous to the opening of the succession, saving to these mortgage creditors their recourse against other property of the donee.

If the donee who owes the collation has, before the opening of the succession, voluntarily sold the immovable property given to him, and his other property is not sufficient to satisfy his co-heirs for the collation due them, the co-heirs, after a previous discussion of the effects of the donee, shall have the right of claiming the immovable property thus sold from those who may be the purchasers or detainers thereof, who shall be compelled to give it up as an object which had never belonged to the donee.

The third purchaser or possessor of the real estate subject to collation may avoid the effect of the action of revendication by paying to the co-heirs of the donee to whom the collation is due, to wit: the excess of the value of the property above the disposal portion, if the donation has been made as an advantage or extra portion, or the whole of the value thereof, if the donation has been made without this provision, by fulfilling in this respect all the obligations by which the donee himself was bound towards the co-heirs.

When movables have been given, the donee is not permitted to collate them in kind; he is bound to collate for them by taking less, according to their appraised value at the time of the donation, if there be any annexed to the donation. In default thereof, recourse may be had to other evidence to establish the value of these movables at the time of the donation.

Therefore the donation of movables contains an absolute transfer of the rights of the donor to the donee in the movables thus given.

The collation of money may be made in money or by taking less, at the choice of the donee who is bound to decide thereon, in the same manner as is prescribed for the collation of immovable property.

If it be movables or money, of which the donee wishes to make the collation by taking less, he has the right of compelling his co-heirs to pay themselves the collation due to them in money, and not otherwise, if there be sufficient in the succession to make these payments with.

But if there is not sufficient money in the succession to pay such heirs the collation due to them, they shall pay themselves by taking an equivalent in the other movables or immovables of the succession, as is directed with respect to the collation of immovable property.

In case there be no property or effects in the succession to satisfy the collations due for movables or money given, the donee shall have, for the payment of the sum due to his co-heirs, the same terms of payment as are given for the payment of the amount of collations of immovable property, and under the same conditions as are before prescribed: La. 1259-1288.

## CHAPTER V.—OF THE RIGHTS OF THE WIDOW AND HUSBAND.

**Art. 320. Dower.**

§ 3200. **Note.** We may distinguish, besides homestead and community property, three different interests the widow may have in the estate of a deceased husband. These are: (1) *dower* as at common law or as modified by statute; (2) the *intestate share*, or the estate which the widow will have in a husband's real or personal property if he die intestate; (3) the *share in lieu of will*, or estate she will have in his real or personal property if he leave a will which she waives or renounces. The share in lieu of will is frequently, but not always, the intestate share; and the intestate share is frequently, but not always, dower in the real estate and the intestate share in the personalty. For the intestate share, see Art. 310, the widow's share in the respective cases by descent and distribution. For the share in lieu of will, see Art. 326. In a few states, the widow may waive dower, and take a statutory provision in lieu thereof; see § 3263. This may be conveniently termed (4) the *estate in lieu of dower*. The first class, dower, alone forms the subject of this article.

§ 3201. **General Provisions.** Very generally, even in those states where dower has not been formally abolished, it has been practically superseded by the statutes allowing a widow a fixed interest in the real or personal estate of her husband, *in lieu of dower*. See § 3200, class (4). For this reason, in this article, only the creation and extinction of the estate resembling common-law dower is discussed; as it is confirmed or abolished by the state statutes. For the incidents of dower, and methods of barring dower, see Art. 324.

The dower estate, whatever it be, is generally free from all debts of or claims against the husband. It inures to the use of widow for her life: Tenn. 3246. Generally, in states which preserve the dower estate, the widow has her election of dower or the will, and sometimes also of the intestate share (Art. 310). See §§ 3244, 3262.

In Alabama, the widow is entitled to no dower nor distributive share in the husband's estate, if her separate estate, exclusive of the rents, income, and profits, is equal to or greater in value than her dower interest and distributive share of the husband's estate; if less in value than her dower, she has so much as with her separate estate would be equal to her dower and distributive share in the husband's estate: Ala. 2715-6. The dower interest for this purpose is estimated at seven years' rent of the dower interest: Ala. 2715.

In Vermont, the court may deny the widow dower if she was the second wife of the deceased, and an agreement was entered into before marriage; and the court deem the widow comfortably provided for.

§ 3202. **Amount of Dower.** (A) In many states, dower has been specially preserved as at common law; that is, the widow is endowed of one third part of all lands wherein the husband was seized of an estate of inheritance, at any time during coverture (unless lawfully barred; see Art. 324): Mass. 124,3; Me. 103,1; R.I. 229,1; N.Y. 2,1,3,1; N.J. *Dower*, 1; Pa. *Dower*, 4; *Intestates*, 34 and 6; O. 4188; Ill. 41,1; Mich. 5733; Wis. 2159; Neb. 1,23,1; Del. 87,1; Va. 106,1; W.Va. 1882,86,1; N.C. 2102; Ky. 52,4,2; Mo. 2186; Ark. 2571; Ore. 17,1. See, however, F.

(B) In many others, dower is absolutely abolished: Ind. 2482; Io. 2440; Minn. 48,1; 1875,40,5; Kan. 33,28; Cal. 5173; Nev. 157; Col. 1039; Wash. 2414, 3304; Dak. Civ. C. 779; Ida. 1874-5, p. 636,10; Wy. 42,1; Uta. 1022; Miss. 1170; Ariz. 1976.



[But in these states, she is nevertheless entitled to a share by descent or intestate share, which frequently resembles common-law dower; see § 3105. In the laws of these states, subsequent provisions found in this article (320) refer to such intestate share, instead of dower.]

(C) In a few states, it seems that dower remains as at common law, either (1) by the silence of the statutes: Pa.<sup>c</sup> *Dower*, 4; (2) or by implication: R.I. 187,8; Md. 65,104; S.C. 1852.

(D) In two states, where curtesy is abolished, both the husband and wife are "endowed" as at common law: Me.<sup>a,b</sup> 65,6-7; 103,14; Ill. 41,1.

(E) In a few others, the widow is entitled to dower in lands only of which her husband *died* seized: N.H.<sup>a</sup> 202,2; Vt. 2215; Ct.<sup>d</sup> 1885,110,189; Del. 85,1; Tenn. 3244; Ga. 1763; Fla. 95,1.

And in such, she has a life estate, and on her death it reverts to the heirs of the husband: Fla. 95,4. In Georgia, she is entitled to dower in lands to which the husband obtained title in right of his wife also (whether the husband died possessed of them or not).

(F) But in several, when the husband (or wife, in Maine) died without issue and solvent, the widow (or surviving husband, in Maine) is entitled to half the real estate for life, in dower; otherwise, to one third: Me.<sup>c</sup> 65,7; Del.; Ark. 2592; Ala. 2233.

For other states, see § 3105 for similar provisions.

For dower upon divorce, see § 6249. For dower of divorced persons, see § 3247.

NOTES. — <sup>a</sup> But another statute provides that such dower estate shall be so much of any real estate of the husband as will produce an income equal to one third of the yearly income thereof at the time the husband died or parted with the title: N.H. 202,4. <sup>b</sup> Only if such deceased wife's estate is solvent. <sup>c</sup> Dower is nevertheless practically superseded by the *intestate share*. See § 3263. <sup>d</sup> Of marriages made before April 20, 1877. <sup>e</sup> Of which he died seized.

§ 3203. **Conveyance by the Husband.** In Vermont, the voluntary conveyance by the husband of any of his real estate made during coverture, with intent to defeat dower, and not to take effect until after his decease, is void, so far as concerns her dower: Vt. 2228. (This provision would only seem necessary in states where dower extends only to lands of which the husband *died* seized, as in § 3202, E).

She is so endowed free of all alienations, debts, and incumbrances made by the husband after marriage. (This would seem to be implied in the law of all the states, except when specially expressed otherwise, as it is part of the common law of dower): Del. 87,1; N.C. 2103,2106; Ark. 2602.

In Georgia, no lien created by the husband in his lifetime, though assented to by the wife, shall in any manner interfere with her right to dower: Ga. 1769. But see § 3202, E.

But the wife is not endowed of land sold by the husband before marriage, though not conveyed before: Ky. 52,4,5; nor of land held only by executory contract, unless so held by the husband at death (§ 3212): Ky. 52,4,12.

Advancements are not to be considered in determining the widow's dower: Del. 85,6.

§ 3204. **Inchoate Dower.** In one state, when the husband's land is levied on or sold under decree of court, where the inchoate interest is not directed by the court to be barred by virtue of such sale, such interest becomes absolute and vests in the wife as if the husband had died. She has right of possession, and, when sold, may have partition accordingly: Ind. 2503.

But not when land sold is of value over \$20,000, as to such excess: Ind. 2509.

In one other, dower, or the right of dower, is in no case subject to execution for the payment of any debt of the husband during the wife's life: N.C. 2104. So, of course, in all.

For other states, see in Part IV.

## Art. 321. The Dower Estate.

§ 3210. **General Principles.** See §§ 3201,3202.

§ 3211. **Dower in Lands not Possessed.** The wife has dower of real estate, although there may have been no actual possession or recovery of possession by

the husband in his lifetime : Va. 106,2 ; W.Va. 1882,86,2 ; Ky. 52,4,4 ; Mo. 2207 ; and although the same is held by the husband as joint-tenant, common tenant, or coparcener : Mo.

In Ohio, she is also endowed of all real estate of which her husband at his decease held the fee in remainder or reversion : O. 4188. But not until after the particular estate has determined : O.

§ 3212. **Dower in Equitable Estates.** (A) In many states, there is a general provision that the widow is entitled to dower in equitable estates : Ind.<sup>b</sup> 2491 ; Ill. 41,1 ; Md. 45,1 ; Va. 112,17 ; W.Va. 82,17 ; N.C. 2103 ; Tenn. 3244 ; Ala. 2232.

And, in particular, in lands of which the husband had a perfect equitable title at death, he having paid all purchase-money thereof : Ala.

(B) In others, there is a special provision that she has dower in a right or interest in land held by her husband at his decease, by bond, article, contract, lease, or other evidence of claim : O. 4188 ; Ill.<sup>a, c</sup> 41,1 ; Ky. 52,4,12 ; Mo. 2188.

But such dower in an equitable title does not, in two states, operate to the prejudice of any claim for the purchase-money of such lands or other incumbrance previously existing on the same : Md., Mo.

So, in others, if a husband has made a contract for lands, and at his death the consideration has not been paid, but is paid after death out of his estate, wife has her dower in such land as if the legal estate had vested in the husband during coverture : Ind.<sup>b</sup> 2493 ; Mo. 2187.

And if only part of the consideration was paid, and the estate is sold upon the husband's death, under the will or by decree of court, the wife is entitled to her third in such estate in proportion to the amount of consideration paid by the husband : Ind.<sup>b</sup> 2494.

Conversely, in Georgia, the widow of one who gave a bond of title or contract of sale is not entitled to dower in the land affected : Ga. 1763. See also § 3246.

NOTES. — <sup>a</sup> Only if the title be perfected after his decease. <sup>b</sup> See § 3202, B. <sup>c</sup> Both husband and wife ; see § 3202.

§ 3213. **Dower in Land Mortgaged after Marriage.** (A) It would seem, by the common law, that where there is no special enactment to the contrary the widow is entitled to dower in the whole of land mortgaged or incumbered by the husband after marriage, by a conveyance in which the wife has not joined, and when she has not been otherwise barred. But in those states where she is only endowed of land of which the husband *died* seized, the law would be otherwise ; see § 3202, E.

There is, accordingly, an express provision that the widow is entitled to dower (only) in the equity of redemption of lands mortgaged by the husband (whether she joined in the mortgage or not, but *quære*) : Vt. 2216.

And in other states, she has dower in lands mortgaged after marriage by deed in which she joined, as against every person except the mortgagee, and those claiming under him : Mass. 124,5 ; Me. 103,12 ; Va. 106,3 ; W.Va. 1882,86,3.

And if she did not join, she has her dower in the whole free of the mortgage : N.C. 2106.

(B) But there is a special provision, in many states, that if lands were purchased by the husband *during* marriage and at the same time mortgaged to secure the purchase-money, she only has dower in the equity even if she did not join in the mortgage : N.Y. 2,1,3,5 ; Ind. 2495 ; Ill. 41,4 ; Mich. 5736 ; Wis. 2163 ; Neb. 1,23,4 ; W.Va. ; N.C. 1272,2106 ; Ark. 2575 ; Ore. 17,4 ; Ga. 1763*a*. And the same is the law as to the husband's curtesy, etc., in any mortgages by the wife : Del. V. 15,165,3 ; V. 16,126.

In South Carolina, it is provided that "nothing in this chapter [concerning the record of deeds] shall be construed to bar any widow of any mortgagor of any lands from her dowry and

right in or to said lands, who did not legally join with her husband in such mortgage, or otherwise bar or exclude herself from such dowry or right:" S.C. 1782.

In Tennessee, by an anomaly, she has dower in land mortgaged or conveyed by trust-deed to secure debts when the husband dies before foreclosure and sale (and there is nothing to show that this right of dower would not extend to land mortgaged before the marriage): Tenn. 3245.

§ 3214. **Dower in Lands Mortgaged before Marriage.** In this case it is evident that the widow has dower, if at all, only in the equity of redemption, and the mortgagee has a good title. The widow would seem to have such dower under the general provision (see § 3203).

And in other states, there is a special provision to this effect, and she has dower as against every person but the mortgagee: Mass. 124,5; Me. 103,12; Vt. 2216; N.Y. 2,7,3,4; Ill.<sup>a</sup> 41,3; Mich. 5735; Wis. 2162; Neb. 1,23,3; Va. 106,3; W.Va. 1882,86,3; Ark. 2574; Ore. 17,3.

But in Vermont, the probate court has power to give the widow dower in the whole of the lands mortgaged, if the husband left personal estate enough to pay it off: Vt. 2218.

And the widow may claim dower in the whole land on paying the heir or other representative of the husband her share of the mortgage so paid off: Mass. 124,5; Me. 103,12; Vt. 2216.

NOTE. — <sup>a</sup> § 3212, note c.

§ 3215. **Dower in the Estate of a Mortgagee.** In a few states, it is provided that a widow is not endowed of lands mortgaged to her husband unless he acquires an absolute estate therein during marriage: N.Y. 2,1,3,7; Ill.<sup>a</sup> 41,6; Ark. 2577. (The same is probably law everywhere; as a mortgage is commonly declared to pass no title, or to be deemed personalty. See Art. 185.)

NOTE. — <sup>a</sup> See § 3212, note c.

§ 3216. **Dower in Surplus Proceeds.** As to lands mortgaged by the husband before marriage, or after marriage to secure the purchase-money, as in § 3213, B, in most states, (A) the widow, if the lands are sold by the mortgagee, has dower in the proceeds remaining after satisfying the mortgage: Mass. 124,5; Me. 103,12; Vt. 2217; N.Y. 2,1,3,6; Ill.<sup>a</sup> 41,5; Mich. 5737; Wis. 2164; Neb. 1,23,5; Va. 106,3; W.Va. 1882,86,3; Ky. 52,4,5; Ark. 2576; Ore. 17,5. So, if sold by the executor or administrator of the husband: Wis. So, in lands mortgaged by deed in which she joined: Va., Ky. But not when the surplus proceeds were received or disposed of by the husband in his lifetime: Ky. Such dower in proceeds equals the interest or income of one third of the surplus for her life. Ill., Mich., Wis., Neb., Ark., Ore. (B) If the heir or other person claiming under the husband pay or satisfy the mortgage, the amount so paid shall be deducted from value of land, and the widow shall have set out to her for dower the value of one third of the residue: Mass.; Me.; Vt.; Mich. 5738; Wis. 2165; Neb. 1,23,6; Ore. 17,6.

NOTE. — <sup>a</sup> See § 3212, note c.

§ 3217. **Dower in Trust Estates.** In New Jersey, it is specially provided that there shall be no dower for the widow of a trustee in the trust estate: N.J. *Dower*, 25.

(This rule would seem to hold good in all states by the common law of trusts and joint-tenancy.)

§ 3218. **Dower in Lands Leased and Exchanged.** In several states, if a husband exchanges one estate for another during marriage, the widow cannot have dower in both, and shall be deemed to take dower in the lands so received in ex-



change if she do not commence proceedings to recover dower in the lands given within one year of her husband's death : N.Y. 2,1,3,3 ; Ill.<sup>a</sup> 41,17 ; Mich. 5734 ; Wis. 2161 ; Neb. 1,23,2 ; Ark. 2573 ; Ore. 17,2.

*In leasehold estates* for a term of more than twenty years, she has dower ; but if less than twenty years, she shares as if it were personal property : Mo. 2186. Compare §§ 1300,1311.

When dower is assigned in land held under a lease for years the widow or assignee must pay one third of the rent to the owner of the unexpired residue : Mass. 121,2.

NOTE — <sup>a</sup> See § 3212, note <sup>c</sup>.

§ 3219. **Dower in Wild Land.** But in New England, the widow is not generally entitled to dower in wild land, nor in wild land conveyed by the husband and afterwards cleared ; except wood-lots or other land used with the farm or dwelling-house : N.H. 202,3 ; Mass. 124,4 ; Me. 103,2 ; 65,1.

## Art. 323. Rights of Dowress.

§ 3230. **General Principles.** See *Life Estates*, Art. 133.

§ 3231. **Waste by Dowress.** (A) Generally, if a dowress commit or suffer waste, she is liable to the owner of the next estate of inheritance for damages : N.H. 202,6 ; Mass. 124,16 and 179,1 ; Me. 95,1 ; 103,13 ; Vt. 2227 ; R.I. 229,22 ; N.Y. Civ. C. 1651 ; N.J. *Waste*, 3 ; Ill. 41,45 ; Mich. 5754,7940 ; Wis. 2174 ; Neb. 1,23,21 ; Md. 50,221 ; Del. 88,1 ; Ore. 17,22 ; Col. 3574.

But so, in one other, only as to wanton waste : O. 4194.

In other states, she is liable like tenants for life (§ 1332) : N.J.

She is liable for waste committed by her second husband : Col.

He is also liable (1) after her death : Del. 88,3 ; (2) at any time : Md., Col.

(B) And in several, a dowress so committing waste forfeits the estate upon which the waste is committed to the remainder-man or reversioner of the freehold : Mass., Me., R.I., N.J., O., Ill. See also § 1332.

She may, however, take wood for fuel and repairs : N.H., Me.

(C) And in Connecticut, a dowress forfeits her estate to the remainder-man in the case of *permissive* waste, for such time as will enable him to make, out of the rents and profits, the necessary repairs : Ct. 18,11,1,4,3.

Compare also § 1353.

§ 3232. **Repairs.** It would seem to follow from the mere prohibition of *permissive* waste that the dowress must keep the estate in sufficient repair, in all the states ; and in some it is specially so expressed : N.H. ; Vt. ; R.I. ; Ct. 1885, 110,191 ; Ill. ; Mich. ; Wis. ; Neb. ; Ore. See § 3231 for citations.

But in Maryland, it is provided that the Probate Court "shall determine what part of the necessary repairs and improvements shall be borne by the widow : " Md. 50,222.

§ 3233. **Emblements.** The widow may, in many states, bequeath the crop in the ground held by her for dower : R.I. 229,26 ; N.Y. 2,1,3,25 ; N.J. *Wills*, 10 ; Pa. *Wills*, 5 ; Va. 106,14 ; W.Va. 1882,86,14 ; Ark. 2618 ; S.C. 1856. See also § 2630.

And if she die intestate it goes to her administrator : Va., W.Va., Ark.

The widow's executors may enter and remove buildings or fences erected by her on her dower land : R.I. 1882,286.

## Art. 324. Barring Dower.

§ 3240. **Note.** In the United States there are recognized three ways of barring dower : (1) by jointure or settlement (§§ 3241-3243) ; (2) by devise or bequest

(§ 3244); (3) by deed (§ 3245). Dower may also be forfeited by adultery, divorce, etc. (§§ 3246-7).

§ 3241. **By Jointure.<sup>a</sup>** Generally, in most states, dower may be barred by a conveyance, gift, or devise of real property, made by any person to, or in trust for, an intended wife, before marriage, by way of jointure or with intent to bar dower (subject to the conditions below): N.H.<sup>a</sup> 202,11; Mass. 124,7; Me. 103,7; Vt. 2219; R.I. 229,23; Ct. 1885,110,189 and 193; N.Y. 2,1,3,9; N.J. *Dower*, 10; O. 4189; Ind.<sup>b</sup> 2500; Ill.<sup>c</sup> 41,7; Mich. 5746; Wis. 2167; Neb. 1,23,13; Del. 87,3; Va. 106,4; W.Va. 1882,86,4; Ky. 52,4,6; Mo. 2201; Ark. 2579,2583; Ore. 17,14; S.C. 1800; Ga. 1764.

In several states, dower is equally barred when such conveyance, etc., is made to the husband and the intended wife: N.Y., N.J., Ind., Ill., Mo., Ark.

And in Delaware, dower is so barred when a charge upon real estate is made in favor of such intended wife.

But in Maryland, the widow is only barred by an estate so settled before marriage *by her husband*: Md. 50,226.

**Conditions.** (A) The conveyance, etc., must, in many states, be made (1) with the intended wife's assent: Mass.; Me.; N.Y.; Ind.<sup>a</sup> 2500; Ill.<sup>b</sup> 41,7; Mich.; Wis.; Neb.; Del.; Va. 106,5; W.Va. 1882,86,5; Ky.; Mo.; Ark.; Ore.; Ga.

In Vermont, there is an express provision that the conveyance, etc., will bar dower whether she consented to it or not: Vt. 2219. (2) Her assent must be evidenced, in many, by her becoming a party to the conveyance: Mass.; Me.; N.Y. 2,1,3,10; Ill.<sup>b</sup> 41,8; Mich. 5747; Wis. 2168; Neb. 1,23,14; Ark. 2580; Ore. 17,15.

In one, it must be signified by her in writing indorsed on, or attached to, the deed: Ind.<sup>a</sup>

(3) If the intended wife be under age, (α) her father or guardian may give such assent for her, in several states: N.Y.; Ind.<sup>b, d</sup> 2503. (β) She must join with her father or guardian in the conveyance: Mass., Me., Ill.,<sup>c</sup> Mich., Wis., Neb., Ark., Ore.

(γ) But in other states, the conveyance, etc., it seems, will fail of effect if she be under age at the time: Del.

(B) And in most states, if made without her consent she shall make her election (§ 3271) of the estate so conveyed, etc., and dower; but shall not be entitled to both: Mass. 124,9; Me. 103,9; Vt. 2219 (see A, above); N.Y. 2,1,3,12; Ind.<sup>b</sup> 2504; Ill.<sup>b</sup> 41,9; Mich. 5749; Wis.<sup>e</sup> 2170,2172, Amt.; Neb. 1,23,16; Va.; W.Va.; Ky.; Ark. 2582; Ore. 17,17.

But in one state, she may waive such jointure in all cases, whether made with or without her consent: Vt.

In several, if made during her infancy, the widow may waive such jointure and claim dower, but shall not be entitled to both: R.I. 229,23; N.J. *Dower*, 12; O. 4189; Va.; W.Va.; Ky.; Mo. 2202.

(C) In many states, her interest in such conveyance, in order to bar dower, must take effect immediately upon, or no later than, the death of the husband: Mass.; Me.; Vt.; R.I.; Ct.; N.J.; O.; Ind. 2502; Mich. 5746; Wis. 2167; Neb.; Del.; Mo. 2201; Ore. 17,14.

And must, in many, be at least for the term of her natural life: <sup>f</sup> Mass., Me., R.I., N.J., O., Mich., Wis., Neb., Del., Mo., Ore.

So, in others, the jointure must not be less than a "freehold" estate in lands: Mass.; Me.; Ind. 2502; Mich.; Wis.; Neb.; Ore. But in Rhode Island, it may be made determinable by such acts as would forfeit her dower at common law: R.I.

(D) In several, the intent to bar dower must be expressed in the conveyance, etc.: N.H. 202,11; Vt.; Ct. 1885,110,193; Ind. 2500; Mo.

The same would probably be implied in Virginia and West Virginia, and perhaps in others.

In one state, a jointure made as provided above respectively will also bar the widow's intestate share, if so expressed in the deed creating it: N.H. And the same is probably law in all states. Compare Art. 326.

NOTES. — <sup>a</sup> But in most states, dower is not absolutely barred by this, and the widow has her election in all cases; see § 3243 and below. <sup>b</sup> See § 3202, B. <sup>c</sup> Either husband or wife may so be barred; see § 3202. <sup>d</sup> Or the mother, if no father. <sup>e</sup> This provision does not, however, apply to cases where the husband died intestate, *sine prole*. <sup>f</sup> This provision is probably implied in the statutes of all the states.

§ 3242. **By Settlement of Personal Property.** In most states, the widow's dower may be barred in the same way by a pecuniary provision settled on, or made to, the intended wife before marriage, in lieu of dower: N.H. 202,11; Mass. 124,8; Me. 103,8; Vt. 2219; R.I. 229,23; Ct. 1885,110,189; N.Y. 2,1,3,11; O. 4189; Ind. 2500; Mich. 5748; Wis. 2169; Neb. 1,23,15; Va. 106,4; W.Va. 1882,86,4; Ky. 52,4,6; Mo. 2201; Ark. 2581; Ore. 17,16; Ga. 1764.

But in Maryland, only if settled by her husband: Md. 50,226.

In many states, she must assent, as in § 3241: Mass., Me., N.Y., Ind., Mich., Wis., Neb., Va., W.Va., Ky., Mo., Ark., Ore., Ga.

If made without her assent, she may, in many states, elect this or dower, under their several rules as expressed in § 3241: Mass. 124,9; Me. 65,4; 103,9; Vt.; R.I.; N.Y. 2,1,12; Ind.<sup>a</sup> 2504; Mich.; Wis.<sup>a</sup> 2170; 2172, Amt.; Neb. 1,23,16; Va.; W.Va.; Ky.; Ark. 2582; Ore. 17,17.

So, in several states, she has her election, if the pecuniary provision was made before she arrived at full age: R.I.; O. 4189; Va.; W.Va.; Ky.; Mo. 2202.

Such pecuniary provision must take effect no later than the husband's death: R.I., Vt., Ct., Mo. Compare § 3241.

It must last for the term of her natural life: R.I.

NOTE. — <sup>a</sup> See § 3241, note <sup>e</sup>.

§ 3243. **By Settlement after Marriage.** Generally, where a corresponding interest in land (see § 3241) or pecuniary provision (see § 3242) is made, conveyed, given, or settled after marriage, the widow has her election of such estate or provision, and dower, but is not entitled to both: Mass. 124,8; Me 103,9; 65,4; Vt. 2219; R.I. 229,23; N.Y. 2,1,3,12; N.J. *Dower*, 12; O. 4189; Ind.<sup>a</sup> 2504; Ill.<sup>b,c</sup> 41,9; Mich. 5749; Wis. 2170; Neb. 1,23,16; Va. 106,5; W.Va. 1882,86,5; Ky. 52,4,6; Mo. 2201–2; Ark. 2582; Ore. 17,17; S.C. 1803–4; Ga. 1764.

In other states, there are no statutes authorizing dower to be barred by conveyance or settlement during marriage.

NOTES. — <sup>a</sup> See § 3241, note <sup>b</sup>. <sup>b</sup> But not, it seems, after marriage, by a settlement of personalty. <sup>c</sup> § 3140, note <sup>d</sup>.

§ 3244. **By Husband's Will.** (See also Art. 326.) (Δ) In most states, if lands are devised or (except in Maryland, Missouri, and Arkansas) pecuniary provision made by the husband's will to or for the widow, she shall not be entitled to claim both this and dower, but must make election: N.H. 202,18; Mass. 127,20; Me. 103,10; Vt. 2219; Ct. 1885,110,192 and 194; N.Y. 2,1,3,13; N.J. *Dower*, 16; Pa. *Dower*, 4; *Wills*, 12; O. 5963; Ind. 2505; 1885, Ex. 103; Ill. 41,10 (husband or widow); Mich. 5750; Wis.<sup>e</sup> 2171; Neb. 1,23,17; Md. 50,227 and 229; Va. 106,4; W.Va. 86,5; 1882,94,11; N.C. 2103; Ky. 31,12; Ore. 17,18; Ga. 1764; Fla. 95,1.



So, it seems, if a devise or bequest be made by any person, — the husband or any other: Ark. 2583. But in Kentucky, she may claim dower and distributive share, and be charged with the value of any devise or bequest to her by his will.

(B) In a few states, however, only a devise bars dower; and a mere pecuniary provision or bequest of personal property will not bar dower (1) unless so expressed in the will: Md. 50,230; Ga. 1763,1765; (2) in no case: N.J.; Del. 87,5; Mo. 2199; Ark. 2594-5.

And in two, neither devise nor bequest will bar dower, unless the court deem that such intention appear in the will: Vt., Ga.

But in most states, she is entitled to dower, in addition to the devises or pecuniary provisions in the will, if such plainly appear to have been the testator's intention: Mass.; Me. 65,5; 103,10; Vt. 2219; Ct.; O.; Ind.; Mich.; Wis.; Neb.; Va.; Ky.; Mo. 2199; Ark.; Ore.

Such intention must be *expressed* in the will: N.J., Ill., Md., Del.

If in such case she elect dower, she must convey and release to him the land so devised to her: Ark. 2596. And this renunciation is deemed sufficient notice of waiver of will: Ark. It must be executed in eighteen months after his death, or the widow is deemed to have accepted will: Ark. 2237.

(C) Generally, the intestate share of the widow in personalty is barred if she do not waive the will according to Art. 326, as dower would be: Ct. 1885,110, 194; Io. 2452; Kan. 117,41; W.Va.; Miss. 1174; Fla. 95,3. So, by implication, in most states.

But if by the will a specific devise or bequest is made to her in lieu of any particular thing or interest to which she would be entitled in case of intestacy, her election to take such devise or bequest, or the thing or interest in which it is given, does not deprive her, or any other person, of the right to leave the will in other respects intact and unimpaired: Mich.

In Maryland, a devise of lands to the widow is construed to be in addition to any jointure or settlement made before marriage by the husband, and she will be entitled to both: Md. 50, 226.

In two states, there is a general provision that every devise or bequest by husband or wife to the other is holden to be in lieu of all rights which either have by law in the estate of the other, unless it shall appear that such was not the intention: N.H. 202,18; Miss. 1174.

So, in Maryland, a devise and bequest made as above bars both dower and her intestate share; but if the devise is only of a part of the real estate, or of a part of the personal estate, it bars her only of the real estate or of the personal estate, accordingly: Md. 50,230.

*Note* that, in many states, a devise or bequest in jointure or settlement may be made by the husband under the general provisions of §§ 3241-3: R.I., Ky.

§ 3245. **By Deed.** (See also Art. 650.) A woman may, generally, bar her dower by deed executed either (1) jointly with the husband: Mass. 124,6; Me. 103,6; Ind. 2491; Ill. 30,17; Mich. 5745; Kan. 33,8; Neb. 1,23,12; 1,73,43; N.C. 2107; Mo. 2197; Ark. 2586; Ore. 17,13; Ga.<sup>a</sup> 1764; Ala. 2234; 1885, 65; Fla. 95,14-15.

(2) Separately, at the time of (except in Massachusetts), or after the conveyance by the husband: Mass.; Me.; N.J. 1881,136; Mich.; Neb.; Ore.; Ala.; Fla.

(3) Jointly, after the conveyance by the husband: Mass., Me., Neb.

(4) By deed executed like ordinary deeds of a wife's separate real property (see Art. 647): R.I. 229,1; N.J. *Dower*, 1.

The intent to bar dower must be expressed in the deed: Mich.

And so, when the husband's estate has been divested by process of law, she may release her dower at any time thereafter, by joint or separate deed: Mass., Me., N.J., Ill.

Such joint deed releasing dower must have two attesting witnesses: Ala., Fla.

A separate deed must be made in the presence of two witnesses; but they need not attest the same if the deed is acknowledged: Ala.

If out of the State, a widow may release dower by joint or separate deed, in the same manner as to land in the State; but the conveyance must be *acknowledged* by them as other conveyances executed beyond the State: Ala. 2235.

Widows may convey or release the right of dower, whether of full age or not: Ala. 2236.

But in Illinois, dower is not released by a conveyance made by order of court, unless so specified therein: Ill. 41,45. See, generally, in Part IV.

(5) In South Carolina, it is not necessary that the wife should join in the deed; but she may relinquish her dower by special process, appearing before certain officers: S.C. 1796. Such relinquishment may be made in open court, or before any person authorized to take the acknowledgment or proof of deeds in or out of the State: S.C.

This acknowledgment must be made upon private and separate examination, and must state that she has renounced freely and voluntarily, without any compulsion, dread, or fear of any person whatsoever: S.C. 1797; Fla.

It must be recorded within forty days: S.C.

A certificate of such relinquishment and examination must be indorsed upon the deed, or a separate instrument to the same effect, and be duly recorded: S.C. 1798.

The certificate must be under the hand and seal of the officer taking the acknowledgment: S.C.

And it must be signed by the woman herself: S.C.

NOTE. — <sup>a</sup> It is only necessary that she should join in the deed when it conveys lands to which the title came through her: Ga.

§ 3246. **Forfeiture of Dower. (A) Adultery.** In many states, a wife (or, in Illinois, a husband) willingly leaving her husband (or wife), and dwelling in adultery, loses her (his) dower: N.J. *Dower*, 14; O. 4192; Ind.<sup>b</sup> 2496; Ill.<sup>c</sup> 41,15; Del. 87,9; Va. 106,7; W.Va. 1882,86,7; N.C.<sup>a</sup> 1844,2102; Ky. 52,4,3; Mo.<sup>c</sup> 2204; S.C. 1799.

So, the husband, in a similar case, loses curtesy: N.C. 1845. So, in two others, a wife "who is ravished, and consents to the ravisher:" N.J. *Dower*, 15; Mo.<sup>c</sup>

But not, if in either case she (he) return and be reconciled and dwell with the husband (or wife): N.J., O., Ill., Del., Va., W.Va., N.C., Ky., S.C.

In Georgia, this provision is expressed that dower is barred by adultery of the wife unpardoned by the husband: Ga. 1764.

(B) **Abandonment.** In a few states, a wife forfeits her dower who has abandoned the husband without his consent (1) and not by his fault: Ct. 18,11,1,4,1; 1885,110,189; or (2) and without such cause as would entitle her to a divorce: W.Va.; (3) if at death of the husband or wife, the wife or husband surviving had wilfully without just cause deserted and lived separate and apart from the deceased person for the space of one year prior thereto, the survivor is barred of *all* estate in the lands of the deceased: Minn. 46,4. Unless the husband be reconciled and suffer her to dwell with him: W.Va.

(C) **Divorce.** A widow is not endowed when, before the husband's death, there has been an absolute divorce (1) for her fault: Ct. 18,11,1,4,1; N.Y. 2,1,3,8; Ill.<sup>c,d</sup> 41,14; Tenn.<sup>d</sup> 3330; Mo. 2198; Ark. 2578; (2) for her adultery: Del.<sup>c</sup> 75,8; Ky. p. 954, § 1.

So, in Illinois, of the husband, if divorced for his fault.

So, when the marriage was void from the beginning: Ill.<sup>c,d</sup>

In other states, she is entitled to no dower in any case of absolute divorce: Mass. 146,28; Ct. 1885,110,189; N.C. 1843; Ky. 52,4,14; Mo. 2196. See also Art. 624.

*Except* (1) when the divorce was for cause of adultery by the husband: Mass. 146,28; (2) when for cause of sentence of the husband to prison: Mass.; (3) when, after a decree *nisi* of divorce, on the wife's libel, the husband dies before the decree is made absolute: Mass.; (4) when she has been divorced without alimony, she being the innocent party: Ct.

*Conversely*, a husband or wife divorced for fault of the other, *is* entitled to dower, unless the marriage was void from the beginning: Ill.<sup>c,d</sup>

NOTES. — <sup>a</sup> *Provided* the husband commenced proceedings for divorce during his lifetime: N.C.

<sup>b</sup> Only if she be so living in adultery at the time of his death: Ind. <sup>c</sup> So, she is barred of jointure or settlement. <sup>d</sup> So, of intestate share and estate given in lieu of dower.

§ 3247. **Forfeiture of Jointure, etc.** (A) Generally, in many states, a wife forfeits her jointure, settlement, intestate share, or provisions of husband's will in lieu of dower, by the same acts, or in all cases where she would lose dower (see § 3246): N.Y. 2,1,3,15; N.J. *Dower*, 14,15; Ill. 41,14; Del. 87,9; N.C. 1844; Ark. 2585; S.C. 1852.

So, of the husband: N.C. 1845.

The foregoing provisions in favor of the husband and the wife are subject to the qualification that, if the husband would be barred of his curtesy in the estate of his wife, or the widow of dower in his estate, under any provision of law, neither shall have any part of the estate of the other unless the same be given by will: W.Va. 1882,94,12.

So, the widow is barred of her distributive share in the husband's estate if she have separate estate equal to it and dower together: Ala. 2715.

(B) If the husband separates from the wife and lives apart from her in adultery, and she dies without a reconciliation and cohabitation, he has no part of her personal estate as distribution: N.C. 1482; Ky. 31,14.

Nor has he curtesy: N.C. 1838.

So, if he have abandoned her: N.C.; or maliciously turned her out of doors: N.C.

And in such case, the estate so settled or devised goes to the person entitled to it as on the widow's death: N.Y., Ark.

(C) A widow is barred of her share of intestate personalty left by the husband (1) if she voluntarily leave him, and dwell in adultery: Va. 119,13; N.C. 1481; 1844; Ky. 31,13.

(2) If she abandon him without sufficient cause: Ct. 1885,110,194. So, respectively, of a husband: Ct.; N.C. 1845; Ky. 31,14.

Unless the husband (or wife) was afterwards reconciled, and allowed her to live with him: Va., N.C., Ky.

She has no such share in any land of which the husband has made a conveyance when she was not at the time, and never had been, a resident in the State: Kan. 33,8.

§ 3248. **Failure of Jointure.** In most of the states, if a widow be lawfully evicted (without fraud on her part) from the jointure, or the estate settled or devised in lieu of dower, she may still claim dower (or, except in Massachusetts, Indiana, Michigan, Wisconsin, Nebraska, Kentucky, Oregon, dower in so much of the residue of her husband's lands as will equal that from which she was evicted): Mass. 124,15; Me. 103,11; Vt. 2225; R.I. 229,25; Ct. 1885,110,193; N.J. *Dower*, 11; O. 4191; Ind. 2506; Mich. 5752; Wis. 2173; Neb. 1,23,19; Del. 87,4; Va. 106,6; W.Va. 1882,86,6,1; Ky. 52,4,7; Mo. 2202; Ore. 17,20; S.C. 1802.

But in Maryland, it seems, only where she is evicted of an estate *devised* in lieu of dower: Md. 50,231.

But when a conveyance intended to be in lieu of dower fails to be a legal bar thereto, and the widow accordingly demands her dower, her interest in the estate so conveyed ceases: R.I. 229,24; N.J. *Dower*, 13; O. 4190; Mo. 2203.

§ 3249. **By Act of Husband.** Generally, the wife can lose her dower by no act of the husband (compare § 3203). This would seem to result from the common law as adopted in the United States. And in many states, there are special statutes. Thus, in four, that no act, deed, or conveyance executed or performed by the husband without the consent of his wife, evidenced by her joining in the deed or acknowledging it as required by law (Art. 650), shall prejudice her right of dower, or preclude her from its recovery, if otherwise entitled: N.Y. 2,1,3,16; Ind. 2499; Ill. 41,16; Mo. 2197; Ark. 2586. In several, that no judgment or



decree conferred by or rendered against the husband, and no laches, default, covin, or crime on his part shall so prejudice her right to dower: N.Y.; N.J. *Dower*, 5; O. 4193; Ind.; Ill.; Mo.; Ark.

§ 3250. **By Descent.** In states where there is an intestate share given the widow in real estate in lieu of dower, she may not generally take both: N.H. 202,9; Mass. 124,3; Vt. 2219,2230; Pa. *Intestates*, 34; *Dower*, 2; S.C. 1797, 1852; Ga. 1764; Fla. 95,3. For other states, see §§ 3106,3110.

### Art. 326. Widow's Waiver.

§ 3260. **Note.** For the effect of a devise or bequest in barring dower, or of the total omission of the widow's name in a will, see also §§ 2840,2841,3244.

Commonly, any will or any devise or bequest to the widow will deprive her of any right to the husband's estate, unless she waive such will as in this article provided.

But if the will devise only real estate, or only personal estate, to the widow, she will be entitled to her share in the personal estate or in the real estate, respectively, in addition to the devise or bequest, without waiver, unless the will expressly direct otherwise: Md. 50,230. The widow must waive both devises of real and of personal estate, or be barred to her right in either: Md. 50,229.

§ 3261. **Separate Property.** The right of a widow to her separate property shall in no case be affected by her waiving or failing to waive the husband's will, as hereafter provided: Col. 1051. So, of course, in nearly all the states. See Art. 642. But compare § 3201.

§ 3262. **Waiver of Will, etc.<sup>a</sup>** In many states, a widow may waive any provision that may be made for her in the husband's will, or by jointure or settlement (as in Art. 324), and will then take in lieu thereof (A) her intestate share in both real and personal property (Art. 310): N.H. 202,7-9; 193,13; Mass.<sup>a</sup> 127,18; Pa. *Dower*, 10 and 5; *Wills*, 13; Ind. 2491; 1885, Ex. 103; Io. 2452; Minn. 46,3; Kan.<sup>b</sup> 117,41; 33,17; Ga. 1764.

(B) In others, she takes her intestate share in the personal property and dower: N.H. 202,15; O.<sup>b,c</sup> 5963-4; Ill. 41,10; Md.<sup>c</sup> 50,228; Va. 119,12; N.C. 2109; Ky. 31,12; Ark. 2595; Ala. 2292; Fla. 95,2. Or she may, in lieu of dower and the intestate share of personalty, take one half the real estate and personal estate remaining after debts are paid, there being no children: Ill. 41,12.

But in New Hampshire, she may at her election waive dower and homestead, and take her intestate share in both real and personal property. See § 3264.

(C) In others, she takes her dower in the real estate only: Me. 65,5; Vt. 2219; R.I. 229,23; 182,11; Ct.<sup>d</sup> 1885,110,192; N.Y. 2,1,3,13; N.J. *Dower*, 16; Neb. 1,23,17; Del. 87,5; Mo. 2200; S.C. 1801. But see also § 3241.

(D) In two others, she takes her dower and one third of the personal estate only, in all cases (whether there are children or not): Wis. 2172; W.Va. 1882,94,11.

(E) In one other, she takes one half the estate, both real and personal, in all cases: Col. 2270. In Mississippi, she takes a child's part, or, if no children, half: Miss. 1172.

(F) In Michigan, she takes dower and her intestate share of personalty up to \$5,000 in value; and of the residue half the share she would have had, if the husband had died intestate: Mich. 5824,5750.

(G) She, or the husband, takes one third of real and personal property for life: Ct.<sup>e</sup> 1885,110,194.

And if a special devise or bequest is made to the wife in lieu of any particular thing or interest to which she would be entitled in case of intestacy, the election by her to take such devise, etc., or other particular thing, etc., does not deprive her or any other person of the right to leave the testamentary disposition of property in all other respects unaffected and unimpaired,

and to have the benefit of any other provisions therein, the same as if this act had not been passed: Mich. 5824.

(H) She takes dower and one third part of the personalty in all cases, whether there are children or not, except that she takes a child's part, if more than two: Tenn. 3252.

But in Massachusetts, if she would, under intestate distribution, become entitled to his personal estate to an amount exceeding \$10,000, she shall receive, in addition to that amount, only the income during her life of the excess of her share of such estate above that amount: Mass. 127,18. In such case, the court may appoint a trustee of the personal estate during the life of the widow: Mass. 127,19.

NOTES. — <sup>a</sup> See § 3201. <sup>b</sup> There is an anomaly. Instead of waiving the will, the widow must make election to take under it, if she so desire: O., Kan. <sup>c</sup> *Except* that it seems she takes only her intestate share in the personal property as if the husband had died leaving children, although in fact he left no issue at his death. <sup>d</sup> As to marriages made before April 20, 1877. <sup>e</sup> As to those made after that date.

§ 3263. **Limitations.** (For cases where the widow forfeits her right, see § 3247.) In Mississippi, if the widow have a separate property at the death of the husband equal in value to her lawful portion of his real and personal property, and he has made a will, she cannot waive the will and take such intestate share; but if her separate property be not so equal in value, she may waive the will, and have an estate equal to such deficiency made up to her, to be determined by three appraisers, as follows: if her separate property equals two thirds of her intestate share, she shall have one third of her intestate share in real and personal property, respectively; if it equals one half, one half; if one third, two thirds; and if her separate property is not equal to one fifth, she may waive, and take her full intestate share: Miss. 1175.

These same provisions apply to a husband waiving the wife's will: Miss. 1175.

§ 3264. **Waiver of Dower.** (A) In many states, the intestate share given in Art. 310 is in lieu of, and in satisfaction of, dower; and she has no dower in the real estate of her husband dying intestate; see also §§ 3106,3110,3244.

*Except* that such intestate share extends only to lands of which he died seized; and she has dower, in addition, in lands aliened by him in his lifetime of which her right to dower was not duly (Art. 324) barred: Pa.

(B) And in a few states, the widow is presumed to take her intestate share (§§ 3105, 3109) in the real estate; but she may elect to take her dower (§ 3202) in lieu thereof: Mass. 124,3; Vt. 2230,2219.

(C) But in others, she is presumed to take dower (§ 3202); but may elect to take her intestate share (§§ 3105,3109) in lieu thereof: Mo. 2192,2195-6; Ark. 2599; S.C. 1852; Ga. 1764; Fla. 95,3 (such share being a child's part).

§ 3265. **Method of Waiver.** The election of dower (or of the intestate estate in lieu of dower, § 3264) or waiver of the settlement or devise or bequest, made in lieu of dower, or the waiver of the will (see §§ 3243,3244,3260) must be made by the widow (1) within one year of the husband's death: N.Y. 2,1,3,14; Wis. 2172; Neb. 1,23,18; Va.<sup>a</sup> 106,5; Ky.<sup>a</sup> 52,4,6; Tenn. 3251; Ark.<sup>a</sup> 2524; Ore. 17,19; (2) within eighteen months thereafter: Ark. 2598.

(3) In other states, within one year of the probate of will or grant of administration on the husband's estate: R.I. 229,23; 182,11; Ind.; Ill. 41,11; Mich. 5825; Va.<sup>b</sup> 119,12; W.Va.<sup>b</sup> 1882,94,11; Ky.<sup>b</sup> 31,12; Mo. 2194,2200; Ga. 1764-5; Ala.<sup>b</sup> 2293; Fla. 95,1. In others still, (4) within six months after such probate or administration granted: Mass. 124,3 and 9; 127,18; Me. 65,5; N.J. *Dower*, 16; Md. 50,228; N.C. 2108; Miss.<sup>c</sup> 1172.

(5) Within eight months of probate, etc.: Vt. 2219; (6) within fifteen months thereof: Mo.<sup>c</sup> 2196; (7) sixty days thereafter: Ark.<sup>c</sup> 2600; (8) within two months after the time limited for proving debts against the estate: Ct. 1885,110,192; (9) within one month after a citation issued any time after one year from the husband's death, on the application of any party interested: Pa. *Dower*, 6; Del. 87,6; (10) within one year after citation made by the judge of

probate forthwith upon the probate of the will: O.<sup>b</sup> 5963; 1880, p. 308; (11) within thirty days thereafter: Kan. 117,42.

But in some states, she has, in cases of jointure or settlement, (1) six months after notice of the husband's death: Mass. 124,9; Me. 65,4; (2) one year after: Ind. 2504; Mich. 5751; (3) and six months after notice of such jointure, etc.: Mass.; (4) eight months after administration granted: Vt. 2219.

And in others, in cases of provision by will, six months after notice of the probate of the husband's will: Me. 103,10; Io.<sup>a</sup> 2452; eight months after: Vt.

But if the will be appealed from within such time limited, she has (1) twelve months after the appeal is disposed of: Ky.; three months thereafter: O.; six months thereafter: Mass. 127,18.

NOTES. — <sup>a</sup> In the case of waiving a jointure. <sup>b</sup> In the case of waiving a will. <sup>c</sup> In the case of electing the intestate share, under § 3262.

§ 3266. **Effect of Waiver.** Generally, if the widow do not elect to waive the will within a certain time she will be deemed to have accepted it. But *note* that, in some states, she must elect to take under the will, and will, in default of election, be supposed to have chosen her intestate share in real and personal property: O. 5964; Ind. 2491; Io. 2452; Kan. 117,42.

In Georgia, it is provided that "an election by the widow to take a child's part of the realty, in ignorance of the condition of the estate, or of any fact material to her interest, shall not bar her right to dower, provided the rights of third parties acting *bona fide* upon her election shall not be prejudiced:" Ga. 1766.

To enable a widow to act as her interest may require, the executor, etc., shall disclose to her the state and condition of the husband's estate within the period limited for waiver: Tenn. 3253.

But in a few states, she need make no election (1) if the will make *no* provision for her; but will receive her dower or intestate share: Va.; W.Va.; Miss. 1173; nor (2) when all the husband's estate is taken for debts: Tenn. 3251.

When the widow elects to take dower, the jointure or devise or settlement reverts to the heirs or representatives of the grantor or deviser: Ky. 52,4,6.

§ 3267. **Process.** In most states, the widow is deemed to have made election for the settlement or the provisions of the jointure, will, etc., unless within the time limited in § 3265 she either (1) transmit a written renunciation to the probate court: N.H. 193,13; Mass. 127,18; Me. 65,4-5; Vt.; R.I. 229,23; 182, 11; Ct. 1885,110,192; N.J. *Dower*, 16; Ind. 1885, Ex. 183; Ill. 41,11; Mich. 5825; Wis. 2172; Md. 50,228; Va. 119,12; W.Va. 1882,94,11; Ky. 52,4,6; 31,12; Mo. 2194,2196,2200; Ark. 2599; Ala. 2293; Miss. 1172; Fla. 95,1.

Which must be duly acknowledged or proved like a deed: Ind.; Va.; W.Va.; Ky.; Mo.; Ark. 2600.

It must be recorded in the probate court: N.H. 1883,34,1; Ind.; Mo.; and also in the registry of deeds: N.H.

Or (2) she must enter on or commence proceedings for her dower lands: N.Y. 2,1,3,14; Mich.<sup>a</sup> 5751; Neb. 1,73,18; Ark. 2584; Ore.

Or (3) she must appear in the probate court in person (or by attorney, in Delaware and North Carolina), and make election: Pa.; O. 5964; Kan. 117,42; Del. 87,6-8; Va.; N.C.<sup>b</sup> 2108; (4) no way is specified: Vt. 2219; (5) she must make a deed of the jointure estate to the heirs, as required in § 3244: Ark. 2597.

*Except* when non-resident or ill, when a commission issues to take her election: O. 5965; Kan. 117,43.

The court (or commissioner) must explain to her the will, her rights under it, and the law in case of her refusal to take under it: O., Kan.

If she is insane, the court makes election for her according to her interest: O. 5966; Kan. 117,44.

NOTES. — <sup>a</sup> In the case of jointure or settlement in lieu of dower. <sup>b</sup> The attorney must be authorized in a writing, executed by the widow, attested by one witness, and duly proved and recorded: N.C.



**Art. 327. Assignment of Dower.**

§ 3270. **Note.** For the Widow's Quarantine, or the allowance pending settlement of dower, see also in the Probate Code, *Allowances to Widow and Children*.

§ 3271. **By the Heir.** Dower (or the estate in lieu of dower) is, in many states, to be assigned (A) by the heir, remainder-man, reversioner, or devisee entitled to the land subject to dower: N.H. 246,1-2; Mass. 174,1-2; Me. 103, 15-17; Vt. 2220; R.I. 229,4; N.J. *Dower*, 3; O.<sup>a</sup> 5707; 1884, p. 198; Ill. 41,18-19; N.C.<sup>c</sup> 2110; Mo. 2206; Ark. 2603; Fla. 95,10; or by the person having the next estate of freehold in the land: R.I., Ill., Fla.; or by the tenant in possession: R.I. 229,5.

The heir or other person must assign it (1) within forty days of the husband's death: N.J.; (2) as soon as possible: Ill., Ark., Fla.; (3) within thirty days thereafter (or after her demand, in New Hampshire, Massachusetts, Maine, and Rhode Island): N.H.; Mass.; Me.; R.I. 229,7. (4) But the widow may apply at any time not before twenty days from the husband's death: Io. 2444; Kan. 33,10; (5) within one year after such death, or three months after demand: Ark.; (6) within two years after such death: Mo.; (7) within two months thereafter: Fla.; (8) after the expiration of three months from the husband's death: Ga. 4042.

**Limitation.** The widow must sue for or claim dower (1) within five years after the husband's death: Kan.; (2) within ten years thereafter: Io.; (3) within twenty years: Mass. 124,14; N.Y.<sup>b</sup> 2,1,3,18; Civ. C. 1596; (4) within seven years: Ga. 1764; (5) within three years when the rights of alienees, etc., of the husband, are involved: Ala. 2251; (6) within one year after demand: Mass.; but a new demand may be made at any time thereafter: Mass. See *Prescription*, in Part IV.

But if, at any time before the claim for dower is barred as above, the owner of the subject land, in possession, have recognized it in a writing under seal, acknowledged like a deed of land, or it have been so recognized by judgment or decree of court, the time previous to such deed, etc., is not counted: N.Y. 1882,277.

NOTES. — <sup>a</sup> When the land is free of mortgages and judgment liens. <sup>b</sup> Such assignment must be confirmed by the court. <sup>c</sup> If the personal property be sufficient to pay debts and charges of administration. <sup>d</sup> Unless under legal disability; see Part IV., *Limitations*.

§ 3272. **By the Probate Court.** In many states, dower may also be assigned by (1) the probate court in which the husband's estate is being settled: N.H.<sup>a</sup> 202,2; Mass. 124,10; 174,1; Me.<sup>b</sup> 65,1; Vt. 2220; R.I. 229,17; Ct. 18,11,1,4,2; 1885,110,190; N.J.<sup>a</sup> *Dower*, 17; Pa. *Dower*, 11; Mich.<sup>b</sup> 5740; Wis.<sup>a</sup> 3869; Neb.<sup>b</sup> 1,23,8; Md. 47,62; Del.<sup>c</sup> 85,7 and 16; Va. 106,9; Ky.<sup>c</sup> Civ. C. 499; Tenn. 3255; Ark. 2606; Ore.<sup>a,b</sup> 17,8; S.C.<sup>c</sup> 2283; Ala.<sup>c,d</sup> 2239; Fla. 95,7.

Also (2) in a few others, by the superior court: Pa. 1885,183; W.Va. 1882,86,9; N.C. 2111; Ky.; <sup>c</sup> Tenn.; Mo.<sup>c</sup> 2208-9; Fla.; (3) by the chancery court: Tenn., Ala.; <sup>c</sup> (4) by any court of record: Ill.<sup>c</sup> 41,20.

NOTES. — <sup>a</sup> Only in land of which the husband *died* seized. <sup>b</sup> Only when the widow's right to dower is not disputed. <sup>c</sup> By the court of the county where the land lies, in the noted states. <sup>d</sup> Only when it can fairly be assigned by metes and bounds; for other cases, see below.

§ 3273. **Process.** Dower may so be assigned by the probate court on petition (1) of the widow (for citations, see also § 3272): R.I.; Ct.; N.J.; Pa. *Decedents' Estates*, 136; Mich.; Wis.; Neb.; Del.; W.Va.; Ky.; Ark.; Ore.; S.C.; Ala.; Fla.; (2) of other persons interested: Mich., Wis., Neb., Del., Ky., Ore.; (3) of the heirs, devisees, or persons holding the fee of the land subject to dower: R.I. 1882,315,1; Ct.; N.J.; Va.; W.Va.; Ala.; (4) of the executor or administrator: Ala.; (5) of the creditors of the widow: Mo. 2218; (6) of the lineal descendants of the deceased: Pa.

Notice, by service or publication, is generally required; and guardians must be appointed for minor heirs.

§ 3274. **By Suit.** If the heir does not satisfactorily assign dower as required in § 3271 (N.H., Mass., Me., R.I., Ill., N.C., Ark., Fla.), or if the probate court fail to do so as required by §§ 3272-3, or in all cases (Pa.), the widow may bring suit for her dower at law or equity: <sup>a</sup> N.H. 246,2; Mass. 174,1-2; Me. 103,15-16; R.I. 229,7; N.J. *Dower*, 3; Pa. *Dower*, 9; O. 5708; Ill.<sup>b</sup> 41,19; Wis. 3094; Neb. 1,23,18; Del. 87,10; Va. 106,9; W.Va. 1882,86,9-10; N.C. 2111; Ky. Civ. C. 499; Mo. 2206; Ga. 4041; Ala. 2248; Fla. 95,12.

NOTES.—<sup>a</sup> For the form of such suit, see in Part IV. <sup>b</sup> Or the husband, where the husband has dower.

§ 3275. **Method.** (A) In all cases of assignment of dower by a court (§§ 3272-3274), the actual division or computation is made by three (or five, in Delaware, Georgia, Alabama, and Florida) disinterested commissioners appointed by the court: N.H. 246,6; Mass. 174,5; Me. 65,2; Vt. 2220; R.I. 229,11 and 19; 1882,315,1; Ct. 1885,110,190; N.Y. Civ. C. 1607; N.J. *Dower*, 17; Pa. *Decedents' Estates*, 141; O. 5712; Ill. 41,34; Mich. 5741; Wis. 3870 and 3094; Io. 2443; Kan. 33,9; Neb. 1,23,8; Md. 47,62; Del. 85,9; Va. 106,9; W.Va. 1882,86,9; N.C. 2113; Ky. Civ. C. 499; Tenn. 3259; Mo. 2211 and 2219; Ark. 2612; Ore. 17,9; S.C. 2285; Ga. 4041; Ala. 2244; Fla. 95,7.

Subject, however, to the court's approval and confirmation: Mass. 174,7; Vt. 2222; R.I.; Ct.; N.J. *Dower*, 19; O. 5713; Ill. 41,38; Mich. 5742; Wis.; Io. 2448; Kan. 33,14; Neb. 1,23,9; Md.; Del. 85,13; Va.; W.Va.; Ky.; Tenn. 3265; Mo. 2213; Ark. 2613; Ore. 17,10; S.C.; Ga. 4047; Ala. 2245; Fla. 95,13.

It is returned to the court, and, if confirmed, is recorded: Vt.; N.J.; Wis.; Neb.; Ky.; Mo.; Ark. 2614; Ore.; S.C.; Ala.

§ 3276. **Division by Bounds or Otherwise.** In all cases, dower is assigned by metes and bounds: N.H. 202,5; Mass. 124,11; Me. 65,2; 103,22; Vt. 2220; R.I. 229,18 and 12; N.Y. Civ. C. 1609; N.J. *Dower*, 19; Pa. *Decedents' Estates*, 141; O. 5713-4; Ill. 41,35; Mich. 5741; Wis. 3870; Io. 2446; Kan. 33,12; Neb. 1,23,8; Del. 85,9; 81,14; Mo. 2212; Ark. 2612; Ore. 17,9; S.C. 2285; Ga. 4045; Ala. 2239; Fla. 95,7.

But when this cannot be fairly or conveniently done, without injury, the widow may have dower assigned in a special manner; as, in many, (1) one third of the rents and profits: N.H. 202,5; Mass. 174,12; Me. 65,3; 103,3 and 23; Vt. 2223; R.I. 229,2; O. 5714; Ill. 41,39; Mich. 5743; Wis. 3871; Neb. 1,23,10; Ark. 2615; Ore. 17,11.

(2) Or as a money allowance, one third of the yearly value or a fixed rental: R.I. 1882,315,4; N.Y. Civ. C. 1613; Ill.; Mo. 2215-6; (3) or the estate may be sold and her share in the proceeds paid the widow: N.Y. Civ. C. 1619; Io. 2451; Del. 85,15; Ga. 1770.

(4) The legal interest on such widow's share remains charged on the land, and is paid to her annually: Pa. *Decedents' Estates*, 153. When, however, the widow has dower in an undivided interest, the husband's interest must be severed before her dower can be assigned: Vt. 2221. So, generally; see Part IV., *Partition*.

When the estate is thus sold, the widow may recover the interest from the purchaser on her third (or half, if no children) of the proceeds: Del. 85,23. But the purchaser may at his option pay the widow's share into court, and be relieved of such liability: Del. 85,26.

The estate will not, however, be sold as above if any person interested give bond for the appraised value of the widow's share, to be paid within one year and ten per cent interest: Io. 2451.

(5) So, in Alabama, when the land has been aliened by the husband, and from improvements made by the alienee, or for any other cause an assignment by metes and bounds would be unjust, the widow is dowerable of the value of the land at the time of alienation, the interest on one third part thereof to be paid to her annually during her life and secured if necessary by a lien on the land: Ala. 2249. Unless the parties agree to a compensation in gross, which the court must give effect to: Ala. (6) So, in Michigan, in such case, the court orders a gross sum to her, or may assign to her as tenant in common a just share of the rents and profits for life: Mich. 5768.

Where dower in any land may be claimed by two or more widows, the one whose husband was first seized therein is first entitled thereto; and in all cases where dower in any land shall have been assigned or it shall appear that the owner or person having an interest therein shall have made full satisfaction to the person having such prior right, the land is not subject to any other claim for dower during such latter person's lifetime: Mich. 5769.

(7) Or she may, in a few states, elect (α) a sum absolute to be paid her in lieu of dower, to be estimated by commissioners: N.Y. Civ. C. 1617-8; Ga. 1771; (β) her legal share of the proceeds; and in such case the estate may be sold, as above: Del. 85,17; (γ) a sum estimated according to § 3278: W.Va. 1882,86,17; S.C.

In Georgia, the widow may, with the assent of the executor or administrator, elect to take a life estate in one third part of the proceeds of a sale of the land, in lieu of dower: Ga. 1770.

**§ 3277. Selection of Land.** (A) In four states it is expressed that the widow is to have dower in one third of the lands (1) according to valuation: N.C. 2103; S.C. 2288; Ga. 1763.

Such valuation is to be as of the time of the husband's death, with interest: S.C. 1883, 305.

(B) In many, the usual place of residence with outhouses, etc., is, or may be, if the widow desire, included in the land assigned as dower: Ill.<sup>c</sup> 41,37; Io. 2441; N.C.; Tenn. 3247; Mo. 2209; Ark. 2589; Ga.<sup>a,b</sup> 1763; Ala.<sup>d</sup> 2246; Fla.<sup>c</sup> 95,1.

In two, if the whole of such residence and appurtenances cannot be assigned without injustice to the children or heirs, such part thereof as the court deem sufficient to afford her a decent residence, due regard being had to her condition and past manner of life, shall be assigned to her: Tenn. 3248; Fla.

The commissioners shall, at the request of the widow, lay off dower in any part of the lands of the deceased, whether the same include the dwelling-house or not, *provided* it can be done without essential injury to the estate: Ark. 2590.

Permanent improvements made since the husband's death, or after his alienation, must not be assigned to the widow, if possible; or, if assigned, a proportionate deduction must be made from her dower share: N.Y. Civ. C. 1609.

In several states, where the widow has a right of dower in several tracts of land, her entire dower may be assigned out of one tract by her selected: R.I. 229,3; 1882,315,2; N.Y. Civ. C. 1620; Ill. 41,36; N.C.; Ky. 52,4,11; Mo. 2209; Ga. 1767.

So, in Tennessee, the commissioners need not assign one third of such tract of land, but may assign in any such manner as will give her one third in value of the whole estate: Tenn. 3249.

NOTES. — <sup>a</sup> Unless it is in a town or city: Ga. <sup>b</sup> It seems that she is to hold such house in dower without reference to its value (*i. e.*, whether it is more than one third of the dowerable estate or not). <sup>c</sup> If she do not so take the dwelling-house, she loses her homestead therein. <sup>d</sup> When the estate is solvent, and it can be done without prejudice.

**§ 3278. Damages for Withholding Dower.** (A) When a widow is entitled to dower in the lands of which her husband died seized, she may (1) continue to occupy the same with her children and the other heirs so long as they do not object, without having dower assigned: <sup>a</sup> Mass. 124,13; Vt. 2224; Mich. 5744; Wis. 3872; Neb. 1,23,11; Ore. 17,12; or (2) she is to receive one third of the rents, issues, and profits of the same (compare also C): Mass.; Mich.; Wis.; Va.



106,8 ; W.Va. 1882,86,8 ; Ore. ; or (3) she may remain in the mansion-house free of rent until dower is assigned (provided she bring suit within a year of the grant of administration : R.I.) : R.I. 229,6 ; N.J. *Dower*, 2 ; O.<sup>b</sup> 4188 ; Va. ; W.Va. ; Ky. 52,4,8 ; Mo. 2205 ; Ark. 2588 ; Ga. 1768 ; Ala. 2238 ; Fla. 95,9 ; so, (B) whenever, in any action brought for the purpose, a widow shall recover her dower in land of which her husband shall have died seized, she shall be entitled also to recover damages for the withholding of such dower : N.H. 146,4 ; Mass. 174,4 ; Me. 103,19 ; R.I. 229,11 ; N.Y. 2,1,3,19 ; Civ. C. 1600 ; N.J. *Dower*, 3 ; Ill. 41,41 ; Mich. 5756 ; Wis. 2175 ; Neb. 1,23,23 ; Del. 87,13 ; Va. 106,11 ; W.Va. 1882,86,10 ; Mo. 2206 ; Ore. 17,24. Such damages are one third part of the rents and profits of the land in which she recovers dower, as in C : N.Y. 2,1,4,20 ; N.J. ; Mich. 5757 ; Wis. 2176 ; Neb. 1,23,24. So, in others, (C) the widow is entitled to receive one undivided net third part of the rents and profits of the estate of which her husband died seized until her dower is assigned : N.H. 202,13 (see below) ; Mass. 174,10-11 ; Me. 103,4 ; Vt. 2224 ; O. 5715 ; Ky. 52,4,8 ; Mo. 256 ; Ark. 66 ; Ore. 17,25.

These damages are estimated, in a suit against heirs, from the time of the husband's death ; as against other persons (*i. e.*, in land of which the husband did not die seized), from the time of the widow's demand of dower upon them : Mass. ; N.Y. Civ. C. 1601 ; N.J. ; Mich. ; Wis. ; Neb. ; Va. ; W.Va. ; Ky. 52,4,9 ; Mo. ; Ore. ; as against all persons, only from the date of the action : O. ; as against any defendant, only for the time during which he held possession of the dower estate : Mass. 174,40 ; Me. 103,20.

Such damages cannot be given (1) for more than six years in the whole : N.Y., Wis. ; (2) not for more than five years : Va., W.Va., Ky.

When a widow shall recover her dower in any lands alienated by the heir of her husband, she shall be entitled to recover of such heir in an action her damages for withholding such dower from the time of the death of her husband to the time of the alienation by the heir, not exceeding six years in all ; and the amount which she shall be entitled to recover from such heir shall be deducted from the amount she would otherwise be entitled to recover from such grantee ; and any amount recovered as damages from such grantee shall be deducted from the amount she would otherwise be entitled to recover of such heir : N.Y. 2,1,3,22 ; Civ. C. 1603 ; Mich. 5759 ; Wis. 2177 ; Neb. 1,23,26 ; Ore. 17,27.

So, if she recover her dower and damages against the tenant, she may then bring an action against a prior tenant for the rents and profits for the time during which he held the premises after her demand : Mass. 174,11.

In making the appraisal of such dower estate, rents, etc., all permanent or valuable improvements made on the estate after the husband of such widow ceased to own it shall be excluded : N.Y. 2,1,4,21 ; O. 5716 ; Mich. 5758 ; Wis. 2176 ; Neb. 1,23,25 ; Ky. 52,4,9 ; Mo. ; Ore. 17,26.

But in two others, she takes her third in the estate as it is when the recovery is had : Va., W.Va. But the tenant under deed from the husband has relief in equity, so that he need pay only lawful interest on one third of the land's value at the time of alienation : Va. 106,12.

So, the tenant so claiming may pay the widow such interest, or in lieu thereof a gross sum according to the value of an annuity of six per cent on the principal sum during the probable life of the dowress : W.Va. 1882,86,12 and 17. No damages are allowed in cases of assignment by the probate court : R.I. 229,20. So, probably, in all states.

NOTES. — <sup>a</sup> Compare the *Widow's Quarantine* provisions, Probate Code. <sup>b</sup> But only for one year after the husband's death.

§ 3279. **Lands Aliened.** Dower in land aliened by the husband is to be determined, as against the purchaser (or the husband's devisee : Mich., Ky.), according to the value of the land (1) at the time of alienation (with interest from the husband's death,

in S.C.): Mich. 5739 ; Wis. 2166 ; Neb. 1,23,7 ; Ky. 52,4,9 ; Ore. 17,7 ; S.C. 2289 ; (2) at the time she recovers dower: Mo. 2206.

Generally, if the heir alien land, the widow still has dower in such land as against any person: Ark. 2617.

§ 3280. **Fraud.** If, in several states, during the minority of an heir, dower be assigned to a widow not entitled thereto, or she recover the same by the default, fraud, or collusion of the guardian, such heir has an action against the widow to recover such lands on coming of age: N.Y. 2,1,3,24 ; Civ. C. 1605 ; N.J. *Dower*, 6 ; O. 5717 ; Mich. 5761 ; Wis. 2179 ; Neb. 1,23,28 ; Va. 106,13 ; W.Va. 1882,86,13 ; Mo. 2220 ; Ore. 17,29.

So, in others, an heir is not bound by any collusive or *ex-parte* assignment of dower except so far as the widow shows herself to have been justly entitled thereto: N.J. *Dower*, 7 ; Ky. 52,4,10.

Conversely, any conveyance made to children or others with intent to defeat the widow of her dower is void, and such widow is entitled to her dower in land so conveyed: Tenn. 3254.

The widow shall not be barred of dower by reason of any judgment rendered by default or collusion against the husband, if she would be entitled to dower had there been no such judgment: Va. ; W.Va. ; Ky. 52,4,10 ; so, it seems, in New Jersey.

§ 3281. **Insolvent Estates.** When the husband died insolvent, the widow and two thirds of the creditors may, in Vermont, agree upon a portion of the real estate, to be assigned to her for life, or of the personal estate, forever, in lieu of dower: Vt. 2226. See also in Probate Code.

§ 3282. **Further Claim.** Generally, an assignment of dower, once made and accepted by the widow, is a bar to her further claim of dower: N.Y. 2,1,3,23 ; Civ. C. 1604 ; Mich. 5760 ; Wis. 2178 ; Kan. 33,15 ; Neb. 1,23,27 ; Ark. 2614, 2604 ; Ore. 17,28.

Unless she shall have been lawfully evicted of the lands so assigned: Mich., Wis., Neb., Ore.

### Art. 330. Curtesy.

§ 3300. **Note.** The same general remarks that were made of the law of *Dower* (§ 3200) are applicable to *Curtesy*, *mutatis mutandis*. So, see § 3202, B.

§ 3301. **Amount.** (A) In a few states, the estate by curtesy is expressly preserved as at common law ; that is, the husband, on the death of the wife, has a life estate, free from all her debts, in any land of which she was seized of an estate of inheritance at any time during coverture, if he had lawful issue by her born alive and capable of inheriting: N.H. 202,14 ; Mass. 124,1 ; Vt. 2229 ; R.I. 187,8 ; Del. 85,1 ; N.C. 1838 ; Ariz. 1474. So, in other states, where the laws are silent, or imply as much ; see Ct. 18,7,15 ; N.Y. 2,2,20 ; N.J. *Descent*, 6 ; Mo. 3961 ; Ore. M. L. 10,13. In Tennessee, Arkansas, and Alabama the laws are silent.

(B) In others, he holds the land for life, whether there are issue born or not: O. 4176 ; Mich. 5770 ; Neb. 1,23,29 ; W.Va. 1882,86,15 ; Ore. 17,30 ; Ala. 2714.

(C) In one, the husband has curtesy even when there were no issue born ; if issue, being born, would have been capable of inheriting: Pa. *Intestates*, 4. (D) In Maine, the husband has no curtesy in lands acquired since 1844: Me. 103,15. (E) In Kentucky, curtesy is as at common law, except that it only extends to land of which the wife *died* seized, and is subject to all her debts: Ky. 52,4,1.

(F) Curtesy is turned into dower ; that is, the husband on the death of the wife has an estate precisely similar to that which the wife takes on the death of the husband: Ill. 41,1 ; Kan. 33,28. Compare also §§ 3105,3109.

(G) In many states, curtesy is abolished : Me. 103,15 (since 1844) ; Ind. 2482 ; Ill. 41,1 ; Io. 2440 ; Minn. 1875,40,5 ; Kan. 33,28 ; Cal. 5173 ; Nev. 157 ; Col. 1039 ; Wash. 3304 ; Dak. Civ. C. 83 and 779 ; Ida. 1874-5, p. 636,10 ; Wy. 42,1 ; S.C. 1883,215 ; Ga. 2259 ; Miss. 1170 ; Ariz. 1976.

But in some few of these states, the husband has "dower;" see § 3202.

§ 3302. **Extent.** (A) In several, the husband has curtesy in lands held by equitable title (this would seem to be the case in all states, where not expressly enacted to the contrary, by the common law) : Md. 45,2 ; Va. 112,17 ; W.Va. 82,17 ; N.C.

But not to the prejudice of any claim for the purchase-money of such land or other lien on the same : Md.

So, in a few states, not as against the mortgagee, where the wife at the time of purchase mortgaged the land to secure the purchase-money : Mass. 124,2 ; Minn. 69,2 ; N.M. 1088.

(B) In a few, if the wife at her death leave issue by a former husband, the widower has no curtesy in such of her land as descends to such issue : Vt. 2229 ; O. ; Mich. ; Wis. ; Neb.

Unless such estate came to the wife by deed or gift from such surviving husband or his ancestors : O.

§ 3303. **Election.** (A) In the two states where curtesy is made to resemble dower the laws and rules affecting it are, generally, the same ; see Art. 320 : Me. 65,6 ; 103,15 ; Ill. 41,1.

So, in Illinois, a husband is barred of his curtesy by jointure or settlement made as in §§ 3241-2, and assented to by him : Ill. 41,8.

(B) And in particular, a husband has his election of curtesy or the estate devised by his wife to him, but cannot claim both : Me. ; Ill. 41,10 ; N.C. 1839.

§ 3304. **Bar.** And in other states, he may be barred of curtesy or his intestate share by settlement or jointure, as the wife may be barred of dower (§§ 3241-3) : N.H. 202,17. So, if any estate, real or personal, be delivered by the wife to the husband in lieu of curtesy, and he accept the same, he is barred of curtesy in the residue : W.Va. 1882,86,16. See also § 3213.

So, in one other, he is barred by ante-nuptial settlement of real or personal property, provided he assent in writing, as in §§ 3241-2 : Ind.<sup>a</sup> 2501.

So, every devise or bequest to the husband is holden to be in lieu of curtesy unless the contrary appear : N.H. 202,18.

And the husband cannot claim both curtesy and such devise or bequest : N.H.

NOTE. — *a i. e.*, he is barred of his intestate share ; see above, and § 3202, B.

§ 3305. **Waiver of the Will by Husband.** (A) In many states, the husband may waive the wife's will and take the share to which he would have been entitled, both of realty and personalty, had she died intestate : N.H. 202,15-16 ; Ill. 41,10-1 ; Minn. 46,3 ; Kan. 33,28 ; Miss.<sup>a</sup> 1172. And in many other states, he will take curtesy, etc. ; see § 6460.

So, he will in such case take dower in the realty and his intestate share in the personalty : Ill. 41,10.

(B) In other states, it seems a husband is entitled to curtesy whether he waive the will or not (see also § 6460) : Vt. 2229. In one other, he takes the same share that *she* would take in his real and personal estate ; or he may in lieu thereof take his curtesy in the real estate only : Pa. *Marriage*, 23. But not of property held in settlement to the wife's sole or separate use : Pa.

He takes the share he would have taken had she died intestate and *without children* : W.Va. 1882,94,11.

He takes a share similar to that of the widow (§ 3262) : Ct.<sup>b</sup> 1885,110,194.

NOTES. — *a* But such share may not exceed one half part, whether there are issue or not. *b* See § 3262, note *c*.



§ 3306. **Waiver of Curtesy.** In Vermont, the husband may elect to take his intestate share (§ 3105, etc.) in lieu of curtesy: Vt. 2229. See also § 3105, note <sup>b</sup>.

§ 3307. **Forfeiture, etc.**<sup>a</sup> In Maine, the husband is not entitled to dower when the wife died insolvent.

In one state, a husband loses his curtesy in case of absolute divorce for his fault: N.C. *Divorce*, 14.

If he separate from his wife and live in adultery he loses his curtesy; provided the wife have commenced proceedings for divorce during her lifetime: N.C. A husband who has left his wife and is living at her death in adultery, takes no part of her estate: Ind.<sup>a</sup> 2497.

So, any husband who has left his wife except for cause of divorce is barred of curtesy, unless she be afterwards reconciled: W.Va. 1882, 86, 16.

So, if he abandon her and fail to make suitable provision for her and his children by her: Pa. *Marriage*, 30; Ind. 2498.

A divorce bars all claim to curtesy: Ky. 52, 4, 14.

NOTE. — <sup>a</sup> See § 3304, note <sup>a</sup>. See also § 3246.

§ 3308. **Waste.** A tenant by curtesy is liable for waste like any other life tenant (see § 1332): Mass. 179, 4; N.Y. Civ. C. 1651; N.J. *Waste*, 3; O. 4177; Mich. 7940; Wis. 3171; Del. 88, 1.

He forfeits the estate, and is liable in actual damages, both for actual and permissive waste: O. 4177.

§ 3309. **Eviction.** In Indiana, when a man is lawfully evicted of lands or deprived of other property conveyed to him in the nature of a jointure, his right to the estate in lieu of curtesy is revived: Ind. 2506.

## **Art. 340. Descent of Community Property.** See Art. 643.

### **§ 3400. Louisiana Law.**

In all cases, when either husband or wife shall die, leaving no ascendants or descendants, and without having disposed by last will and testament of his or her share in the community property, such share shall be held by the survivor in usufruct during his or her natural life.

In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage: La. 915-6; D. 1710-1.

§ 3401. **On the Death of the Wife**, all such property (A) belongs to the husband without administration: Cal. 6401; Nev. 160; Ida. 1874-5, p. 636, 11; 1879, p. 50, 1; Mon. Prob. C. 550. *Except*, (1) such portion thereof as may have been set apart for her by judicial decree for her support and maintenance is subject to her testamentary disposition, and, in the absence of such disposition, goes to her descendants or heirs, exclusive of the husband: Cal., Mon.

(B) It goes in the same manner as in the case of the death of the husband (§ 3402): Wash.

(C) It goes to the husband if there are no children (*i.e.*, the *acquest* [*gananciales*] property; see § 3404): N.M. 1422.

Except, if the husband has abandoned the wife and lived separate and apart from her, one half of the community property, subject to the payment of its equal share of debts chargeable to the estate owned in community, is at her testamentary disposition in the same manner as her separate property; and in the absence of such disposition it goes to her descendants equally, *per stirpes*, unless they are in the same degree of kin, when it goes *per capita*; and if none, to her heirs, exclusive of the husband: Nev. 160; Ida. 1874-5, p. 636, 11; 1879, p. 50, 1.

NOTE. — <sup>a</sup> Without such cause as would have entitled him to a divorce.

§ 3402. Upon the Death of the Husband, half the community property goes to the wife surviving; the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants; and if none, (A) it is distributed like the separate property: Cal. 6402; Ida.; Mon. Prob. C. 551.

(B) It goes all to the wife surviving, without administration: Nev. 161; 1881,69; 1883,11; Wash. 2412.

(C) It goes to the wife if there are no children, as in § 3401: N.M. 1422.

The entire community property is equally subject, in such case, to the debts of such deceased husband, and to administration expenses and the family allowance: Cal., Nev., Wash., Ida., Mon.

If the husband or wife be dead, it goes to the father of such husband, etc., deceased; if none, to the mother, there being no kin by blood; if none, to the brothers and sisters of such husband, etc., and their issue; if none, it escheats: Uta. 1884,44,2,3.

§ 3403. In all cases, community property goes one half to the surviving husband or wife, subject to the community debts; the other half to the legitimate issue of the body of the person deceased; if no issue, all to surviving husband or wife as above: Tex. 1653; Wash. 2410-1,3303; Ariz. 1977.

Subject to all debts against it: Tex. 1654; Wash.; Ariz.

If the decedent was a widow or widower, and leaves no kindred, it goes to the father, mother, or brothers and sisters of the deceased spouse of the intestate: Cal. 6386, Amt.

§ 3404. New Mexico. After the estate of a testator or intestate is duly inventoried, the following deductions are made: (1) the private property of the wife as her dowry, or of any other denomination; *provided* it be her property and held by the husband, in which case it shall have precedence over all other creditors, as an implied privileged mortgage; (2) the private property of the husband possessed before marriage or acquired by him as a bequest, or by any donation or legacy; (3) the common debts of the marriage; but the private debts of the husband shall be paid from his private property, and the private debts of the wife from hers. (4) After making the above deductions, the balance remaining of the estate is termed the acquest property; and the same is said of the property of the wife, making the corresponding deductions, if she be the person deceased: N.M. 1410,1411.

This acquest property descends one half to the widow or husband, the remainder to the [children] heirs or devisees of the husband or widow deceased: N.M. 1411.

The following deductions from such acquest property are further provided: (1) one fifth, to pay funeral expenses and all legacies, when the testator left issue (*i. e.*, and no more); (2) one third for such purpose when there are no descendants; (3) both a fifth and a third, if there is sufficient, and there is any just reason expressed by the testator for so doing in reference to his descendants: N.M. 1412.

After having deducted one fifth, it shall follow and be established that a last deduction be made of one fourth the private property of the husband in favor of the wife; *provided* said property amount to \$5,000 and there are no descendants, and although it may exceed this sum in the absence of the latter. So, also, from the wife's property in favor of the husband, if otherwise he would remain poor: N.M. 1413.

The remainder of the estate, after the above deductions, descends to the children in equal shares, termed *legitimate portions*: N.M. 1414. Compare § 3105.

§ 3405. The Jointure Estate. If a married woman, who holds real property vested in her by jointure or settlement in view of marriage, dies before the husband, all such property descends to the surviving husband: Ind. 2510. And if she marry again while holding such property, she cannot alienate it during such marriage; and if she die, it will descend to her children by such prior marriage: Ind.

**Art. 345. Homestead.** For the estate of homestead, see in Part IV., *Exemptions*. For barring homestead by deed, see § 6504.

**TITLE IV. — ADMINISTRATION.** (This title has been incorporated, for convenience' sake, with the Probate Code, Part IV., Division I.)

## **TITLE V. — PERSONAL PROPERTY.**

§ 4000. **Note.** For successions to personal property, see Title III. For general provisions, see also Title I.

### **CHAPTER I. — GENERAL PROVISIONS.**

#### **Art. 400. Definitions.**

§ 4001. **Personal Estate** is, in Georgia, defined (1) to include all such property as is movable in its nature, everything having value in itself, or the representative of value, not included in the definition of realty. Stocks representing shares in an incorporated company, holding lands, or a franchise in or over lands, are personalty, except in mining and manufacturing companies whose principal investments are in realty and machinery attached thereto, in which case the stock is deemed realty: Ga.<sup>a</sup> 2237.

(2) Every kind of property that is not real is personal: <sup>b</sup> Cal. 5663; Dak. Civ. C. 167.

(3) Anything detached from the realty becomes personalty instantly on being so detached: Ga. 2220. *Personalty in possession* is, in Georgia, defined to be where the right of property is accompanied by immediate possession, actual or constructive: Ga. 2238.

**NOTE.** — <sup>a</sup> But is transferable as personalty: Ga. 1883, p. 57; see in Part III., *Transfer of Stock in Corporations*. <sup>b</sup> Dogs are personal property: Minn. 1885, 177; Del. V. 14, 415; La. 1201.

§ 4002. **Choses in Action** are personalty to which the owner has a right of possession in future, or a right of immediate possession, wrongfully withheld: Ga. 2239. See § 4030.

§ 4003. **Civil Law of Movables.** Estates are movable either by their nature or by the disposition of the law.

Things movable by their nature are such as may be carried from one place to another, whether they move by themselves, — as cattle, — or cannot be removed without an extraneous power, — as inanimate things.

Things movable by the disposition of the law are such as obligations and actions, the object of which is to recover money due or movables, although these obligations are accompanied with a mortgage; obligations which have for their object a specific performance, and those which from their nature resolve themselves into damages; shares or interests in banks or companies of commerce, or industry, or other speculations, although such companies be possessed of immovables depending upon such enterprises. Such shares or interests are considered as movables with respect to every associate as long only as the society is in existence; but as soon as the society is dissolved, the right which each member has to the division of the immovables belonging to it produces an immovable action.

In the class of things movable by the disposition of the law, are also considered perpetual rents and annuities, whether they be founded on a price in money or on the price or the condition of the alienation of an immovable.

All things corporeal or incorporeal, which have not the character of immovables by their nature or by the disposition of the law, according to the rules laid down in this title, are considered as movables.

Materials arising from the demolition of a building, those which are collected for the purpose of raising a new building, are movables, until they have been made use of in raising a new building.

But if the materials have been separated from the house or other edifice, only for the purpose of having it repaired or added to, and with the intention of replacing them, they preserve the nature of immovables, and are considered as such.



The word *furniture* made use of in the dispositions of the law, or in the conventions or acts of persons, comprehends only such furniture as is intended for the use and ornament of apartments, but not libraries which happen to be there, nor plate.

The expressions *movable goods*, *movables*, or *movable effects*, employed as above stated, comprehend generally all that is declared to be movable, according to the rules laid down in this chapter.

The sale or gift of a house ready furnished, includes only such furniture as is in the house.

The sale or gift of a house, *with all that is in it*, does not include the money, nor the credits or other rights, the titles of which may be in the house ; all other movable effects are included : La. 472-480.

## **Art. 401. Estates in Personalty.**

§ 4010. **Creation.** (A) In Georgia, any estate may be created in personal property that can be created in realty: Ga. 2245 ; and the rules of construction are the same as to both: Ga.

But an estate for life cannot be created in such property as is destroyed in the use: Ga. 2253. See also § 1331.

(B) The names and classification of interests in real property have only such application to interests in personal property as is in Title II. expressly provided: Cal. 5702 ; Dak. Civ. C. 194.

(C) Survivorships of joint owners are forbidden (compare § 1370): Ark. 3903.

§ 4011. **Law.** If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile: Cal. 5946 ; Dak. Civ. C. 359.

§ 4012. **Increase.** The natural increase of property belongs to a tenant for life: Ga. 2256. But any extraordinary accumulation of the corpus (such as issue of new stock) attaches to the corpus and goes with it to the remainder-man: Ga.

§ 4013. **Restrictions.** In Georgia, the tenant for life of personalty may not remove it from the State without the consent of the remainder-man: Ga. 2261.

## **Art. 403. Choses in Action.**

§ 4030. **Definitions.** A thing in action is a right to recover money or other personal property by a judicial proceeding: Cal. 5953 ; Dak. Civ. C. 360 ; Ga. 2243.

Upon the death of the owner, a chose in action passes to his personal representatives, except as in Part IV. provided: Cal. 5954 ; Dak. Civ. C. 361.

No contract for labor or for the payment or delivery of property in which the time of performance is not fixed, can be converted into a money demand until a demand of performance has been made and the maker refuses, or a reasonable time is allowed for performance: Io. 2097 ; N.M. 1727.

§ 4031. **Assignment of Choses in Action.** (Compare § 4701.) In many states, all choses in action arising upon contract may be assigned so as to vest the title in the assignee: Me. 82,130 ; N.Y. Civ. C. 1910 ; Pa. *Bonds*, 1-3 ; Ind. 5501,251 ; Minn. 66,26 ; Kan. 14,1 ; 80,26-7 ; N.C. 177 ; Tenn. 2724 ; Ark. 473 ; Tex. 267 ; Cal. 5954 ; Dak. Civ. C. 361 ; S.C. Civ. C. 132 ; Ga. 2244 ; Ala. 2099 ; Fla. 162,72 ; N.M. 1725 ; Ariz. 3465. See also, in Part IV., *Parties*.

So, in several, all bonds are assignable in the same way: N.J. *Practice*, 19 ; Pa. *Bonds*, 1 ; Ind. ; Mich. 7344 ; Io. 2084 ; Md. 64,43 ; Del. 63,8 ; Va. ; N.C. 41 ; Ky. 22,6 ; Tenn. 2714 ; Ark. ; Wash. ; Ida. 1874-5, p. 648,1-2 ; Ala. ; Fla. 162,86 ; Ariz. 3456-7.

All bills: N.C., Ky., Tenn., Ark., Ida., Fla. ; notes: Pa., Mich., Del., Va., Ky., Tenn., Ark., Miss., Fla., Ariz. ; due-bills: Io., Ida., Ariz. ; all instruments or writings not

negotiable : Mich. ; Io. ; Tenn. ; Tex. 266 ; Ida. ; Ala. 2099 ; Ariz. All bonds, sealed or unsealed, containing any agreement for the payment of money : N.J. ; N.C. ; Tenn. 2716 ; Ida. ; Ala. ; Miss. 1124 ; Fla. All judgments (see in Part IV.) : Md., Wash. See also § 4701.

A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defences existing in favor of the maker at the time of the indorsement : Cal. 6459 ; Dak. Civ. C. 818.

Instruments by which the maker promises to pay a sum of money in property or labor, or to pay and deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker ; but the use of the technical words "order" or "bearer" alone will not manifest such intent : Io. 2085.

All contracts for the sale and conveyance of real estate : N.J. *Vendors' Liens* ; Miss. 1124.

An open account of sums due on contract : Io. 2087 ; Wash.

So, in Georgia, all such bonds, etc., are "negotiable" like bills of exchange or promissory notes : Ga. 2776. And the above provisions (respectively) are extended to judgments and executions from any state court : Ga.

So, in two others, a bond or specialty issued by a corporation or joint-stock company for the payment of money, if purporting to be payable to order or bearer, or to a person designated or bearer, are negotiable like promissory notes : Mass. 77,4 ; Minn. 24,9. See Art. 476. But the holder of such instrument may require any corporation issuing it, if in the state, to exchange for it a bond payable to such person by name, which can only be assigned by assignment duly acknowledged like a deed of real estate, and which shall be registered to the person by name on the books of the corporation : Mass. 77,5-7. And owners of state, city, or town coupon bonds may have them converted into registered bonds : N.Y. 1885,426 ; Pa. *Bonds*, 9-12.

And in New York, the holder of any municipal bond issued in the State and payable to bearer may render such bond non-negotiable, except by the owner's indorsement, by indorsing and subscribing a statement on the same that it is the property of such owner ; and thereupon it shall only be payable to such owner and his legal representatives or assigns : N.Y. 1870, 438,1 ; 1873,595,1. So, in New York, of railroad or other corporation bonds for which a registry is not provided : N.Y. 1871,84,1. But all these bonds may be transferred by indorsement in blank, to bearer, or order of purchaser, subscribed by the assignor, giving his name and residence : N.Y. So, of interest coupons : N.Y.

For Bills of Lading, etc., see Art. 434. For Bills and Notes, see Art. 470.

§ 4032. **Suits by Assignee.** In most states, the assignee of any bond or other chose in action assignable (§ 4031) may maintain in his own name any action thereupon which the original obligee or payee might have brought : Me. 82,130 ; Ct. 19,5,6 ; N.Y. Civ. C. 1909 ; N.J. *Practice*, 19 and 21 ; Pa. *Bonds*, 3 ; Ind. 5502 ; Mich. 7344 ; Neb. 2,30 ; Md. 64,41 ; Del. 63,8 ; Va. 141,17 ; W.Va. 12,14 ; N.C. 41 ; Tex. 267 ; Wash. 15 ; Ida. *ib.* 3 ; Ala. 2890 ; Miss. 1124 ; Fla. 162,86 ; Ariz. 3458 ; notwithstanding the assignor may have an interest in the thing assigned : Wash. But the assignee does not obtain any greater title or interest therein than had his assignor : Mo. 664.

But the assignee takes it (except in the case of negotiable securities) subject to the equities or set-offs existing at the time of the assignment between the assignor and the debtor, and (except in Washington, Wyoming) until notice of the assignment is given to the person liable : Me. 82,130 ; Ct. 19,7,14 ; 19,12,2 ; N.Y. ; N.J. ; Ind. 5503,276 ; Mich. ; Io. 2084,2087,2546 ; Minn. 66,27 ; Kan. 80,27 ; Neb. 2,31 ; Md. 64,43 ; Va. ; W.Va. ; N.C. 177 ; Ky. 22,61 ; Civ. C. 19 ; Ark. 475 ; Tex. 267 ; Cal. 10368 ; Nev. 1068 ; Col. Civ. C. 4 ; Wash. 15 ; Dak. C. Civ. P.

75 ; Ida. C. Civ. P. 183 ; Mon. Civ. C. 5 ; Wy. Civ. C. 23 ; Uta. C. Civ. P. 225 ; S.C. Civ. C. 133 ; Ala. 2100 ; Miss. ; N.M.<sup>a</sup> 1725,1919 ; Ariz. 2441.

But after such assignment the assignor cannot release any debt, or such realty, due by such bond or other instrument : Pa. *ib.* 8 ; Del. ; Mo. 664 ; Ark. 481.

And no maker of such note, etc., or other person liable thereon, shall be allowed to allege payment to the payee made after notice of assignment as a defence against the assignee : Ill. 98,6.

Where by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid, but subject to any defence or counter-claim which the maker may have against the assignor before suit is commenced thereon : Io. 2086.

NOTE. — <sup>a</sup> In New Mexico, there is no exception in the case of negotiable paper, but the assignee would seem liable to the defences which exist between the assignor and the maker, as in cases of ordinary choses in action.

§ 4033. **Method of Assignment.** All assignments of bonds and specialties must be under hand and seal : Pa. *ib.* 7 ; Del.

But in others, no such indorsement or assignment need be under seal : N.J. *Practice*, 20 ; Md. 64,41 ; Ga. 2776.

And it must have at least two credible witnesses, in a few states : Pa., Del.

They may be assigned by simple indorsement : Ida. *ib.* 2 ; Ariz. 3457.

All assignments of any instrument must bear date of the true day on which the assignment is made ; blank assignments are taken to have been made on such day as is most to the advantage of the defendant : Ark. 479,480.

§ 4034. **Consideration.** (See §§ 4120,4706.) In any action on an assignment, only the consideration actually paid for the note or obligation can be recovered : Ky. 22,7.

§ 4035. **Record.** Generally, the provisions for the record of deeds do not apply to personalty or choses in action. But see Arts. 450,452,453,456.

§ 4036. **Suits against Assignors.** The assignee of any bond, non-negotiable note, or account, may sue the assignor upon failure to obtain payment from the obligor (1) if he use due diligence in pursuing the obligor : Md. 64,48 ; Mo. 665 ; Tex. 267 ; Ida. *ib.* 4 ; Ala. 2112-5 ; Ariz. 3459 ; (2) if the obligor is insolvent, or not a resident of the State, so that a suit against him would be unavailing : Md., Mo., Ida., Ala., Ariz. ; (3) if he give due notice of such non-payment or protest as in the case of negotiable paper (Art. 473) : Ark. 482.

And parol testimony is inadmissible to prove that the assignor, drawer, or indorser of any instrument, negotiable or not, has released the holder thereof from such obligation to use due diligence : Tex. 268. Compare § 4731.

The assignee of any instrument not negotiable may sue any previous assignor ; but a remote assignor is only subject after the subsequent assignors to such recovery ; and he has the benefit of all defences to which he would have been entitled as against any intermediate assignee : Va. 141,18 ; W.Va. 12,15 ; Tex. 269.

The assignor may discharge himself from liability to the assignee by specifying in the assignment that the same is made without recourse : N.M. 1726.

The assignor of any non-negotiable instrument is liable to the action of his assignee without notice : Io. 2083.

§ 4037. **"Due Diligence"** is defined to be the institution of a suit against the maker within sixty days after maturity of the obligation : Ida. *ib.* 4 ; Ariz. Compare § 4734.

§ 4038. **Fraud.** Compare also § 4710.

"If any fraud or circumvention be used in obtaining the making or executing of any of the instruments in § 4031 specified, it may be pleaded in bar to any action brought on the instrument so obtained, whether brought by the party committing the fraud or any assignee : " Ida. *ib.* 6. See also in Part IV.



**Art. 404. Feræ Naturæ.**

§ 4040. **General Principles.** (See also § 4053.) The Georgia code provides that property may exist in all animals, birds, or fishes. To constitute property in those which are wild by nature, as distinguished from domestic animals, one must have them within his actual possession, custody, or control; this he may obtain either by domesticating them or by confining them within restricted limits or by killing or capturing them: Ga. 2240.

So, in Illinois, all birds and animals *feræ naturæ* when domesticated, or raised in domestication, or kept in enclosures and reduced to possession, are objects of ownership the same as cattle, shall receive the same protection in law, and be subject to larceny and trespass like other personal property: Ill. 8,37.

So, in two states, animals wild by nature are the subjects of ownership while living, only when on the land of the person claiming them, or when tamed, and taken or held in possession, or disabled and immediately pursued: Cal. 5636; Dak. Civ. C. 161.

Pigeons, bees, or fish, which go from one pigeon-house, hive, or fish-pond, into another pigeon-house, hive, or fish-pond, belong to the owner of those things; *provided*, such pigeons, bees, or fish have not been attracted thither by fraud or artifice: La. 519.

Any deposit or increase made by wild animals on realty belongs to the owner; as honey, eggs, or the young of birds or increase of animals so long as they remain unable to leave the land, belong to the owner: Ga. 2241.

**Art. 405. Acquirement of Title.** Compare Arts. 111,112.

§ 4050. **Mixture.** When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner, or surrender the whole to him: Cal. 6025; Dak. Civ. C. 590; La. 521.

That part is to be deemed the principal to which the other has been united only for the use, ornament, or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united: Cal. 6026; Dak. Civ. C. 591; La. 522-3.

If neither part can be considered the principal, within the above rule, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part: Cal. 6027; Dak. Civ. C. 592; La. 524.

§ 4051. **Uniting Materials.** If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless it exceeds the value of the materials, in which case the thing belongs to the maker on reimbursing such latter value: Cal. 6028; Dak. Civ. C. 593; La. 525-6.

When one has used materials which belong in parts to him and another, in order to form a new thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors in proportion of the materials of the one and of the materials, *plus* the price of his workmanship, of the other: Cal. 6029; Dak. Civ. C. 594; La. 527.

When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, an owner without whose consent the admixture was made may require a separation, if the materials can be separated without inconvenience; if not, the owners acquire the thing in common, in proportion to the quantity, quality, and value of their materials; <sup>a</sup> but if the materials of one were far superior to those of the others, both in quantity and value, he may

claim the thing on reimbursing to the others the value of their materials: Cal. 6030; Dak. Civ. C. 595; La. 528-9.

In all cases where one whose material has been used without his knowledge, in order to form a product of a different description, can claim an interest in such product, he has an option to demand either restitution of his material in kind, in the same quantity, weight, measure, or quality, or the value thereof: Cal. 6032; Dak. Civ. C. 597; La. 531; or, where he is entitled to the product, the value thereof in place of the product: Cal., Dak.

NOTE. — <sup>a</sup> In such case, the thing must be sold at auction for the common benefit: La. 530.

§ 4052. **Trespassers.** The foregoing sections of this article are not applicable to cases in which one wilfully uses the materials of another without his consent; but in such cases the product belongs to the owner of the material, if its identity can be traced: Cal. 6031; Dak. Civ. C. 596.

One who wrongfully employs materials of another is also liable to him in damages: Cal. 6033; Dak. Civ. C. 598; La. 532.

§ 4053. **Accession.** The young of animals belong to the owner of the mother of them by right of accession: Ga. 2242; La. 500.

The right of accession, when it operates upon two movable things, belonging to two different owners, rests altogether upon principles of natural equity: La. 520.

§ 4054. **Of Occupancy.** Occupancy is a mode of acquiring property by which a thing which belongs to nobody becomes the property of a person who took possession of it, with the intention of acquiring a right of ownership upon it.

It follows from the above definition that occupancy can only be a lawful mode of acquiring property, when the thing in occupancy has no owner, and when it is of a nature which admits of its being taken possession of, and when it is retained by the acquirer with the intention of keeping it as his own property.

There are five ways of acquiring property by occupancy, to wit: —

By hunting; by fowling; by fishing; by finding (that is, by discovering precious stones on the sea-shore, or things abandoned, or a treasure); by captures from the enemy.

Wild beasts, birds, and all the animals which are bred in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly, by the law of nations, the property of the captor; for it is agreeable to natural reason that those things which have no owner shall become the property of the first occupant.

And it is not material whether they are taken by a man upon his own ground or upon the ground of another. But the proprietor of a tract of land may forbid any person from entering it for the purpose of hunting thereon.

Wild beasts are those which enjoy their natural liberty, and go wherever they please.

Wild beasts and fowls, when taken, are esteemed to be the property of the captor as long as they continue in his possession, but when they have once escaped and recovered their natural liberty, the right of the captor ceases, and they become the property of the first who seizes them; and they are understood to have recovered their natural liberty, if they have run or flown out of sight, and even if they are not out of sight, when it happens that they cannot, without difficulty, be pursued and retaken.

Peacocks and pigeons are considered as wild fowls, though after every flight it is their custom to return; and with regard to these animals which go and return customarily, the rule to be observed is, that they are understood to be yours as long as they retain the habit of returning; but if this habit ceases, they cease to be yours, and will again become the property of those who take them. And these animals are considered to have lost the habit of returning when they have ceased to return for a certain time.

It is not lawful to kill peacocks and pigeons belonging to another, when they shall be feeding in the fields, unless they shall commit depredations; it shall likewise be unlawful to set traps for the purpose of catching them, under the penalty of damages, which shall be recoverable by the owner.

Chickens, turkeys, geese, ducks, and other domestic animals, shall not be considered wild animals, though there are species of these animals which exist in a state of natural liberty.

Therefore, if the geese or fowls of anybody should take flight, they are nevertheless reckoned to belong to him, in whatever place they are found, although he shall have lost

sight of them ; and whoever detains such animals with the intention to make them his, is understood to commit a theft.

Those who discover or who find precious stones, pearls, and other things of that kind on the sea-shore or other places where it is lawful to search for and take them, become masters of them.

He who finds a thing which is abandoned, that is, which its owner has left with the intention not to keep it any longer, becomes master of it in the same manner as if it had never belonged to anybody.

If he who has found a movable thing that was lost, having caused it to be published in newspapers, and having done all that was possible to find out the true owner, cannot learn who he is, he remains master of it till he who was the proper owner appears and proves his right ; but if it be not claimed within ten years, the thing becomes his property, and he may dispose of it at his will.

Although a treasure be not of the number of the things which are lost or abandoned, or which never belonged to anybody, yet he who finds it on his own land, or on land belonging to nobody, acquires the entire ownership of it ; and should such treasure be found on the land of another, one half of it shall belong to the finder and the other half to the owner of the soil.

A *treasure* is a thing hidden or buried in the earth, on which no one can prove his property, and which is discovered by chance.

We must not reckon in the number of things abandoned those which one has lost, nor those which are thrown into the sea in peril of shipwreck to save the vessel, nor those which are lost in a shipwreck. For although the owners of such things lose possession of them, yet they retain the ownership and the right to recover them. Therefore, those who find things of this kind cannot make themselves masters of them, but are obliged to restore them to their lawful owners, in the manner provided for by the special laws made on that subject.

The manner of acquiring property captured from an enemy in time of war is regulated by the law of nations ; and with respect to prizes made at sea, by laws which are general throughout the Union : La. 3412-3425.

## **Art. 406. Trade-marks, Deeds, Names, etc.**

§ 4060. **Property in.** Trade-marks, letters, and names cannot, in several states, be used without the consent of the person first using them : Mass. 76,1 ; Me. 126,8 ; Uta. 2016-7 ; and in most states, this is made a penal offence ; see in Part V.

If so used knowingly by any person, or if the mark is placed on articles sold or for sale, such person is liable to the party aggrieved for actual damages : Mass. 76,2 ; Me. 126,9. (So, probably, in all states, either by penal provision as above, or by the common law.)

Any person who has first adopted, recorded, and used a trade-mark or name, whether within or beyond the limits of the state, is its original owner ; such ownership may be transferred in the same manner as personal property, and is entitled to the same protection by suits at law : Me. 39,39 and 43 ; Cal. 3199 ; Nev. 4027,4029.

And any court of competent jurisdiction may restrain, by injunction, any use of trade-marks or names in violation of this article : Mass. 76,7 ; Me. 126,11 ; Cal. ; Nev.

Any person may secure the exclusive use of a trade-mark or name by filing his claim, with a description of the same, setting forth that he is the exclusive owner, with the Secretary of State or other officer : Me. 39,37 ; Ct. 1880,77,1 ; Mo. 7542 ; Ark. 6447-8 ; Cal. 3197 ; Ore. 33,1 ; Nev. 4020,4028 ; Col. 2244 ; Mon. G. L. 114,5.

One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form, symbol, or name, which has not been so appropriated by another, to designate the origin or ownership thereof ; but he cannot exclusively appropriate any designation which relates only to the name, quality, or description of the thing or business, or the place where it is produced or carried on : Cal. 5991 ; Dak. Civ. C. 576.



Foreign persons or corporations are entitled to similar protection, provided they make record of the trade-mark, as above provided, with the registers of deeds of the counties where they or their agents have a place of business : Ark. 6447 ; Dak. Civ. C. 576a.

There are special provisions for recording the trade-marks of beverages, etc., and other goods, in many states.

See also *Equity*, in Part IV.

§ 4061. **Definition.** The phrase *trade-mark* as here used includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usually affixed by any mechanic, manufacturer, or merchant to denote any goods to be goods imported, made, compounded, produced, or sold by him, other than any name generally denoting any goods to be of some particular class or description : Cal. 3196 ; Dak. Civ. C. 415 ; Uta. 2019. So, in many states, in the Criminal Code ; see Part V.

§ 4062. **Warranty Marks.** A manufacturer of leather or boots and shoes has, in two states, the exclusive right of stamping them with the first letter of his Christian name, his surname, and place of abode : Mass. 76,4 ; Me. 39,32. Such stamping is a warranty that the article is merchantable : Mass., Me. ; and it is not considered merchantable unless so stamped : Mass.

(There are many similar statutes providing for the inspection of divers commodities, in other states, which it has not seemed best to collect, in this edition.)

§ 4063. **Names.** No person in business can assume or continue to use the name of a former partner or other person, either alone or in connection with others, without the written consent of such person or his representatives : Mass. 76,6 ; Me. 126,10.

See generally in Arts. 530,540.

§ 4064. **The Good Will of a Business** is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired : Cal. 5992 ; Dak. Civ. C. 577.

The good will of a business is property, transferable like any other : Cal. 5993 ; Dak. Civ. C. 578.

§ 4065. **Title Deeds.** Instruments essential to the title of real property, not kept in a public record office pursuant to law, belong to the person in whom for the time being such title may be vested, and pass with it : Cal. 5994 ; Dak. Civ. C. 579.

## Art. 407. Patents and Copyrights.

§ 4070. **General Principles.** The author of any product of the mind, whether it is an invention or a composition in letters or art, or a design, with or without delineation or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession : Cal. 5980 ; Dak. Civ. C. 570.

Unless otherwise agreed, a product of the mind in the production of which several persons are jointly concerned, is owned by them as follows : (1) if the product is single, in equal proportions ; (2) if not single, in proportion to the contribution of each : Cal. 5981 ; Dak. Civ. C. 571.

§ 4071. **Transfer.** The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same : Cal. 5982 ; Dak. Civ. C. 572.

§ 4072. **Publication.** If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner so far as the law of the State is concerned : Cal. 5983 ; Dak. Civ. C. 573.

§ 4073. **Subsequent Inventor.** If the owner do not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the same extent against all persons except the prior author or those claiming under him : Cal. 5984 ; Dak. Civ. C. 574.

§ 4074. **Letters** and other private communications in writing belong to the person to whom they are addressed and delivered, but they cannot be published against the will of the writer except by authority of law : Cal. 5985 ; Dak. Civ. C. 575.

## TITLE VI. — OF CONTRACTS.

### CHAPTER I. — GENERAL PRINCIPLES.

**Art. 410. Definitions.** See also Arts. 423, 424.

§ 4100. **Contract.** A contract is, in four states, defined to be an agreement between two or more parties for the doing or not doing of some specified thing : Cal. 6549 ; Dak. Civ. C. 870 ; Ga. 2714 ; La. 1761.

*An executed contract* is, by the codes of three, defined to be one in which all the parties thereto have performed all the obligation which they have originally assumed : Cal. 6661 ; Dak. Civ. C. 952 ; Ga. 2715.

*An executory contract* is one in which something remains to be done by one or more of the parties : Cal., Dak., Ga.

*A contract of record* is one which has been declared and adjudicated by a court having jurisdiction, or which is entered of record in obedience to, or in carrying out, the judgments of a court : Ga. 2716.

*A specialty* is declared to be a contract under seal, and is considered by the law as entered into with more solemnity, and consequently of higher dignity, than simple contracts : Ga. 2717.

*Simple contracts* are declared to be all contracts except specialty and record contracts : Ga. 2718. They may be either in writing or rest only in words as remembered by witnesses. *Parol contracts* include only the latter : Ga. 2719.

*Court contracts* are contracts filed with the county court. They may be any written agreement for lease, rent, or personal service not exceeding one year ; they have the effect of a judgment, or decree for specific performance, and may be enforced as such by the court by attachment for contempt, or other suitable process. Damages for breach may be enforced in the same way ; or the party injured may elect to have rescission and be restored to his original situation. In construing court contracts, time is regarded as of the essence. At the expiration of the term fixed for performance the relation established by the contract ceases, without notice to or from either party ; but the power of the court continues in so far that any order may be applied for within two months thereafter ; otherwise breaches may be sued within the limitation of time applying to ordinary contracts. The remedy herein provided in such court contracts is not exclusive, but cumulative. Ga. 2758-9, 2761-4, 2766-9, 2772. If a court contract is signed by mark, it must specify that it was duly read over to the party executing : Ga. 2771.

A contract is either express or implied. An express contract is one the terms of which are stated in words. An implied contract is one the existence and terms of which are manifested by conduct. All contracts may be oral, except such as are specially required by statute to be in writing : Cal. 6619-6622 ; Dak. Civ. C. 915-8.

The contract must not be confounded with the instrument in writing by which it is witnessed. The contract may subsist, although the written act may for some defect be declared void ; and the written act may be good and authentic, although the contract it witnesses be illegal. The contract itself is only void for some cause or defect determined by law : La. 1762.

To all contracts there must be at least two parties, — one who does or engages to do or not to do ; another to whom the engagement is made. If this latter party make no express agreement on his part, the contract is called *unilateral*, even in cases where the law attaches certain obligations to his acceptance.

It is called a *bilateral* or reciprocal contract when the parties expressly enter into mutual engagements : La. 1765.

No contract is complete without the consent of both parties. In reciprocal contracts it must be expressed. In some *unilateral* contracts the law provides that under certain circumstances it shall be presumed : La. 1766.

Contracts, considered in relation to their substance, are either commutative or independent, principal or accessory : La. 1767.

Commutative contracts are those in which what is done, given, or promised by one party is considered as equivalent to or a consideration for what is done, given, or promised by the other.

Independent contracts are those in which the mutual acts or promises have no relation to each other, either as equivalents or as considerations.

A contract containing mutual covenants shall be presumed to be commutative, unless the contrary be expressed.

A principal contract is one entered into by both parties on their own accounts, or in the several qualities they assume. An accessory contract is made for assuring the performance of a prior contract, either by the same parties or by others, — such as suretyship, mortgage, and pledge : La. 1768-1771.

Considered in relation to their effects, contracts are either certain or aleatory.

A contract is aleatory or hazardous when the performance of that which is one of its objects depends on an uncertain event.

It is certain when the thing to be done is supposed to depend on the will of the party, or when in the usual course of events it must happen in the manner stipulated.

Contracts in general, under whatever denomination they may come, and whether they may or may not be included in any of the above divisions, are regulated by certain rules, which are the subject of this title.

Certain contracts are regulated by particular rules which are established in the parts of the code which treat of those contracts : La. 1775-8.

### § 4101. Subject of Contract. See § 4122.

All things that are not legally forbidden by law may legally become the subject of, or the motive for, contracts ; but different agreements are governed by different rules, adapted to the nature of each contract, to distinguish which it is necessary in every contract to consider : —

1. That which is the essence of the contract, for the want whereof there is either no contract at all or a contract of another description. Thus a price is essential to the contract of sale ; if there be none, it is either no contract, or, if the consideration be other property, it is an exchange.

2. Things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce without destroying the contract or changing its description ; of this nature is warranty, which is implied in every sale, but which may be modified or renounced without changing the character of the contract or destroying its effect.

3. Accidental stipulations which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties. The term given for the payment of a loan, the place at which it is to be paid, and the nature of the rent payable on a lease are examples of accidental stipulations.

What belongs to the essence and to the nature of each particular description of contract is determined by the law defining such contracts ; accidental stipulations depend on the will of the parties, regulated by the general rules applying to all contracts : La. 1764.



§ 4102. **Essentials.** In four states, to constitute a valid contract there must be (1) parties able to contract; (2) the assent of the parties to the terms of the contract; (3) and a subject-matter upon which it can operate: Cal. 6550; Dak. Civ. C. 871; Ga. 2720; La. 1779; (4) and there must be a consideration: Cal., Dak., Ga. (see also Art. 412); (5) there must be a lawful purpose: La.

§ 4103. **Absolute and Conditional Contracts.** In Georgia, a contract may be absolute or conditional. In the former, every covenant is independent, and the breach of one does not relieve the obligation of another; in the latter, the covenants are dependent the one upon the other, and the breach of one is a release of the binding force of all dependent covenants; and the classification of every contract must depend upon a rational interpretation of the intention of the parties: Ga. 2721.

§ 4104. **Conditions** may be precedent or subsequent. In the former, the condition must be performed before the contract becomes absolute and obligatory upon the other party; in the latter, the breach of the condition may destroy the parties' rights under the contract, or may give a right to damages to the other party, according to a true construction of the intention of the parties: Ga. 2722.

Generally, the provisions of Art. 136 apply also to contracts about personal property.

**Void Conditions.** (Compare Art. 136.) Impossible, immoral, and illegal conditions are void: Ga. 2723.

§ 4105. **Contracts are Entire or Severable;** and in the former the whole contract stands or falls together; in the latter, the failure of a distinct part does not void the remainder: Ga. 2725. The character of the contract in such case is determined by the intention of the parties: Ga.

§ 4106. **Apportionment.** In some cases, even an entire contract is apportionable, — as where the price to be paid is not fixed, or is by the contract itself apportioned according to time; so, if the failure of one party to perform is caused by the act of the other: Ga. 2726.

§ 4107. **Mutual Assent.** Until each party has assented to all the terms of the contract, it is incomplete, and either party may withdraw his offer, unless a given time is agreed upon in which the other party may assent: Ga. 2727.

If the offer is made by letter, the acceptance by written reply takes effect from the time it is sent, and not from the time it is received; hence the offerer cannot withdraw in the mean time: Ga. 2723. If the letter contains alternative propositions, the offeree may elect: Ga.

§ 4108. **Consent in General.** (Compare also § 4190.) The consent of the parties to a contract must be (1) free; (2) mutual; and (3) communicated by each to the other. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission.

An apparent consent is not real or free when obtained through (1) duress: Cal., Dak., La.; (2) menace: Cal., Dak., La.; (3) fraud: Cal., Dak., La.; (4) undue influence: Cal., Dak.; or (5) mistake: Cal., Dak., La.; (see also Art. 421): Cal. 6565-7; Dak. Civ. C. 876-8; La. 1819.

Consent being the concurrence of intention in two or more persons with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by —

Error; fraud; violence; threats: La. 1819.

Consent is not mutual, unless the parties all agree upon the same thing in the same sense. But in certain cases defined by the chapter on interpretation they are to be deemed so to agree without regard to the fact.

Consent can be communicated with effect only by some act or omission of the party contracting by which he intends to communicate it, or which necessarily tends to such communication.

If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.

Consent is deemed to be fully communicated between the parties as soon as the party accepting the proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last paragraph.

Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.

An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal.

A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.

A proposal is revoked, —

1. By the communication of notice of revocation by the proposer to the other party, in the manner prescribed above for the communication of consent, before his acceptance has been communicated to the former;

2. By the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance;

3. By the failure of the acceptor to fulfil a condition precedent to acceptance; or,

4. By the death or insanity of the proposer.

A contract which is voidable solely for want of due consent may be ratified by a subsequent consent.

A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting: Cal. 6580-6589; Dak. Civ. C. 891-900.

When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent. This being a mere operation of the mind, can have no effect unless it be evinced in some manner that shall cause it to be understood by the other parties to the contract. To prevent error in this essential point, the law establishes, by certain rules adapted to the nature of the contract, what circumstances shall be evidence of such consent, and how those circumstances shall be proved; these come within the purview of the law of evidence.

As there must be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; the will of both parties must unite on the same point.

It is a presumption of law that in every contract each party has agreed to confer on the other the right of judicially enforcing the performance of the agreement, unless the contrary be expressed or may be implied.

The contract consisting of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed. If he who proposes should, before that consent is given, change his intention on the subject, the concurrence of the two wills is wanting, and there is no contract.

The party proposing shall be presumed to continue in the intention which his proposal expressed if, on receiving the unqualified assent of him to whom the proposition is made, he do not signify the change of his intention.

He is bound by his proposition, and the signification of his dissent will be of no avail if the proposition be made in terms which evince a design to give the other party the right of concluding the contract by his assent; and if that assent be given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow.

But when one party proposes and the other assents, then the obligation is complete, and by virtue of the right each has impliedly given to the other, either of them may call for the aid of the law to enforce it.

The acceptance need not be made by the same act, or, in point of time, immediately after the proposition; if made at any time before the person who offers or promises has changed his mind, or may reasonably be presumed to have done so, it is sufficient.

The acceptance to form a contract must be in all things conformable to the offer; any condition or limitation contained in the acceptance of that which formed the matter of the offer gives him who makes the offer the right to withdraw it.

This takes place even when more is promised than was demanded, or when less is offered than was required; for example, if a request is made to borrow fifty dollars, and the party answers that he will lend one hundred dollars; or if the request be to borrow one hundred dollars, and the answer that fifty will be lent, there is no obligation in either case without a further assent of the borrower to take the one hundred, in the first case, and the fifty in the other; for the proposal to borrow fifty does not necessarily imply an assent to borrow one hundred, nor does the proposal to lend one hundred necessarily imply a desire to lend only fifty. The modification or change of the proposition is, in all respects, considered as a new offer, and the party making it is bound by the acceptance in the same manner as if the original proposition had been made by him.

When, however, from the circumstances of the case, the offer necessarily implies an assent to the modification of the acceptance, then the obligation is complete, although there be a difference in terms between the one and the other. If, for example, one offers to sell a certain article for one hundred dollars, and the other, not having yet received the offer, should on his part propose to give two hundred dollars, the proposal to give the greater sum necessarily implies an assent to take it for a less, and the contract is complete at the lowest sum.

But a consent to give anything else, although of a greater value than that contained in the offer, or to give the same or a larger sum at a different term of payment, does not imply an assent to the offer, and there is in that case no obligation.

The obligation of a contract not being complete until the acceptance, or, in cases where it is implied by law, until the circumstances which raise such implication are known to the party proposing, he may therefore revoke his offer or proposition before such acceptance, but not without allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may be supposed to have intended to give, to the party, to communicate his determination.

If the party making the offer die before it is accepted, or he to whom it is made die before he has given his assent, the representatives of neither party are bound, nor can they bind the survivor. But if the contract be accepted before the death of the party offering it, although he had no notice of it, the obligation is complete; but if the representatives assent to an acceptance of the surviving party in the first instance, or the survivor assent to an acceptance made by the representatives in the second instance, then it becomes a new contract between the representatives and the surviving party.

The proposition as well as the assent to a contract may be express or implied, —

Express when evinced by words, either written or spoken.

Implied, when it is manifested by actions, even by silence or by inaction, in cases in which they can from circumstances be supposed to mean, or by legal presumption are directed to be considered as evidence of, an assent.

Express consent must be given in a language understood by the party who accepts, and the words by which it is conveyed must be in themselves unequivocal; if they may mean different things, they give rise to error which, as is hereinafter provided, destroys the effect of a contract.

Even when words are unequivocal and expressive of assent they are not always obligatory, when from the context, if in writing, or from what in speech is equivalent to it, the words which immediately precede or follow, it appears that the party did not intend to obligate himself.

Unequivocal words, expressive of mere intent, do not make an obligation.

A positive promise that, from the manner in which it is made, shows that there was no serious intent to contract, creates no obligation.

Actions without words, either written or spoken, are presumptive evidence of a contract, when they are done under circumstances that naturally imply a consent to such contract. To receive goods from a merchant without any express promise, and to use them, implies a contract to pay the value. If an offer is made of an article in deposit, and the article is received, the contract of deposit is complete. If a mandate is acted on, the mandator is bound in the same manner as if he had accepted in writing. In all those cases and others of the like nature all the conditions which he who gives or proposes annexed to the delivery or the acceptance of the proposition are also presumed to have been accepted by the act of receiving. If the merchant in delivering the goods declare that they must be paid for by a certain time, if the depositor designate how the deposit is to be kept, or the mandator in what manner his com-



mission is to be executed, he who receives and acts is obligated to the performance of all these conditions.

Silence and inaction are also, under some circumstances, the means of showing an assent that creates an obligation; if, after the termination of a lease, the lessee continue in possession, and the lessor be inactive and silent, a complete mutual obligation for continuing the lease is created by the act of occupancy of the tenant on the one side, and the inaction and silence of the lessor on the other.

Where the law does not create a legal presumption of consent from certain facts, then, as in the case of other simple presumptions, it must be left to the discretion of the judge whether assent is to be implied from them or not: La. 1797-1818.

**§ 4109. Breach of Contracts.** (See, generally, in Part IV., Division II.) For every violation of a contract, express or implied, and for every injury done by another to person or property, the law gives a right to recover (which is a *chose in action*) and a remedy to enforce it (by action at law): Ga. 2243.

### Art. 411. Of the Parties.

**§ 4110. Who may Contract.<sup>a</sup>** In four states, generally, all persons can contract except (1) married women, infants, insane persons, and drunkards: Ga. 2729; La. 1782. (2) Infants, insane persons, and persons deprived of civil rights: Cal. 6556; Dak. Civ. C. 872.

Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, — such as a husband and wife, tutor and ward, — whose contracts with each other are forbidden; or in relation to the subject of the contract, such as purchases by the administrator of any part of the estate which is committed to his charge, and the incapacity of the wife, even with the assent of the husband, to alienate her dotal property, or to become security for his debts. These take place only in the cases specially provided by law, under different titles of this code: La. 1790.

NOTE. — <sup>a</sup> For other states, and for the law in detail, see Division II., generally.

**§ 4111. Incapacity as a Defence.<sup>a</sup>** In Georgia, any person may plead his own incapacity to contract: Ga. 2736.

The persons who have treated with a minor, person interdicted, or of insane mind, or with a married woman, cannot plead the nullity of the agreement, if it is sought to be enforced by the party when the disability shall cease, or by those who legally administer the rights of such person during the disability.

If the contract be reciprocal it must not be enforced on one side only; and if the minor or other incapacitated person opposes his incapacity against any part of the agreement, the whole of the contract is void.

If, in a contract with an incapacitated person, or in a contract void for want of form, entered into with any one for the benefit of such incapacitated person, any consideration be paid or given, and the contract be afterwards invalidated on account of such incapacity or want of form, the consideration so paid or given must be restored, if it was applied to the necessary use or benefit of the incapacitated person.

A person who, being ignorant of the incapacity of one unable to contract, shall make an agreement with such person, may, immediately after he has discovered the incapacity, call on the party, if the incapacity have ceased, or on the person having the legal administration of his affairs, if it have not, to confirm or annul the contract; and if it be a contract of such kind as the administrator might have made, then his assent shall confirm it, or his dissent shall free the contracting party from the obligation on his part. If the assent of a family meeting would have been necessary to authorize the contract, it may be called, on the application of the party, and their decision shall have the same effect in confirming or invalidating the contract that it would have had on its formation.

If a contract, made by a person incapacitated from contracting, shall be confirmed by him after his incapacity shall cease, the rights of third persons acquired before such confirmation are not impaired thereby, even if such rights were acquired with notice of the invalid act.

Those who may be interdicted from the enjoyment of their civil rights in consequence of a conviction for crime, cannot oppose their incapacity against the performance of any contract they may have made, unless it be against some person having power over them during their confinement, nor can any person with whom they contract plead such incapacity: La. 1791-6.

NOTE. — <sup>a</sup> For special cases, see Division II., generally.

§ 4112. **Lex Loci.** The code of Georgia enacts that sometimes persons are capable to contract by the law of the place of contract, but incapable under the law of the home state; in such case the law of the place of contract is generally enforced, unless the circumstances show an attempt to evade the law of the state, or the contract is of such a character as contravenes the policy of the state law: Ga. 2733.

§ 4113. **Joint Contracts,** or contracts which would be joint by the common law, are, in many states, declared to be construed as joint and several: N.J. *Obligations*, 2; Ill. 76,3; Kan. 21,1; Del. 63,9; Tenn. 3486; Mo. 658; Ark. 3900; Col. 1834; Mon. G. L. 772; Ala. 2905; N.M. 1845,1889.

Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several. A promise made in the singular number, but executed by several persons, is presumed to be joint and several: Cal. 6659-60; Dak. Civ. C. 950-1.

In case of the death of one or more joint obligors or promisors, the joint debt or contract survives against the heirs or administrators as well as against the survivors: Me. 82,28; Vt. 935; R.I.<sup>a</sup> 204,28; N.J. *Obligations*, 3; Pa. *Abatement*, 12; Ind. 624; Minn. 53,19; Kan. 21,2; Neb. 1,23,231; Md. 64,51; Va. 141,13; W.Va. 12,13; Ky. 22,8; Civ. C. 27; Tenn.; Mo. 659; Ark. 3898; Ala.; Miss. 1134; N.M. 1885.

If all the obligors die, the debt or contract survives against the heirs or administrators of all the obligors: Kan. 21,3; Mo. 660; Ark. 3899.

For other states, see Art. 501, *Joint Debtors*, and in Part IV., Division I.

NOTE. — <sup>a</sup> But the creditor must first get execution against the surviving debtors.

§ 4114. **Civil Law: General Provisions.** Where there are more than one obligor or obligee named in the same contract, the obligation it may produce may be either several or joint or *in solido*, both as regards the obligor and the obligee.

Several obligations are produced when what is promised by one of the obligors is not pronounced by the other, but each one promises separately for himself to do a distinct act; such obligations, although they may be contained in the same contract, are considered as much individual and distinct as if they had been in different contracts, and made at different times.

In like manner, a contract may contain distinct obligations to perform different things in favor of several persons; the obligations in this case are several and unconnected, and each obligee has his separate and distinct remedy on the obligation created towards him individually.

When several persons join in the same contract to do the same thing, it produces a joint obligation on the part of the obligors.

When one or more persons make an obligation to several persons for the performance of something for the common benefit of all the obligees, it creates an obligation which is joint in favor of the obligees.

When several persons obligate themselves to the obligee by the terms *in solido*, or use any other expressions which clearly show that they intend that each one shall be separately bound to perform the whole of the obligation, it is called an obligation *in solido* on the part of the obligors.

In like manner, when the obligor contracts expressly, or by using the technical words *in solido*, that he will give to either one, or to all of several obligees the right of enforcing the obligation against him, it creates an obligation *in solido* in favor of the obligees: La. 2077-2083.

§ 4115. **Of the Rules which govern Several Obligations and Joint Obligations.** Several obligations, although created by one act, have no other effects than the same obligations would have had if made by separate contracts; therefore they are governed by the rules which apply to all contracts in general.

In every suit on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any unless it be proved that all joined in the obligation, or are by law presumed to have done so.

In a suit on a joint obligation, judgment must be rendered against each defendant separately for his proportion of the debt or damages, if the suit resolves itself into damages. If the suit be for a specific performance, each defendant may be compelled to execute his proportion of the obligation, if the nature of the case permit and justice require it. The proportion meant by this and the succeeding articles is calculated by the number of the obligors, each one answering for an equal part, unless the parties have expressed a different intention.

If one of the obligors in a joint-obligation has performed or discharged his part of the obligation, although he must be joined in the suit on account of the eventual interest he has for the repetition of his payment, if the contract be disproved or annulled; yet, if the contract be affirmed, the defendant who has paid his proportion or performed his part shall have judgment. The judgment for the costs is *in solido* against all the defendants who have not paid or performed their parts: La. 2034-7.

**§ 4116. Death of Parties.** A written obligation to a person who happens to be dead at the time of its execution may be proceeded on by the representative of such person or the surviving obligees, as if it had been executed in such person's lifetime: Va. 141,12; W.Va. 12, 12; Ky. 22,9. In any contract for the breach of which damages could be recovered, or which could be specifically enforced between the original parties, the obligation is incurred, and the right is vested in their representatives, although they are not specially named, unless the contrary intent is expressed, or unless it results from the nature of the agreement: La. 1763.

**§ 4117. Volunteers.** A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it: Cal. 6559; Dak. Civ. C. 875.

**§ 4118. Who are Parties.** Those only are parties to a contract who have given their consent to it, either expressly or by implication.

The cases in which consent is implied are particularly determined by law: La. 1780-1.

It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them: Cal. 6558; Dak. Civ. C. 874.

**Art. 412. The Consideration.** See also §§ 4024,4706.

**§ 4120. Nudum Pactum.** The code of Georgia provides that a consideration is essential to a contract which the law will enforce: Ga. 2739.

**Definitions.** A *good* consideration, in Georgia, is one founded on natural duty and affection or a strong moral obligation; a *valuable* one is founded on money, or something having a value in money, or on marriage: Ga. 2741. So, *value* or a *valuable consideration* is a thing of value parted with, or a new obligation assumed, at the time of obtaining a thing, which is a substantial compensation for it: Dak. Civ. C. 2121.

**Nature of the Consideration.** Three codes declare a consideration valid when any benefit accrues to the promisor or any injury to the promisee: Cal. 6605; Dak. Civ. C. 906; Ga. 2740. So, in Georgia, a promise of another is good consideration for a promise: Ga. 2744. And in mutual subscriptions for a common object, the promises of the others are a good consideration for the promise of each: Ga.

An existing legal obligation resting on the promisor or a moral obligation originating in some benefit conferred upon him or prejudice suffered by the promisee, is also a good consideration to the extent of such obligation, but no further.

The consideration of a contract must be lawful within the meaning of § 4130.

If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.

A consideration may be executed or executory, in whole or in part. In so far as it is executory it is subject to the provisions of this article.



When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person, or regulated by any specified standard.

When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

Where a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible of execution, the entire contract is void.

Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is or becomes impossible of execution, such provision only is void. The burden of proving consideration rests upon the party seeking to avoid the contract: Cal. 6606-6615; Dak. Civ. C. 907-914.

*Of the Cause or Consideration of Contracts.* An obligation without a cause, or with a false or unlawful cause, can have no effect.

An agreement is not the less valid, though the cause be not expressed.

The cause is unlawful, when it is forbidden by law, when it is *contra bonos mores* (contrary to moral conduct) or to public order.

If the cause expressed in the consideration should be one that does not exist, yet the contract cannot be invalidated, if the party can show the existence of a true and sufficient consideration: La. 1893-1900.

By the *cause* is here meant the consideration or motive for making the contract; and a contract is said to be without cause whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed or had ceased to exist before the contract was made. The contract is also considered as being without cause when the consideration for making it was something which, in the contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist. A gift in consideration of a future marriage is void by this rule, if the marriage do not take place.

Where the consideration or cause of the contract really exists at the time of making it, but afterwards fails, it will not affect the contract, if all that was intended by the parties be carried into effect at the time. The destruction of property sold, after the sale is perfected, without the fault of the seller, is a case governed by this rule.

But, if the contract consist of several successive obligations to be performed at different times, and the equivalent is not given in advance for the whole, but is either expressly or impliedly promised to be given at future periods; then, if the cause of the contract, corresponding to either of the successive obligations, should fail, the obligation depending on it will cease also. Thus in leases for years, the obligation to pay the yearly rent ceases, if the property which is leased should be destroyed: La. 1896-9.

§ 4121. **Consideration Presumed.** The code of Georgia enacts that in some cases a consideration is presumed and an averment to the contrary will not be received; as, generally, (1) contracts under seal: Ga. 2739.

But in several states, a seal is only presumptive evidence of consideration, which may be rebutted as if the instrument was not sealed: N.Y. Civ. C. 840; N.J. *Evidence*, 16 and 52; Mich. 7520; Wis. 4195; Ore. Civ. C. 743; Ala. 2981. See also § 1564. In several states, all contracts in writing signed by the party to be bound or his authorized agent or attorney import a consideration (*i. e.*, it is presumed *prima facie*): Io. 2113; Kan. 21,7; Tenn. 2479; Mo. 663; Tex. 4487; Cal. 6614, 11963(39); Dak. Civ. C. 913; Ala. 3035; Fla. 162,88.

(2) Negotiable instruments, alleging a consideration upon their face, in the hands of innocent holders without notice, who have received them before dishonor: Ga. See also § 4739.

In Missouri, all instruments made and signed by any person or his agent whereby he promises to pay any other or his order or bearer any sum of money or property therein mentioned shall import a consideration and be due and payable as therein mentioned: Mo. 663.

§ 4122. **The Object of the Contract.** Everything is deemed possible except that which is impossible in the nature of things: Cal. 6595-8; Dak. Civ. C. 901-4.

Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertain-

able, the entire contract is void: Cal. 6599(V.3); Dak. Civ. C. 905. Contracts are either gratuitous or onerous; the former benefit the person with whom they are made without profit or advantage received or promised as a consideration for it. It is not the less gratuitous if it proceed either from gratitude or the hope of receiving a future benefit. Anything given or promised as a consideration, though unequal to it in value, makes the contract onerous: La. 1772-4.

**Louisiana Law.** Every contract has for its object something which one or both of the parties oblige themselves to give, or to do, or not to do.

The mere use, or the mere possession of a thing, may be, as well as the thing itself, the object of a contract.

All things, in the most extensive sense of the expression, corporeal or incorporeal, movable or immovable, to which rights can legally be acquired, may become the object of contracts.

An obligation must have for its object something determinate, at least as to its species.

The quantity of a thing may be uncertain, provided it be capable of being ascertained.

Future things may be the object of an obligation.

One cannot, however, renounce the succession of an estate not yet devolved, nor can any stipulation be made with regard to such a succession, even with the consent of him whose succession is in question.

Yet a future succession may become the object of a marriage contract; it may be stipulated that such succession shall be dotal or paraphernal, that it should be vested in real estate, or other covenants of the like nature, for the benefit of one of the parties or their children.

No one can, by a contract in his own name, bind any one but himself or his representatives; but he may contract, in his own name, that another shall ratify or perform the stipulation which he makes, and in this case he shall be liable in damages, if the contract be not ratified or performed by the person for whose act he stipulates.

A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.

The object of a contract must be possible, by which is meant physically or morally possible. The possibility must be determined, not by the means or ability of the party to fulfil his agreement, but by the nature of the thing which forms the object of it.

That is considered as morally impossible, which is forbidden by law, or contrary to morals. All contracts having such an object are void: La. 1883-1892.

§ 4123. **Want or Failure of Consideration** is a defence: Ind. 366; Io. 2114; Kan. 21,8; Tenn. 2480; Ida.<sup>a</sup> 1874-5,649,5; Ga. 2857; Ariz.<sup>a</sup> 3460.

*Except* to negotiable paper transferred in good faith and for valuable consideration before maturity; see § 4739: Ind., Io. *And except* as against an action brought by an innocent holder in good faith in any contract: Kan., Tenn.

**Failure of Consideration** may be pleaded in defence to the promise: Vt. 911; Ind.; Ga. 2748.

But if the want or failure be partial, an apportionment must be made according to the facts of each case: Vt.; Ind.; Io.; Kan.; Ida.;<sup>a</sup> Ga.; Fla. 162,89.

NOTE. —<sup>a</sup> This section applies, in the noted states, to the bonds, due-bills, non-negotiable instruments, etc., specified in Art. 403.

§ 4124. **Mistake.** In Georgia, a consideration founded on a mistake of fact or law is invalid: Ga. 2743. See § 4194.

§ 4125. **Inadequacy of Consideration** alone will not avoid a contract; but if it be great, it is evidence of fraud; and on a suit for damages for breach of contract it will be evidence in reduction of damages: Ga. 2742.

§ 4126. **Impossible Considerations** will not sustain a promise: Ga. 2746.

Otherwise, however, if the consideration be only improbable: Ga.

§ 4127. **A Consideration Good in Part** and bad in part, the promise will, in Georgia, be sustained or not, according as it is entire or severable (§ 4105): Ga. 2745.

But if *illegal* in part, the whole promise fails: Ga.

Want or failure of consideration in part may be shown, according to § 4123, as a partial defence.

§ 4128. **A Consideration Moving from Another** (see also § 4117) is good, and will sustain an action by the promisee, though a stranger to the consideration : Ga. 2747.

### Art. 413. Void Contracts.

§ 4130. **The Following Contracts are Void**, and cannot be enforced : (A) in three codes, contracts to do an immoral or illegal thing : Cal. 6667 ; Dak. Civ. C. 953 ; Ga. 2749. Compare §§ 4101, 4122.

(B) In Georgia, contracts against public policy : Cal., Dak., Ga.

Such as (1) contracts in restraint of trade : Ga. 2750 ; (2) wagering contracts : Ga. ; (3) contracts of maintenance or champerty (see § 1401, and also in Part V.) : Ky. 11,1 ; Tenn. 2445 ; Ga. ; (4) contracts to evade or oppose the revenue laws of another country : Ga. ; (5) contracts tending to corrupt legislation : Ga. ; (6) contracts tending to corrupt the judiciary : Ga.

(7) All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, tort, or violation of law, are against the policy of the law : Cal. 6668 ; Dak. Civ. C. 954.

If the contract is severable, that which is legal will not, in Georgia, be annulled by that which is illegal : Ga. 2749.

(8) Penalties imposed by contract for any non-performance thereof are void ; but this does not apply to such bonds or obligations, penal in form, as have heretofore been commonly used : Dak. Civ. C. 955.

(9) Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void : Cal. 6670 ; Dak. Civ. C. 956.

(10) *Except*, that the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage : Cal. 6671 ; Dak. Civ. C. 957.

(11) Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his right, is void : Dak. Civ. C. 958.

(12) Contracts, conveyances, etc., any part of the consideration of which has been the illegal sale of intoxicating liquors, are void : Ct. 1882, 107, 9, 1. See also in Part IV.

(13) Every contract by which any one is restrained from exercising a lawful profession, trade, or business, is void, except that one who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business within a specified locality ; and partners may, upon, or in anticipation of, a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof : Cal. 6673-5 ; Dak. Civ. C. 959-961.

(14) Every contract in restraint of the marriage of any person, other than a minor, is void : Cal. 6676 ; Dak. Civ. C. 962. (15) Marriage brokerage bonds or contracts are void : Ga. 3182. (16) Contracts to pay attorney's fees inserted in any bill, note, or evidence of debt, are void : Ind. 5518.

§ 4131. **Seals.** An agreement in writing without a seal for the compromise or settlement of a debt or controversy is valid as if sealed : Ind. 450 ; Tenn. 4538-9 ; Cal. 11934 ; Ore. Civ. C. 745 ; Ala. 3040. See generally §§ 1564-5, 4182.

§ 4132. **Gaming Contracts**<sup>a</sup> are, in most states, void (for negotiable paper, see Art. 470) : Mass. 99,5 ; Me. 125,10 ; Vt. 4311 ; R.I. 246,16 ; Ct. 16,5,1 ; N.Y. 1,20,8,3,8 ; N.J. *Gaming*, 3 ; Pa. *Gaming*, 8 ; O. 4269 ; Ind. 4950 ; Ill. 38, 131 ; Mich. 2027 ; Wis. 4538 ; Io. 4029 ; Minn. 99,14 ; Md. 72,153 ; Va. 139,2 ; W. Va. 98,1 ; N.C. 2841 ; Ky. 47,1 ; Tenn. 2438 ; Mo. 5722 ; Ark. 3406 ; Ore.



Cr. C. 709; 1876, p. 40, § 2; Wash. 1254; Wy. 35,118; S.C. 1723; Ga. 2753; Ala. 2131; Miss. 990; N.M. 2293. See also in Part V.

Money paid or property delivered upon such consideration may generally be recovered back (A) by the loser if he sue (1) within six months after the loss: N.J. *ib.* 2 and 5; O. 4270; Ind. 4951; Ill. 38,132; Ky. 47,4; Ga.; Ala.; Miss. 992; (2) within three months thereafter: Mass. 99,1; Me. 125,8; N.Y. *ib.* 14; Mich. 2023-4; Va. *ib.* 3; W.Va. 98,2; Tenn. 2440,3467; Mo. 5720,5728; Ark.<sup>b</sup> 3403; S.C. 1720; (3) at any time: Minn. 99,13; Neb. 3,214; Md.; Wash. 1255; (4) within a year: N.M. 2290, 2302. (5) Double the value of such money or property may be recovered at any time: Ore. 1876, p. 40, § 3; (6) within one month: Vt. 4310; (7) three months: Ct. 16,5,2; (8) ten days: Pa. *ib.* 9.

(B) By any person, after the expiration of the time above limited, if he sue (1) at any time within four years thereof: Ga.; five years: Ky. 47,2; (2) at any time, without special limit: Me.; O. 4273; Ill.; Va. *ib.* 5; S.C. 1718; (3) within six months thereof: N.J. *ib.* 6; (4) twelve months: Tenn. 2441; Ala. 2132.

Treble the value of the money or property lost may be recovered by such person suing: Mass.; Me.; Ill.; Va.; Ky.; S.C. 1721.

The sum recovered will be for the joint use of such person suing and (in Georgia, the school fund of the county: Ill., S.C., Ga. So, half to the person suing, half (1) to the state: N.J., Va., S.C.; or (2) to the town: Me. (3) For the use of the widow and next of kin of the person who lost the money: Tenn., Ala.

(C) All such contracts, evidences of debt or incumbrances or liens on property, executed upon a gaming consideration, are void (1) in the hands of any person: Vt.; Ct.; N.Y.; N.J.; Pa.; O.; Wis.; Ill. 38,136; Mo. 5723; Wy.; Ga.; Miss. So, in all other states except as follows: (2) as between the parties and all other persons except *bona fide* holders without notice of the illegality: Me., Mich., Minn., Va., W.Va., Ore., Wash.; (3) except negotiable bills and notes duly assigned (see Art. 470): Me.; (4) except as against *bona fide* subsequent purchasers of real estate: Me.

The premises where the gambling took place are liable for such damages: 38,133. See also in Part IV.; also § 2059.

And if a mortgage or conveyance of land is adjudged void under the above provision, such land inures to the sole benefit of such persons as would be entitled thereto were the mortgagor or grantor naturally dead: N.Y. *ib.* 17; N.J. *ib.* 4; Mich. 2028; S.C. 1724; Miss. 991.

For futures, see Art. 477.

NOTES. — <sup>a</sup> Such contracts void because given in consideration of gaming debts, include (1) all bonds, mortgages, and conveyances: Mass.; Me.; Vt.; R.I.; Ct.; N.Y. *ib.* 16; N.J.; Pa.; O.; Ind.; Mich.; Wis.; Io.; Minn.; Va.; N.C.; Ky.; Mo.; Ark.; Ore.; Wash.; Wy.; S.C.; Miss.; N.M.; (2) judgments confessed: N.Y., N.J., Pa., Ill., Mo., Ark., S.C., Miss., N.M.; (3) bill and notes, negotiable or not, whether assigned or indorsed, or not: Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Io., Mich., Minn., Wis., Mo., Ark., Ore., Wash., Wy., S.C., N.M. See also Art. 470. <sup>b</sup> They do not include (1) money, etc., lost on any turf race: Ark. 3405; (2) nor insurance contracts, bottomry, or respondentias: N.Y. *ib.* 10; Ill. 38,134; Wis.

§ 4133. **Record of Contracts.** In Virginia, any contract in writing made in respect to real estate or goods and chattels, in consideration of marriage, or for the sale or conveyance of real estate or a term therein of not more than five years, shall, from the time of record, be as against creditors and purchasers as valid as if it were a deed conveying the estate embraced in such contract: Va. 114,4. Until so recorded it is void as against creditors: Va. 114,5.

§ 4134. **Holidays.** (See also § 4717.) The following days are declared legal holidays for all purposes: January 1: N.Y. 1875,27; Civ. C. 3343; N.J. *Holidays*, 1; Pa. *Holidays*, 1; Wis. 2577; Tex. 2835-6; Cal. 10; Ore. 1885, p. 49; Dak. Civ. C. 2115; Ida. C. Civ. P. 7; Mon. C. Civ. P. 514; Wy. 1879,47; Uta. 1882,30,1; C. Civ. P. 7. S.C. 1636; February 22: N.Y.; N.J.; Pa.; Wis.; Minn. 124,1; Ky. 51,1; Tex.;

Cal. ; Ore. ; Dak. ; Mon. ; Wy. ; Uta. ; S.C. March 2 : Tex. April 21 : Tex. May 30 : N.Y. ; N.J. ; Pa. *ib.* 4 ; Wis. ; Cal. 10, Amt. ; Ore. ; Dak. 1885,88 ; Uta. July 4 : N.Y., N.J., Pa., Wis., Ky., Tex., Cal., Ore., Dak., Ida., Mon., Wy., Uta., S.C. July 24 : Uta. Days appointed by the governor for Thanksgiving : N.Y., N.J., Pa., Wis., Ky., Tex., Cal., Ore., Dak., Ida., Mon., Wy., Uta., S.C. ; or for Fast : N.Y., Pa., Ky., Tex., Cal., Ore., Dak., Ida., Uta. December 25 : N.J., Pa., Wis., Ky., Tex., Cal., Ore., Dak., Ida., Mon., Wy., Uta., S.C. Sundays : Cal., Ore., Dak., Ida., Mon., Uta. All general election days : N.Y., N.J., Wis., Tex., Cal., Ore., Dak., Ida., Mon., S.C.

Sunday, by the laws of some states, lasts from midnight to midnight : Mass. 98,15 ; Mich. 2022 ; Minn. 100,21.

When any legal holiday falls on Sunday, the following day is a holiday : N.Y. ; N.J. *ib.* 2 ; Wis. ; Ky. 51,2 ; Cal. 11 ; Dak. Civ. C. 2116 ; Uta.

Days other than holidays are called business days : Dak. Civ. C. 2117.

§ 4135. **Contracts executed on Sunday** are void : Ala. 2138.

But in Michigan and other states, the execution of contracts, doing business, etc., on Sunday, only subjects the offender to a fine : Mich. 2015. See, for other states, in Part V.

*Except* in a few states, the above provisions do not apply to contracts (1) for the advancement of religion : Ala. ; (2) or executed in case of necessity : Mich., Ala. ; (3) or for some work of charity : Mich., Ala. ; (4) the making of mutual promises to marry : Mich. ; (5) the solemnization of marriage : Mich.

But in Maine, no deed, contract, receipt, or other instrument shall be held void by reason of being dated on Sunday, unless there is other proof of its being made and delivered on that day than such date : Me. 82,115.

No person who receives a valuable consideration for a contract, express or implied, made on the Lord's day shall defend any action upon such contract upon the ground that it was made on Sunday unless he restores the consideration : Me. 82,116.

No person shall be compelled to labor on legal holidays : Pa. *Holidays*, 1. See in Part III.

Canal and railway companies shall not be required to attend to their works on Sundays : Pa. *Sunday*, 1. See in Part III. No person can travel on Sunday except in cases of charity, necessity, etc. : N.Y. 1,20,8,70. But the fact that a person is travelling on Sunday does not constitute a defence to an action for a tort or injury suffered by such person on that day : Mass. 1884,37. See in Part IV.

**Jews.** The penalties and liabilities prescribed in this section do not apply to any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day : N.Y. 1847,349 ; Mich. 2021. So in most states ; see in Part V.

## Art. 414. The Statute of Frauds.

§ 4140. **Clause 4 of the Statute Adopted.** The English Statute 29 Charles II., C. 3, or some modification of it, is enacted in all the states except Maryland, Louisiana, and New Mexico. Thus, in all the other states, clause 4 of the statute is enacted in full ; and no action shall be brought in any of the following cases : <sup>a</sup> —

(1) To charge any executor or administrator upon any special promise to answer damages out of his own estate (in all the states below cited except Wisconsin, Minnesota, California, Colorado, Dakota, Idaho, Utah, Arizona, where this clause is omitted).

(2) In all states, to charge any person upon any special promise to answer for the debt, default, or (in all except Pennsylvania) miscarriage (in Massachusetts, Maine, Vermont, New York, Michigan, Minnesota, Virginia, West Virginia, Kentucky, Nebraska, Washington, *misdoing*) of another ; see, however, note <sup>b</sup>.

(3) In all except Pennsylvania and North Carolina, to charge any person upon any agreement made in consideration of marriage (except, in many, mutual promises to marry: N.Y., Wis., Mich., Minn., Neb., Ky., Cal., Ore., Nev., Col., Wash., Dak., Ida., Mou., Wy., Uta., Ala., Ariz., and, in Georgia, marriage articles).

(4) In all the states except as below (but for other states, see the separate clause; § 4143) to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them (or, in Connecticut, Texas, California, Idaho, upon any sale, etc., of *real estate*).<sup>c</sup> (This particular clause is not copied in New York, Pennsylvania, Illinois, Michigan, Wisconsin, Minnesota, Nebraska, Nevada, Colorado, Washington, Montana, Arizona; see § 4143.)

(5) In all states, except Pennsylvania, North Carolina, to charge any person upon any agreement that is not to be performed (in New York, Michigan, Wisconsin, Minnesota, Nebraska, California, Oregon, Nevada, Colorado, Washington, Dakota, Idaho, Montana, Wyoming, Utah, Alabama, Arizona, "by its terms") within one year from the making thereof.

*Unless* the agreement upon which the action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or by some other person<sup>a</sup> thereunto by him lawfully authorized: N.H. 220,14-15; Mass. 78,1; Me. 111,1; Vt. 981; R.I. 204,7; Ct. 19,11,40; N.Y. 2,7,2,2-4; 2,6,5,1; N.J. *Frauds*, 5; Pa. *Frauds*, 4; O. 4199; Ind. 4904; Ill. 59,1; Mich. 6185; Wis. 2307,2327; Io.<sup>a</sup> 3663-4; Minn. 41,6; Kan. 43,6; Neb. 1,32,8 and 25; Del. 63, 6,7; Va. 140,1; W.Va. 95,1; N.C. 1506,1552,1554; Ky. 22,1; Tenn. 2423; Mo. 2513; Ark. 3371; Tex. 2464; Cal. 6624; Ore. Civ. C. 775; Nev. 289,296,1 and 697; Col. 1521 and 1525; Wash. 2325; Dak. Civ. C. 920; Ida. C. Civ. P. 937; Prob. C. 215; Mon. Prob. C. 247; G. L. 166 and 171; Wy. 57,1; Uta. 1014, 1019; C. Civ. P. 1208; S.C. 2019; Ga.<sup>d</sup> 1950; Ala. 2121; Miss. 1292; Fla. 29,1; Ariz. 2125,2132.

In two, such "other person" must be "lawfully authorized" in writing: Del. V. 13, C. 451; Ala.

And in several, he must be authorized in writing when the contract relates to real estate as in clause 4: N.H., Vt., Minn., Cal., Ore., Dak., Ida. See also § 4143.

NOTES. — <sup>a</sup> But in Iowa, nothing in the Statute of Frauds prevents the party to the contract suing and establishing the contract by evidence of the other party: Io. 3667. And the statute relates merely to the proof of the contract, which may still be enforced as against the party making it if not denied in the pleadings: Io. 3666. <sup>b</sup> But a promise to answer for the obligation of another is, in a few, deemed an original obligation of the promisor, and need not be in writing (1) where it is made by one who has received property of another upon undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or part in consideration of such promise; (2) when the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made his surety; (3) when the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person; (4) when a factor undertakes for a commission to sell merchandise and guarantee the sale; (5) when the holder of an instrument for the payment of money upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument; Cal. 7794; Ida. Civ. C. 938; Uta. C. Civ. P. 1209. <sup>c</sup> "For a longer term than one year:" R.I., Ct., Io., Va., W.Va., Ky., Tenn., Mo., Tex., Cal., Ore., Dak., Ida., Wy., Uta., Ala., Miss., Fla.; or (2) three years: Ind. <sup>d</sup> "Or guardian or trustee," in Georgia, and the statute does not apply to "contracts with overseers."



§ 4141. **Additional Clauses and Exceptions.** In Louisiana, the case of any promise to pay the debt of a third person is added: La. 2278.

**Exceptions** to § 4140, clause 1 or 2. Such a promise is good, though not in writing, up to \$5: Del. 63,5. So, §20: Pa. *ib.* 5. Such a promise is good up to \$5 though not in writing; and good to \$25 if proved by the oath of a witness: Del. 63,6.

(1) In Georgia, no person can be charged upon an acceptance of a bill of exchange unless in writing, etc.: Ga. See, for other states, § 4720.

(2) An agreement authorizing or employing an agent or broker to purchase or sell real estate for a compensation must be in writing: Cal. 6624, Amt. Vol. 3.

§ 4142. **The Memorandum.** The consideration need not, however, be expressed in such note or memorandum, but may be proved by any legal evidence: Mass. 78,2; Me. 111,1; N.J. *Frauds*, 9; Ind. 4905; Ill. 59,3; Mich. 6182,6189; Neb. 1,32,24; Va. 140,1; Ky. 22,1.

But in a few, the consideration must be expressed in the writing (see § 4140 for citations): Minn., Ore., Nev., Ala.

In Delaware, there need be no such note, etc., of goods sold and delivered and other matter properly chargeable in accounts, but the books and oath of the plaintiff are sufficient: Del. 63,7.

In the case of sales at auction (either of real or personal property: Ida., Ala.) the auctioneer's memorandum of the terms and conditions satisfies the Statute of Frauds: N.Y. 2,7,2,4; Mich. 6187; Wis. 2309; Minn. 41,8; Neb. 1,32,10; Cal. 6624,6798; Ore. Civ. C. 775; Nev. 291; Col. 1522; Dak. Civ. C. 920,1028; Ida.; Mon. G. L. 168; Ala. 2122; Ariz. 2127; Ga. 2630.

§ 4143. **Clause 1 Adopted.<sup>a</sup>** (A) In a few states, the English statute is followed; and all leases, estates, interests of freehold or terms of years or uncertain interests in lands created by livery of seisin or by parol only, not put in writing and signed by the parties creating it, or their agents lawfully authorized in writing, have the effect of leases at will only (except leases not (1) exceeding the term of three years reserving full rent: N.H., N.J., Pa.; (2) one year: Mass., Me., Ark., S.C., Ga.): N.H. 135,12; Mass. 120,3; Me. 73, 10; Vt. 1932; N.J. *Frauds*, 1; Pa. *Frauds*, 1; Mo. 2509; Ark. 3380; S.C. 2017; Ga. 2280.

In others, (B) every contract for the leasing for a longer period than one year (except in Louisiana), or for the sale of any lands or interest in lands, is void unless some note or memorandum thereof (expressing the consideration: N.Y., Wis., Minn., Ore., Nev., Col.) be in writing and subscribed by the party by whom the lease or sale is made, or his agent lawfully authorized (in writing: Ill., Mich., Kan., Cal., Ore., Ida.): N.Y. 2,7,1,8-9; Ill. 59,2; Mich. 6181; Wis. 2304; Minn. 41,12; Neb. 1,32,5; Ark. 3371; Tex. 2464; Cal. 6741; Ore. Civ. C. 775,993; Nev. 285-6; Col. 1517-8; Mon. G. L. 162-3; Uta. 1010; C. Civ. P. 1206; La. 2440,2275; Ariz. 2121-2. For other states, see also § 1471.

So, in one, all leases and contracts for leasing land for mining, and all other leases for a term exceeding three years, are void unless put in writing and signed by the party to be charged therewith or some other person thereunto lawfully authorized by him: N.C. 1743.

Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property thus sold: La. 2275.

**NOTE.** — <sup>a</sup> In this section only the strict Statute of Frauds provisions requiring a note in writing are inserted. Many state laws provide that a deed is necessary in these cases; and a deed, of course, includes a "note in writing;" see § 1471. See also § 2002 for the effect of a parol demise.

§ 4144. **Clause 16 Adopted.** The English statute is followed in most of the states; and no contract for the sale of goods, wares, and merchandise for the price of \$50 (in Maine, New Jersey, Missouri, Arkansas, \$30; in New Hampshire, \$33; in Arizona, \$100; in California, Idaho, \$200; in Montana, Utah, \$300; in Vermont, \$40; in Florida, Iowa, to any value) or more is valid, except the buyer accept and receive part of the goods sold or give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the parties to be charged therewith, or their agents thereunto lawfully authorized: N.H. 220,16; Mass. 78,5; Me. 111,4; Vt. 982; Ct. 19,11,41; N.Y. 2,7,2,3 and 8; N.J. *Frauds*, 6; Ind. 4910; Mich. 6186; Wis. 2308; Io. 3664; Minn. 41,7; Neb. 1,32,9; Del. 63,7; Mo. 2514; Ark. 3372; Cal. 6624,6739; Ore. Civ. C. 775; Nev. 290; Col. 1521 and 1525; Wash. 2326; Dak. Civ. C. 920,991; Ida. Civ. C. 937; Mon. G. L. 167; Wy. 57,2; Uta. 1015; S.C. 2020; Ga. 1950; Miss. 1295; Fla. 29,2; Ariz. 2126.

And in Georgia, it is specified to make no difference whether such goods, etc., are *in esse* or not.

But in Iowa, this section does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same: Io. 3665.

An agreement to manufacture a thing from materials furnished by the manufacturer or by another person, is not within the provisions of the last section: Cal. 6740; Dak. Civ. C. 992.

All agreements relative to movable property, and all contracts for the payment of money, where the value does not exceed \$500, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above \$500 in value, must be proved by at least one credible witness and other corroborating circumstances: La. 2277.

§ 4145. **Performance.** The last five sections do not, in Georgia, apply (1) where the contract has been fully executed: Ga. 1951; (2) where there has been performance on the one side accepted by the other in accordance with the contract: Ga.; (3) where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance: Ga.

So, in many, nothing herein is to abridge the powers of a court to compel specific performance of agreements partly performed: N.Y. 2,7,1,10; Ind. 4908; Mich. 6183; Wis. 2305; Minn. 41,13; Neb. 1,32,6; Cal. 6741; Ore. Civ. C. 772; Nev. 287; Col. 1519; Dak. Civ. C. 993; Ida. Civ. C. 936; Mon. G. L. 164; Uta. 1011; C. Civ. P. 1207; Ariz. 2123.

Thus, in two states, specially of sales of land where the purchaser be put in possession by the vendor and part of the purchase-money paid: Io. 3665; Ala.

§ 4146. **Representations Concerning Character.** In many states, no action can be brought (by the person to whom the representation, etc., was made) to charge a person upon or by reason of any representation or assurance made concerning the character, conduct, credit<sup>a</sup> or ability, trade or dealings of any other person, unless such representation, etc., was made in writing, and signed (1) by the party to be charged thereby: Mass. 78,4; Me. 111,3; Vt. 983; Ind. 4909; Mich. 6188; Va. 140,1; W.Va. 95,1; Ky. 22,1; Mo. 2515; Cal.<sup>a</sup> 11974; Ore. Civ. C. 776; Ida.<sup>a</sup> Civ. C. 939; Wy. 57,3; Uta.<sup>a</sup> C. Civ. P. 1210; S.C. 2024; Ala. 1213; La. D. 1443; or (2) by some person thereunto by him lawfully authorized: Mass., Me., Vt., Ind., Mich., Va., Ky., Mo., Wy., S. C., La., in writing: Ky. 22,20.

But in several, it is sufficient if it is in the handwriting of the person to be charged, though not signed: Cal., Ore., Ida., Uta.

NOTE. — <sup>a</sup> In the noted states the provision applies only to representations concerning *credit*.

§ 4147. **New Promise by Insolvent, etc.** No promise for the payment of a debt made by an insolvent debtor who has obtained his discharge in bankruptcy or insolvency proceedings is evidence of a new or continuing contract whereby to deprive the debtor of the benefit of such discharge in bar of the recovery of a judgment upon such debt, unless such promise is made by, or contained in, some writing signed by him or by some person thereunto by him lawfully authorized : Mass. 78,3 ; Me. 111,1 ; N.Y. 1882,324 ; N.J. *Frauds*, 8.

Generally, a new promise, in order to take a contract out of the Statute of Limitations, must be in writing and signed (see § 4140) by the party to be charged thereby <sup>a</sup> or his agent ; but this statute does not (except in Ill., Io., Minn., Va., W.Va., Tex., Cal., Nev., Ida., Uta., Miss., La., N.M., Ariz. ; in these excepted states the statutes are silent on this point) alter the effect of a payment of principal or interest by any person : Mass. 197,15-16 ; Me. 81,97 and 100 ; Vt. 974, 975 ; N.Y. Civ. C. 395 ; N.J. *Limitations*, 10 ; O. 4992 ; Ind. 301 ; Ill. 83,16 ; Mich. 8725-9 ; Wis. 4243,4247 ; Io. 2539 ; Minn. 66,24 ; Kan. 80,24 ; Neb. 2, 22 ; Va. 146,10 ; W.Va. 119,8 ; N.C. 172 ; Mo. 3248 and 3250 ; Ark. 4493 ; Tex. 3219 ; Cal. 10360 ; Nev. 1045 ; Col. 2184 ; Wash. 44-5 ; Dak. C. Civ. P. 73 ; Civ. C. 178 ; Ida. C. Civ. P. 178 ; Mon. C. Civ. P. 53 ; Wy. Civ. C. 21 ; Uta. 1126 ; C. Civ. P. 218 ; S.C. Civ. C. 131 ; Ga. 1950,2934 ; Ala. 3240 ; Miss. 26,88 ; La. D. 1441-2 and 1444 ; Code 2278 ; N.M. 1873 ; Ariz. 2108.

An indorsement or memorandum of such payment will not, however, be sufficient proof of such payment to take the case out of the statute, if made by, or on behalf of, the payee : Mass. ; Me. ; Vt. ; N.J. *ib.* 11 ; Ind. 303 ; Mich. ; Wis. ; Col. ; Ga. 2935. And such indorsement must be in the handwriting of the payer to have effect as above : Vt.

Causes of action founded on contract are also revived by an admission that the debt is unpaid : Io.

So, in several, no action can be maintained to charge any person upon any promise made after full age to pay any debt contracted, or, in Missouri, to perform any contract made, during infancy (except in Maine and South Carolina, debts for necessities, or to which, in New Jersey, infancy would be no defence ; or, in Maine, debts for real estate of which he has received the title and retains the benefit) unless put in writing and signed (1) by the party to be charged therewith : Me. 111,2 ; N.J. *Frauds, etc.* 7 ; Va. 140,1 ; W.Va. 95,1 ; Ky. 22,1 ; Mo. 2516 ; Ark. 3384 ; S.C. 2023 ; Miss. 1298 ; or (2), by some person lawfully authorized : Me., Va., Miss. ; see § 6603.

The effect of such new promise, etc., is generally to make the statute run from the time ; but in Illinois, it gives the creditor ten years' further time from the promise.

A new promise revives the original debt or liability, but does not create a new one : Ga. 2936.

After the dissolution of a partnership or in the case of joint-contractors, a new promise by one partner revives the debt as to himself, but not as to his co-partners or contractors : <sup>a</sup> Ga. 2937-8 ; see also § 4113, and in Part IV., *Limitations*.

NOTE. — <sup>a</sup> See also the Statute of Limitations in Part IV.

§ 4148. **Other Contracts Required to be in Writing.** In Vermont, when the performance of a contract is secured by the obligation of a surety, no agreement made between the creditor and the principal debtor for the extension of the time of payment or performance has any effect at law or equity unless made upon a valuable consideration, and in writing or some note thereof is in writing, signed by such creditor or his agent, and reciting the consideration : Vt. 934 ; see Art. 510.

So, no surety is discharged from liability upon a written obligation for the payment of money by reason of notice from the surety to the creditor to sue, unless such notice be in writing and signed by the party giving the same : Pa. *Guaranty*, 1. See also § 5110.



Sales or transfers of ships and vessels are not, in several states, valid unless in writing and signed by the vendor or his agent: Cal. 6135; Ore. Civ. C. 773; Dak. Civ. C. 634; see also Arts. 453, 456.

In New Jersey, no broker or real-estate agent selling or exchanging land for the owner is entitled to his commission unless the authority for selling, etc., is put in writing signed by the owner or his authorized agent, and the rate of commission therein stated: N.J. *Frauds*, 10.

In Florida, all contracts appertaining to all agricultural, lumber, rafting, and milling business must be in writing and fully explained to the parties before two credible witnesses; and must be in duplicate, one copy to be retained by the employer and the other filed with some judicial officer, with the affidavit of the witnesses; *provided* that contracts for service or labor may be made for a less time than thirty days by parol: Fla. 29, 3. No person is liable to pay for any newspaper, periodical, or documents, unless he subscribe therefor or order it in writing: Fla. 29, 7.

§ 4149. **Fraud.** Where a contract which is required by law to be put in writing is prevented from it by the fraud of a party thereto, any other party who is thus led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party: Cal. 6623; Dak. Civ. C. 919.

## Art. 415. Extinction.

§ 4150. **General Principles.** Obligations are extinguished (1) by payment, (2) novation, (3) voluntary remission, (4) compensation, (5) confusion, (6) by the loss of the thing, (7) by nullity or rescission, (8) by the effect of the dissolving condition (§ 4232), (9) by prescription (see in Part IV.): La. 2130.

§ 4151. **Release by Operation of Law** happens when a creditor releases another who is bound jointly with, or primarily to, the debtor: Ga. 2362.

So also when the creditor accepts from the debtor a higher security for the same debt, not intended to be collateral thereto: Ga. 2362.

Intermarriage of the parties generally releases a debt: Ga. 2363.

But not a bond given in contemplation of marriage: Ga.

§ 4152. **Novations: Definition.** Novation is the substitution of a new obligation for an existing one: Cal. 6530; Dak. Civ. C. 863. One simple contract as to the same matter and on no new consideration does not destroy another between the same parties: Ga. 2724.

But in Georgia, if new parties are introduced by novation so as to change the person to whom the obligation is due, the original contract is at an end.

Novation is made (1) by the substitution of a new obligation between the same parties with intent to extinguish the old; (2) by the substitution of a new debtor in place of the old, with intent to release the latter; (3) by the substitution of a new creditor in place of the old, with intent to transfer the rights of the latter to the former. It is made by contract, and is subject to all the rules concerning contracts in general. When the obligation of a third person, or an order upon such person, is accepted in satisfaction, the creditor may rescind such acceptance if the debtor prevents such person from complying with the order or from fulfilling the obligation; or if at the time it was received such person is insolvent unknown to the creditor, or becomes insolvent before the creditor can with reasonable diligence present the order: Cal. 6531-3; Dak. Civ. C. 864-6.

§ 4153. **Louisiana Law of Novation.** Novation is a contract, consisting of two stipulations: one to extinguish an existing obligation, the other to substitute a new one in its place.

To constitute a novation, there must be, at the time it is made, a valid obligation on which it can operate; if the first obligation, which it is intended to replace by the new one, be void, or if there be no such obligation, then the new obligation is of no effect.

The pre-existent obligation must be extinguished, otherwise there is no novation; if it be only modified in some parts, and any stipulation of the original obligation be suffered to remain, it is no novation.

All kinds of legal obligations are subject to novation.

Novation takes place in three ways: —

1. When a debtor contracts a new debt to his creditor, which new debt is substituted to the old one, which is extinguished.
2. When a new debtor is substituted to the old one, who is discharged by the creditor.
3. When, by the effect of a new engagement, a new creditor is substituted to the old one, with regard to whom the debtor is discharged.

Novation can be made only by persons capable of contracting; it is not presumed; the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt.

Novation by the substitution of a new debtor may take place without the concurrence of the former debtor.

The delegation, by which a debtor gives to the creditor another debtor who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation.

The creditor who has discharged the debtor by whom a delegation has been made has no recourse against the debtor, if the person delegated becomes insolvent, unless that act contains an express reservation to that purpose, or unless the delegated person was in a state of open failure or insolvency at the time of the delegation.

The mere indication made by a debtor of a person who is to pay in his place does not operate a novation.

The same is to be observed of the mere indication made by the creditor of a person who is to receive for him.

The privileges and mortgages of the former credit are not transferred to that which is substituted to it, unless the creditor has expressly reserved them.

When novation takes place by the substitution of a new debtor, the original privileges and mortgages of the credit cannot be transferred on the property of the new debtor.

When novation takes place between the creditor and one of the debtors *in solido*, the privileges and mortgages of the former credit can be reserved only on the property of him who contracts the new debt.

By the novation made between the creditor and one of the debtors *in solido*, the co-debtors are discharged.

The novation that takes place with regard to the principal debtor discharges the sureties.

Nevertheless, if the creditor has required, in the first case, the accession of the co-debtors, or in the second, that of the sureties, the former credit subsists, if the co-debtors or the sureties refuse to accede to the new arrangement: La. 2185-2193.

**§ 4154. Of Confusion.** When the qualities of debtor and creditor are united in the same person, there arises a confusion of right, which extinguishes the obligation.

The confusion which takes place by the concurrence of the qualities of creditor and principal debtor in the same person, avails the sureties of the principal debtor.

That which takes place by the concurrence of the qualities of creditor and surety in the same person does not operate the extinction of the principal obligation.

That which takes place in the person of the creditor, avails his co-debtors *in solido* only for the portion in which he was debtor: La. 2217-8.

**§ 4155. Of the Loss of the Thing Due.** When the certain and determinate substance which was the object of the obligation is destroyed, is rendered unsalable, or is lost, so that it is absolutely not known to exist, the obligation is extinguished, if the thing has been destroyed or lost, without the fault of the debtor, and before he was in default.

Even when the debtor is in default, if he has not taken upon himself fortuitous accidents, the obligation is extinguished, in case the thing might have equally been destroyed in the possession of the creditor, if it had been delivered to him.

The debtor is bound to prove the fortuitous accident he alleges.

In whatever manner a thing stolen may have been destroyed or lost, its loss does not discharge the person who carried it off from the obligation of restoring its value.

When the thing is destroyed, rendered unsalable, or lost, without the fault of the debtor, he is bound, if he has any claim or action for indemnification, on account of that thing, to make over the same to the creditor : La. 2219-2220.

## Art. 416. Payment.

§ 4160. **To Whom Payment may be Made.** Payment of money due to the creditor or his authorized or general agent, or one whom the creditor accredits as his agent, though he may not be so, or to his partner interested with him in the money, is good; and if such agent receives property other than money as money, the creditor is bound thereby : Ga. 2864. But payment to a nominal party, or a naked trustee, without authority to receive, if made collusively and with intention to defeat the true owner, is of no effect : Ga. 2865.

§ 4161. **Payment by Post** is at the risk of the sender, unless done by direction, either express or implied, of the creditor or his agent : Ga. 2866.

§ 4162. **What is Payment.** Bank-bills, if received in payment, are warranted by the payer to be genuine, and that, as far as he knows, the bank is solvent : Ga. 2867.

Bank checks and promissory notes are not payment until themselves paid : Ga. ; see Art. 470.

**Definition.** Performance of an obligation for the delivery of money only is called payment : Cal. 6478 ; Dak. Civ. C. 832.

By payment is meant not only the delivery of a sum of money, when such is the obligation of the contract, but the performance of that which the parties respectively undertook, whether it be to give or to do. He who is bound to do, or not to do, or to give, is indifferently called the obligor or the debtor; and he to whom the obligation is made is in like manner without distinction called the obligee or the creditor : La. 2131-2.

§ 4163. **Effect.** In an action of debt on a bond or sealed bill or judgment, payment of the money due thereon may be pleaded in bar : N.J. *Obligations*, 4 ; Va. 168,1 ; W.Va. 154,1. See § 4177 and in Part IV.

§ 4164. **Manner.** Whenever action is brought on a bond for the payment of money, the penalty being greater than the sum to be paid, it is a bar if the obligor, etc., has paid such sum with interest at any time before suit brought, although not strictly according to the condition : R.I. 212,9 ; N.J. *Obligations*, 6. Compare § 4177.

§ 4165. **Stakeholders.** A stakeholder of money risked on a wager is bound to repay it to the party depositing at any time he may demand it before it is actually paid over to the winner; but if paid over to the winner in good faith, and without notice of the depositor's intention to retract, it is a protection : Ga. 2868.

§ 4166. **Appropriation of Payments.** When a payment is made by a debtor to a creditor holding several demands against him, the debtor has the right to direct the claim to which it shall be appropriated; if he fails to do so, the creditor has such right; if he also fails to do so, the law directs the application in such manner as is reasonable and equitable, both to the parties and to third persons; as a general rule, the oldest lien or item will be first paid : Ga. 2869.

Where a debtor, under several obligations to another, does an act by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows : —

1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation be manifested to the creditor, it must be so applied.

2. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him, both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion;



and an application once made by the creditor cannot be rescinded without the consent of the debtor.

3. If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and if there be more than one obligation of a particular class, to the extinction of all in that class ratably: —

1. Of interest due at the time of the performance.
2. Of principal due at that time.
3. Of the obligation earliest in date of maturity.
4. Of one not secured by lien or collateral undertaking.
5. Of one thus secured: Cal. 6479; Dak. Civ. C. 833.

The debtor of several debts has a right to declare, when he makes a payment, what debt he means to discharge.

The debtor of a debt, which bears interest or produces rents, cannot, without the consent of the creditor, impute to the reduction of the capital any payment he may make, when there is interest or rent due.

Every payment which does not extinguish both the principal and the interest must be imputed first to the payment of the interest.

When the debtor of several debts has accepted a receipt, by which the creditor has imputed what he has received to one of the debts specially, the debtor can no longer require the imputation to be made to a different debt, unless there have been fraud or surprise on the part of the creditor.

When the receipt bears no imputation, the payment must be imputed to the debt which the debtor had at the time most interest in discharging, of those that are equally due; otherwise to the debt which has fallen due, though less burdensome than those which are not yet payable.

If the debts be of a like nature, the imputation is made to the debt which has been longest due; if all things are equal, it is made proportionally: La. 2163-6.

So, in other states, where a payment is made upon any debt, it is to be applied first to the reduction of any interest due, and the balance, if any, to the reduction of the principal: Vt. 1997; Ky. 60,1,5; Ark. 4738; Ga. 2055; Ala. 2091; Miss. 1144.

In Vermont, annual interests unpaid bear simple interest from the time they become due to final settlement; and payments made in any year are applied, *first*, to liquidate such simple interest accruing on interest; *second*, to the annual interest due; and *third*, to the principal: Vt. 1998.

But in two states, if any payment does not extinguish the interest then due on the debt, no interest shall be calculated on the balance of interest, but only on the principal amount, up to the time of the next payment: Ark., Ga.

**§ 4167. Civil Law of Payment or Performance in General.** Every payment presupposes a debt; what has been paid without having been due is subject to be reclaimed.

That cannot be reclaimed that has been voluntarily given in discharge of a natural obligation.

An obligation may be discharged by any person concerned in it, such as a co-obligor or a surety.

The obligation may even be discharged by a third person no way concerned in it, provided that person act in the name and for the discharge of the debtor, or that, if he act in his own name, he be not subrogated to the rights of the creditor.

A third person may, for the advantage of the obligor, put the obligee in default, by offering to perform the obligation on the part of the debtor, even without his knowledge; but it must be for the advantage of the debtor, and not merely to change the creditor.

The obligation of doing cannot be discharged by a third person against the will of the creditor, when it is the interest of the latter that it be fulfilled by the debtor himself.

But where the act to be done may as well be performed by a third person, who offers to do it, as by the obligor, then it may be discharged by this third person, or the creditor may be put in default by his offer to perform it, always under the condition that some advantage may result to the debtor, or that the offer be made at his request.

If the debtor give a thing in payment of his obligation, which he has no right to deliver, it does not discharge his obligation, and the owner of the thing given may reclaim it in the hands of the creditor, unless the obligation has been discharged by the payment of money, or the delivery of some of those things which are consumed in the use, and the creditor has used

them; in which cases neither the money nor the things consumed can be reclaimed, and the payment will be good.

If money, or other stolen property, be given in payment, the payment is not good, and the owner may recover the amount paid.

The payment must be made to the creditor, or to some person having a power from him to receive it, or who is authorized by a court, or by law, to receive it for him.

Payment made to a person not having power to receive it for the creditor is valid, if the creditor has ratified it, or has profited by it.

If the power be revoked, either expressly or by the death of the creditor, payment to the bearer of the power will discharge the debtor, provided he were ignorant of the revocation.

A power to receive payment is revoked, as well by such change in the state of the creditor as renders him incapable himself of legally receiving, as by his death or express revocation; if he should become interdicted, or (if a woman) she should be married, the powers given before these changes took place are void.

A payment made to an attorney-at-law, employed to sue for the payment, will discharge the debtor, although the attorney be not specially empowered to receive the debt.

If the authority of him who gave the power ceases, the power is revoked. Thus a power given by a curator, an executor, or a tutor is no longer valid, after he ceases to exercise his trust.

Payments in general can legally be made only to the creditor, or some one empowered by him. The debtor, however, is discharged by a payment made in good faith to one who is really not the creditor nor empowered by him, in the following cases:—

1. When the debt is due on an instrument in writing, payable to the bearer, or payable to order, and indorsed, or if not payable to the bearer, if it be assigned in blank, or to bearer, and the payment is made to one in possession of the original evidence of the debt.

2. When the person to whom the payment has been made was at the time in possession of the evidence of the debt, under an order of a competent court, as syndic or trustee of creditors, as curator, executor, heir, or by virtue of any office or other trust, that apparently gives him the power to receive the payment.

3. When the debt accrues for rents or other incidents of the administration of immovable property, or for the sale or expenses relative to movable property, of which the person is in possession by virtue of any of the titles mentioned in the last preceding rule, or where he has been in the uninterrupted possession of such immovable property for more than one year under any other title.

A special power to sell includes a power to receive the price, unless the contrary appear from the power, or unless the power be only to sell on a credit, in which case the attorney has no right to receive the price.

Payment made to the creditor is not valid, if he is one of those whom the law has placed under an incapacity to receive it, unless the debtor prove that the payment was applied to some object of utility for the creditor; it is not sufficient if it was applied merely to contribute to his pleasure.

But if the incapacity to receive the payment arose from the privation of civil rights by the effect of a sentence, then the payment is not good, although the payment were applied to the utility of the creditor.

Payment made by a debtor to his creditor, to the prejudice of a seizure or an attachment, is not valid with regard to the creditors seizing or attaching; these may, according to their claims, oblige him to pay anew, and he has in that case alone recourse against the creditor.

The creditor cannot be constrained to receive any other thing than that which is due, although the value of the thing tendered be equal, or even greater.

But if the thing agreed to be delivered be a specific object, and it be destroyed before the time agreed for its delivery, the debtor may be forced to give, and the creditor to receive, the value of this thing in money.

In the case provided for in the last preceding paragraph, and in all other cases where the value of the thing to be delivered enters into the measure of damages, its price, or that sum for which others of the like quality could have been purchased at the time agreed on for the delivery, is to be the rule for calculating the value; or, if no time was stipulated, then the price, at the time of the demand, must be referred to.

The debtor cannot oblige the creditor to receive in part the payment of a debt, even divisible.

But if the sum due consists of several different debts, or of rents falling due at different times, the debtor may force the creditor to receive the payment of one of the debts, or of a single term of the rent; but a creditor is not obliged to receive the rent of a later term, when there is a former due.

The debtor of a certain and determinate matter is discharged by the delivery of the thing in the state in which it is at the time of delivery, provided that, previously to the deterioration, he was not in default.

If the debt be of a thing which is determined only by its species, the debtor, in order to his discharge, is not bound to deliver it of the best kind, but he cannot tender it of the worst.

The payment must be made in the place specified in the agreement. If the place be not thus specified, the payment, in case of a certain and determinate substance, must be made in the place where was, at the time of the agreement, the thing which is the object of it.

These two cases excepted, the payment must be made at the dwelling of the debtor.

The expenses attending the payment are at the charge of the debtor: La. 2133-2158.

**§ 4168. Of Payment with Subrogation.** Subrogation to the right of a creditor in favor of a third person who pays him, is either conventional or legal.

The subrogation is conventional: —

1. When the creditor, receiving his payment from a third person, subrogates him in his rights, actions, privileges, and mortgages against the debtor; this subrogation must be expressed and made at the same time as the payment.

2. When the debtor borrows a sum for the purpose of paying his debts, and intending to subrogate the lender in the rights of the creditor. To make this subrogation valid, it is necessary that the act of borrowing and the receipt be executed in presence of a notary and two witnesses; that, in the act of borrowing, it be declared that the sum was borrowed to make the payment, and that in the receipt it be declared that the payment has been made with the money furnished for that purpose by the new creditor. That subrogation takes place independently of the will of the creditor.

Subrogation takes place of right: —

1. For the benefit of him who, being himself a creditor, pays another creditor, whose claim is preferable to his by reason of his privileges or mortgages.

2. For the benefit of the purchaser of any immovable property, who employs the price of his purchase in paying the creditors, to whom this property was mortgaged.

3. For the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it.

4. For the benefit of the beneficiary heir, who has paid with his own funds the debts of the succession.

The subrogation established by the preceding provisions takes place as well against the sureties as against the debtors. It cannot injure the creditor, since, if he has been paid but in part, he may exercise his right for what remains due, in preference to him from whom he has received only a partial payment: La. 2159-2162.

**§ 4169. Of Tenders of Payment and Consignment.** When the creditor refuses to receive his payment, the debtor may make him a real tender; and on the creditor's refusal to accept it, he may consign the thing or the sum tendered.

A real tender, followed by a consignment, exonerates the debtor; it has the same effect, with regard to him, as a payment, when it is validly made; and the thing thus consigned remains at the risk of the creditor.

To make a real tender valid, it is necessary: —

1. That it be made to the creditor having capacity to receive it.

2. That it be made by a person capable of paying.

3. That it be for the whole of the sum demandable, of the arrearages of interest due, for the liquidated costs, and for a sum towards the costs not liquidated, the deficit of which sum is hereafter to be made up.

4. That the term be expired, if it has been stipulated in favor of the creditor.

5. That the condition on which the debt has been contracted be fulfilled.

6. That the tender be made in the place agreed upon for the payment, or that, if there be no special agreement as to the place of payment, it be made either to the creditor himself, or at his dwelling, or at the house chosen for the execution of the agreement.



The mode in which a tender and consignment must be made is pointed out in the laws regulating the practice of the courts : La. 2167-9.

### Art. 417. Performance.

§ 4170. **Effect.** Full performance of an obligation by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it: Cal. 6473; Dak. Civ. C. 827.

Performance of an obligation by one of several persons who are jointly liable under it, extinguishes the liability of all: Cal. 6474; Dak. Civ. C. 828.

An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the title on deposit: Cal. 6475; Dak. Civ. C. 829.

§ 4171. **What is Performance.** By the Georgia code, performance of contracts, to be effectual, must be by the party bound to perform, or his agent (where personal skill is not required) or some one substituted by consent in his place: Ga. 2870. It must be a substantial compliance with the spirit, and not the letter only, of the contract: Ga. It must be made within a reasonable time: Ga.

If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance: Cal. 6476; Dak. Civ. C. 830.

§ 4172. **Excuse for Non-Performance.** If performance is impossible, and becomes so by act of God, such impossibility is itself a defence equivalent to performance: Ga. 2871. But if by proper prudence such impossibility might have been avoided by the promisor, it ceases to be an excuse for non-performance: Ga. If the non-performance is caused by the act or fault of the opposite party, that excuses the other party from performance: Ga. 2873.

§ 4173. **Prevention of Performance or Offer.** The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes to the extent to which they operate:—

1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,

3. When the debtor is induced not to make it by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.

If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

If the performance of an obligation is prevented by any cause excusing performance, other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

A refusal by a creditor to accept performance made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it: Cal. 6511-5; Dak. Civ. C. 855-8.

§ 4174. **Part-Performance** is a defence *pro tanto* in a severable contract, or one admitting of apportionment: Ga. 2872.

A partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is not presumed to be voluntary: Cal. 6477; Dak. Civ. C. 831.

§ 4175. Tender properly made is equivalent to performance: R.I. 212,10; Ill. 135,2; Cal. 6485; Dak. Civ. C. 834; Ga. 2874. It must be certain and unconditional: Cal. 6494; Dak. Civ. C. 843; Ga. So, it must be in full of the specific debt or obligation, and not in part: Cal. 6486; Dak. Civ. C. 835; Ga. It may be made by an agent or friend: Cal. 6487; Dak. Civ. C. 836; Ga. It may be made to an agent authorized to receive: Cal. 6488; Dak. Civ. C. 837; Ga. Or to one of two joint creditors: Cal., Dak. It may be made at any time before final trial; and if rejected, and not on any ground of informality, such informality cannot be afterwards urged in objection to the tender: Ga.

In the absence of an express provision to the contrary, an offer of performance may be made at the option of the debtor, —

1. At any place appointed by the creditor; or,
2. Wherever the person to whom the offer ought to be made can be found; or,
3. If such person cannot with reasonable diligence be found within this state, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can with reasonable diligence be found within the state; or,
4. If this cannot be done, then at any place within this state: Cal. 6489; Dak. Civ. C. 838.

Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards. Where an obligation does not fix the time for its performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform: Cal. 6490-1; Dak. Civ. C. 839, 840.

Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the mean time: Cal. 6492; Dak. Civ. C. 841.

An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor: Cal. 6493; Dak. Civ. C. 842.

An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer. The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance, unless the offer is accepted. A thing when offered by way of performance must not be mixed with other things from which it cannot be separated immediately and without difficulty. When a debtor is entitled to the performance of a condition precedent to or concurrent with performance on his part, he may make his offer to depend upon the due performance of such condition: Cal. 6495-8; Dak. Civ. C. 844-7.

An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor in some bank of deposit within this state, of good repute, and notice thereof is given to the creditor: Cal. 6500; Dak. Civ. C. 849.

Tender of specific articles must be such as to enable the party to whom tendered to take immediate possession, and at the time and place agreed on in the contract; if no place is agreed on, they must be carried to the person entitled to them, if residing within the state, unless from the nature of the articles or the contract another place of delivery be inferred: Ga. 2875.

If the articles are cumbersome, the deliverer may demand of the receiver to appoint a convenient place of delivery, and on failure to do so the tender shall be considered complete: Ga.

In a tender of money the coin need not be actually presented unless demanded: Ga. 2374.

If a note, bond, bill, or other instrument in writing is for the payment or delivery of personal property other than money, and no particular place is specified therein for the delivery, the maker may tender such personal property on the day of delivery at the place where the obligee resided or had his place of business at the time of the execution of the instrument: Ill. 135,1; Col. 112; Ida. 1874-5, p. 650,7; Ariz. 3462.

If the property is too ponderous to be easily moved, or the obligee at the time of execution of the instrument had not a known residence or place of business within the county (within the state : Io.) where the obligor resided, etc., then a tender may be made at the place where the obligor resided or had his place of business at the time of the execution of the instrument : Ill. ; Io. 2099 ; Col. ; Ida. ; Ariz.

A tender made as above is equally valid, although the instrument have been assigned : Ill., Col., Ida., Ariz.

But in Iowa, tender is to be made, if the maker have notice of the assignment, at the assignee's residence, if in the state, and no farther than the payee's : Io. 2100.

So, in Iowa, when a contract for labor or for the payment or delivery of property other than money, does not fix a place of payment, the maker may tender the labor or property at the place where the payee resided at the time of making the contract, or at the performance of it, or where the assignee resides, when due, if it was assigned : Io. 2098.

In Tennessee, the property is payable at the payer's residence on demand unless it be otherwise ascertained in the contract, or unless the payee give him ten days' notice of the time and place, which must be in the county and not further from the payer's residence than from the payee's : Tenn. 2459-2460.

An offer in writing to pay a particular sum of money or deliver a written instrument or specific personal property, if not accepted, is equivalent to an actual tender (but the other party has a right to demand an inspection of the article tendered before deciding) : Io. 2105 ; Cal. 12074 ; Ore. Civ. C. 842 ; Dak. Civ. C. 848 ; Ida. Civ. C. 983 ; Uta. C. Civ. P. 1258.

A person making a tender may demand a receipt in writing, duly signed, as a condition precedent to delivery : Ct. 1879,26 ; Io. 2106 ; Cal. 12075,6499 ; Ore. Civ. C. 843 ; Dak. ; Ida. Civ. C. 984 ; Uta. C. Civ. P. 1259 ; Ga. 2874.

The other person must make any objection to the article tendered at the time, or he will be deemed to have waived it : Io. 2107 · Cal. 6501,12076 ; Ore. Civ. C. 844 ; Dak. Civ. C. 850.

**§ 4176. Tender after Suit Brought.** A tender may also commonly be made after an action is brought upon any contract, of the whole sum due thereon, with the legal costs of suit incurred up to the time of tender, either to the plaintiff or his attorney, and the plaintiff will recover no further costs : Mass.<sup>a</sup> 168,24-5 ; Ill. 135,4-5 ; Mich. 1764-5 ; Wis. 4266. For other states, see in Part IV.

So, a person guilty of a trespass or injury may, after suit brought, tender a sum he deems sufficient in amends, and costs ; and if the court or jury find this sufficient, it not being accepted, the plaintiff shall be allowed no costs after the tender, but shall pay the defendant his costs incurred after that time : Ill. 135,6 ; Mich.

NOTE. — <sup>a</sup> At any time at least four days before the return day of such suit.

**§ 4177. Effect of Tender.** A valid tender of chattels transfers the title thereto to the person bound to receive : Ill. 135,2 ; Io. 2101 ; Cal.<sup>a</sup> 6502 ; Col. 113 ; Dak.<sup>a</sup> Civ. C. 851 ; Ida. 1874-5, p. 650, § 8 ; Ga. 2877 ; Ariz. 3463.

He may maintain an action for the recovery thereof or for damages, if the possession be withheld : Ill., Io., Col., Ida., Ariz.

And the possession of the promisor, if he retains possession from that time, is for the benefit of the owner, but without liability to account for profits, or for more than ordinary prudence in their preservation and protection : Ga.

And the maker of the tender is discharged from all legal liability : Ill., Col., Ida., Ariz.

So, in several, if the property be perishable, or require feeding, etc., and the holder of the instrument be absent at the time of tender, the person making the tender may preserve or feed the same, and have a lien on the property tendered for such care and expense : Ill. ; Io. 2102 ; Col. ; Ida. ; Ariz.



In all cases where a tender is made, and full payment offered, by discount or otherwise, as the party by the contract ought to do, and the party to whom the tender is made refuses the same, and yet afterwards sues for the debt or goods tendered, he can recover no costs : Ill. 135,3. See in Part IV.

The payment, or tender of payment, of the whole sum due upon any contract for the payment of money, though made after the money is due, may be pleaded to an action subsequently brought in like manner and effect as if made at the time prescribed in the contract : Mass. 168,23 ; Wis. 4265 ; Del. 106,27 ; Miss. 1553. Compare § 4164.

If a tender of money or property is not accepted, the party making it may retain possession ; but if afterwards the other party accept the tender, he must deliver the articles within a reasonable time, or it will be as if he had never tendered them at all : Io. 2104.

If anything is given to a creditor by way of performance which he refuses to accept as such, he is not bound to return it without demand ; but if he retains it, he is a gratuitous depositary thereof : Cal. 6505 ; Dak. Civ. C. 854.

NOTE. — *a* If the debtor at the time signifies his intention to that effect.

§ 4178. **Demand.** If the promise be to deliver on demand, the demand must be reasonable as to time, place, and manner ; if the promise be to deliver at a certain time and place, a tender there and then is good, though the receiver is not present : Ga. 2876.

The person offering a thing other than money by way of performance must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer, and if with reasonable diligence he can find a suitable depositary therefor until he has deposited it with such person : Cal. 6503 ; Dak. Civ. C. 852.

An offer of payment or other performance duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof : Cal. 6504 ; Dak. Civ. C. 853.

## Art. 418. Release and Compromise.

§ 4180. **Accord and Satisfaction : Definition.** Accord and satisfaction is where the parties by a subsequent agreement have satisfied the former one ; and the latter agreement has been executed : Ga. 2878.

An accord is an agreement to accept, in extinction of an obligation, something different from, or less than, that which the person so agreeing is entitled to : Cal. 6521 ; Dak. Civ. C. 859.

The execution of a new agreement may itself amount to a satisfaction where it is so expressly agreed by the parties ; and without such agreement, if the new promise is founded on a new consideration, the taking of it is a satisfaction of the former contract : Ga.

The accord and satisfaction may not amount to an extinguishment of the original debt, but may extend only to suspend the execution or collection thereof for a limited time ; in the mean time, an action cannot be sustained : Ga. 2879.

The accord must be of some advantage, legal or equitable, to the creditor, or it will not have the effect of barring him from his legal rights : Ga. 2880. Examples of such an advantage are the acknowledgment of a disputed title, or the securing of a doubtful claim : Ga.

**Civil Law of Transaction or Compromise.** A *transaction* or *compromise* is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

This contract must be reduced into writing.

A man to transact must have the capacity to dispose of the things included in the transaction.

The tutor of a minor or the curator of a person interdicted or absent cannot make a transaction without being authorized thereto by the judge.

Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed ; and they do not extend to differences which the parties never intended to include in them.

The renunciation which is made therein to all rights, claims, and pretensions extends only to what relates to the differences on which the transaction arises.

If he who has transacted concerning a right which he had in his own person acquires afterwards a like right which belonged to another, the transaction cannot be prejudicial to his new right.

One may add to a transaction the stipulation of a penalty against the party who fails to perform it; and in this case the non-performance of what has been agreed on gives a right to exact the penalty according to the tenor of the agreement, and pursuant to the rules recited in the laws of *Obligations*.

The creditor who transacts with the surety of his debtor may discharge the surety only, and the transaction will not diminish his right against the debtor. But if it is with the debtor himself that he has transacted, the surety will likewise have the benefit of the transaction, because his obligation is only an accessory to that of the principal debtor.

A transaction made by one of the interested parties is not binding for the others, and cannot be opposed by them.

Transactions have, between the interested parties, a force equal to the authority of things adjudged. They cannot be attacked on account of any error in law or any lesion. But an error in calculation may always be corrected.

A transaction may be rescinded notwithstanding whenever there exists an error in the person or on the matter in dispute. It may likewise be rescinded in the cases where there exists fraud or violence.

A transaction may also be rescinded when it has been made in execution of a title which is null, unless the parties have expressly compromised on the nullity.

A compromise entered into on documents which have since been found false, is null *in toto*.

A transaction respecting a suit terminated by a judgment which acquired the force of the thing adjudged, and of which the parties, or either of them, was ignorant, is null. If, however, the judgment is one from which there could be an appeal, the transaction is valid.

When parties have compromised generally on all the differences which they might have had with one another, the titles which they then knew nothing of and which were afterwards discovered, are not a cause of rescinding the transaction, unless they have been kept concealed on purpose by the deed of one of the parties.

But the transaction becomes void if it only relates to an object upon which it is proved by the titles newly discovered that one of the parties has no right at all : La. 3071-3083.

§ 4181. **Effect.** An agreement of the creditor to receive less than his debt cannot be pleaded as an accord, unless it be actually executed by the payment of the money or the giving of additional security, or the substitution of another debtor, or some other new consideration : N.C. 574 ; Ga. 2381.

Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed : Cal. 6522 ; Dak. Civ. C. 860.

Part-performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of a written agreement, though without any new consideration, extinguishes the obligation : Cal. 6524 ; Dak. Civ. C. 862.

No action can be maintained on a demand settled by a creditor or his attorney instructed to collect it, in full discharge thereof, by the receipt of any valuable consideration, however small : Me. 82,45.

§ 4182. **Compromise.** A compromise, or mutual accord and satisfaction, is binding on both parties : N.C. 574 ; Ga. 2382.

Acceptance by the creditor of the consideration of an accord extinguishes the obligation, and is called satisfaction : Cal. 6523 ; Dak. Civ. C. 861. An oral agreement for the compromise of a debt is as obligatory as if a seal were affixed : Ore. Civ. C. 743. See § 4131.

§ 4183. **Release.** An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration, or in writing, with or without new consideration : Cal. 6541 ; Dak. Civ. C. 867.

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him, must have materially affected his settlement with the debtor : Cal. 6542 ; Dak. Civ. C. 869.

For joint debtors, see §§ 4113, 4510.

A release by the other contracting parties is a complete defence: Ga. 2859. So, in Georgia, a rescission by consent.

A party may rescind without the consent of the opposite party for non-performance by him of his covenants, when both parties can be restored to their condition before the contract was made: Ga. 2860.

A covenant never to sue is equivalent to a release: Ga. 2861.

So, a bond to indemnify the debtor against his own debt: Ga.

**§ 4184. Of the Remission of the Debt.** The remission of the debt is either conventional, when it is expressly granted to the debtor by a creditor either having a capacity to alienate;

Or tacit, when the creditor voluntarily surrenders to his debtor the original title under private signature which establishes the obligation.

The surrender of the original title under private signature to one of the debtors *in solido* forms a presumption of the remission of the debt, or of its payment, in favor of his co-debtors; but proof may be adduced to the contrary.

The release or remission of a debt is presumed always to have been accepted by the debtor, and it cannot be revoked by the creditor.

The delivery to the debtor of the authenticated copy of a notarial act, by which the obligation is created, does not alone form a presumption of the release of the debt, but it may, when accompanied by other proof, form such presumption.

The remission or conventional discharge in favor of one of the co-debtors *in solido* discharges all the others, unless the creditor has expressly reserved his right against the latter.

In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission.

The remission of the thing given as a pledge does not suffice to raise a presumption of the remission of the debt.

The remission or even conventional discharge granted to a principal debtor discharges the sureties.

That granted to the sureties does not discharge the principal debtor.

That granted to one of the sureties does not discharge the others.

What the creditor has received from one of the sureties, in discharge of his suretyship, must be imputed to the debt, and goes towards the discharge of the principal debtor and the other sureties: La. 2199-2206.

**§ 4185. Of Compensation.** When two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts, in the manner and cases hereafter expressed.

Compensation takes place of course by the mere operation of law, even unknown to the debtors: the two debts are reciprocally extinguished, as soon as they exist simultaneously, to the amount of their respective sums.

Compensation takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable.

The days of grace are no obstacle to the compensation.

Compensation takes place, whatever be the causes of either of the debts, except in case, —

1. Of a demand of restitution of a thing of which the owner has been unjustly deprived.
2. Of a demand of restitution of a deposit and of a loan for use.
3. Of a debt which has, for its cause, ailments declared not liable to seizure.

The surety may oppose the compensation of what the creditor owes to the principal debtor.

But the principal debtor cannot oppose the compensation of what the creditor owes to the surety.

Neither can the debtor *in solido* oppose the compensation of what the creditor owes to his co-debtor.

The debtor, who has accepted purely and simply the transfer which a creditor has made of his rights to a third person, can no longer oppose to the latter the compensation which, before the acceptance, he might have opposed to the former.

As to the transfer which has not been accepted by the debtor, but which has been notified to him, it hinders only the compensation of credits posterior to that notification.



When the two debts are not payable at one and the same place, the compensation of them cannot be opposed, without allowing for the expense of the remittance.

When there are several compensable debts, due by the same person, the same rules are observed for the compensation as are established for imputation in § 4166.

Compensation cannot take place to the prejudice of the right acquired by a third person ; therefore he who, being a debtor, is become creditor since the attachment made by a third person in his hands, cannot, in prejudice to the person seizing, oppose compensation.

He who has paid a debt which was of right extinguished by compensation, can no longer, in exercising the credit which he has not offered in compensation, avail himself, to the prejudice of a third person, of the privileges and mortgages that were attached to it, unless he had a just cause to be ignorant of the credit which was to compensate his debt : La. 2207-2216.

## Art. 419. Other Defences.

§ 4190. **General Principles.** Consent is deemed to have been obtained through one of the five causes mentioned in § 4108 only when it would not have been given had such cause not existed : Cal. 6568 ; Dak. Civ. C. 879.

Engagements made through error, violence, fraud, or menace are not absolutely null, but are voidable by the parties injured, either by exception to suits upon them or by direct action for the purpose : La. 1881-2.

**Civil Law.** Consent to a contract is void, if it be produced by violence or threats, and the contract is invalid.

It is not every degree of violence or every kind of threats that will invalidate a contract ; they must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation, or fortune. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, must be taken into consideration.

A contract produced by violence or threats is void, although the party in whose favor the contract is made did not exercise the violence or make the threats, and although he were ignorant of them.

Violence or threats are causes of nullity, not only where they are exercised on the contracting party, but also when the wife, the husband, the descendants, or ascendants of the party are the object of them.

The mere reverential fear of a relation in the ascending line, where no violence has been offered nor threats made, will not invalidate a contract.

No contract can be invalidated on an allegation of violence or threats, if it has been approved, either expressly after the violence or danger has ceased, or tacitly by suffering the time limited to elapse without causing it to be rescinded.

If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure authorized by law and by the circumstances of the case, are of this description.

But the mere forms of law to cover coercive proceedings for an unjust and illegal cause, if used or threatened in order to procure the assent to a contract, will invalidate it. An arrest without cause of action or a demand of bail in an unreasonable sum, or threats of such proceeding, by this rule, invalidate a contract made under their pressure.

A contract made with one having no agency in the violence used or the threats made for the purpose of delivering the party from the constraint under which he is, or from the danger with which he is menaced, shall not be invalidated by reason of such violence or threats, provided the contract be made in good faith and without collusion with the offending party. A contract to procure a rescue of person or goods from pirates or robbers is an example of this rule.

All the above articles relate to cases where there may be some other motive besides the violence or threats for making the contract. Where, however, there is no other cause for the contract, any threats, even of slight injury, will invalidate it : La. 1850-9.

§ 4191. **Duress** consists in :—

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife ;

2. Unlawful detention of the property of any such person ; or,

3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive : Cal. 6569 ; Dak. Civ. C. 880.

Duress, either of imprisonment or by threats, or arts by which the free will of the party is restrained, or his consent induced, makes void the contract : Ga. 2752. Legal imprisonment is not, however, duress, unless used for illegal purposes : Ga.

*Menace* consists in a threat, —

1. Of such duress as is specified in subdivisions 1 and 3 above ;

2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section ; or,

3. Of injury to the character of any such person : Cal. 6570 ; Dak. Civ. C. 881.

§ 4192. **Fraud**, as a general principle, in Georgia, vitiates all contracts : Ga. 2751. So, of the written contracts enumerated in Art. 402 : Ariz. 3461. And so also as against an assignee : Ariz. So also of court contracts (§ 4100) : Ga. 2770.

See also Arts. 424, 470.

In Georgia, fraud will not be presumed ; but being in itself subtle, slight circumstances are sufficient to prove it : Ga. 2751.

**Civil Law.** Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party or to cause an inconvenience or loss to the other. From which definition are drawn the following rules : —

1. Error is an essential part of the definition ; an article that cannot deceive can have no effect in influencing the consent, and cannot injure the validity of the contract.

2. The error must be on a material part of the contract, — that is to say, such part as may reasonably be presumed to have influenced the party in making it ; but it needs not be the principal cause of the contract, as it must be in the case of simple error without artifice.

3. A false assertion as to the value of that which is the object of the contract is not such an artifice as will invalidate the agreement, provided the object is of such a nature and is in such a situation that he who is induced to contract by means of the assertion might with ordinary attention have detected the falsehood ; he shall then be supposed to have been influenced more by his own judgment than the assertion of the other.

4. But a false assertion of the value or cost or quality of the object will constitute such artifice, if the object be one that requires particular skill or habit, or any difficult or inconvenient operation, to discover the truth or falsity of the assertion. Sales of articles falsely asserted to be composed of precious metals, sales of merchandise by a false invoice, of any article by a false sample, of goods in packages or bales which cannot without inconvenience be unpacked or inspected, or where the party making the sale avoids the inspection with intent to deceive, of goods at sea or at a distance, are, with others of a like nature, referable to this rule.

5. It must be caused or continued by artifice, — by which is meant either an assertion of what is false or a suppression of what is true, in relation to such part of the contract as is stated in the second rule.

6. The assertion and suppression mentioned in the last preceding rule mean not only an affirmation or negation by words, either written or spoken, but any other means calculated to produce a belief of what is false, or an ignorance or disbelief of what is true.

7. The artifice must be designed to obtain either an unjust advantage to the party for whose benefit the artifice is carried on or a loss or inconvenience to him against whom it is practised, although attended with advantage to no one.

8. It is not necessary that either of the effects mentioned in the last preceding rule should have actually been produced ; it is sufficient to constitute the fraud that such would be the effect of the contract if it were actually performed.

9. If the artifice be practised by a party to the contract, or by another with his knowledge or by his procurement, it vitiates the contract ; but if the artifice be practised by a third person, without the knowledge of the party who benefits by it, the contract is not vitiated by the fraud, although it may be void on account of error, if that error be of such a nature as to invalidate it. In this case the party injured may recover his damages against the person practising the fraud.

10. In the words “ loss or inconvenience ” which may be suffered by the party is included the preventing him from obtaining any gain or advantage which without the artifice he might have obtained.

11. If the advantage to be gained by the party in favor of whom the artifice is practised gives him no unjust advantage, — that is to say, no advantage at the expense of the other party, and this latter would neither suffer inconvenience nor loss in consequence of the deception, if the contract were performed, — the artifice does not vitiate it.

12. Combinations with respect to sales to enhance the price by false bids or offers, or to depress it by false assertions, are artifices which invalidate the contract, when practised by those who are parties to it, or give rise to an action for damages where they are not.

Fraud, like every other allegation, must be proved by him who alleges it; but it may be proved by simple presumptions or by legal presumptions, as well as by other evidence. The maxim that fraud is not to be presumed means no more than that it is not to be imputed without legal evidence.

Some circumstances and acts attending particular contracts are by law declared to be conclusive; and others, presumptive evidence of fraud. These laws will be found in the proper divisions of this Code treating of these contracts: La. 1847-9.

Fraud is either actual or constructive.

Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; or (5) any other act fitted to deceive.

Constructive fraud consists: —

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Actual fraud is always a question of fact: Cal. 6572-4; Dak. Civ. C. 883-5.

§ 4193. **Undue Influence** consists: —

1. In the use by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

2. In taking an unfair advantage of another's weakness of mind; or,

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress: Cal. 6575; Dak. Civ. C. 886.

§ 4194. **Mistake** may be either of fact or law.

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in, —

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed.

Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from, —

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

Mistake of foreign laws is a mistake of fact: Cal. 6576-6579; Dak. Civ. C. 887-890.

§ 4195. **Of Error, its Division and Effects.** Error, as applied to contracts, is of two kinds, —

1. Error of fact.

2. Error of law.

That is called error of fact which proceeds either from ignorance of that which really exists or from a mistaken belief in the existence of that which has none.



He is under an error of law who is truly informed of the existence of facts, but who draws from them erroneous conclusions of law.

Errors may exist as to all the circumstances and facts which relate to a contract; but it is not every error that will invalidate it. To have that effect, the error must be in some point which was a principal cause for making the contract, and it may be either as to the motive for making the contract to the person with whom it is made, or to the subject-matter of the contract itself: La. 1820-3.

**Of Error in the Motive.** The reality of the cause is a kind of precedent condition to the contract, without which the consent would not have been given, because the motive being that which determines the will, if there be no such cause where one was supposed to exist, or if it be falsely represented, there can be no valid consent.

The error in the cause of a contract, to have the effect of invalidating it, must be on the principal cause when there are several. This principal cause is called the *motive*, and means that consideration without which the contract would not have been made.

No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it.

But wherever the motive is apparent, although not made an express condition, if the error bears on that motive, the contract is void. A promise to give a certain sum to bear the expenses of a marriage, which the party supposes to have taken place, is not obligatory, if there be no marriage.

Thus, too, if a suit be brought on an obligation purporting to have been made by the ancestor of the defendant, and, supposing it to be true, the defendant enters into a compromise or promise to pay, the compromise or promise is void if it should be afterwards discovered that the obligation was forged.

In the same manner a compromise of a suit, and any obligation made in consequence of it, is void, if at the time, but unknown to the parties, the suit be finally decided. But if the decision be not final, but subject to appeal or revision, the compromise is valid.

A compromise also is void where one of the parties is ignorant of the existence of a paper which, being afterwards discovered, shows that the other had no right; and this whether the other party knew the existence of the paper or not.

But if the compromise be of all differences generally, and there were other subjects of dispute besides that in which the error existed of sufficient importance to raise a presumption that, even if the error had been discovered, the compromise would still have been made, then such error shall not invalidate the contract.

In all cases, however, when the information which would have destroyed the error has been withheld by the other party to the contract, it comes under the head of fraud, and invalidates the contract.

Error in the motive also is shown in the case either of an insurance on property or an annuity on lives. If the property be lost or the life be at an end at the time of making the contract, there is no obligation, unless, in the case of the insurance, it be expressly stipulated that the insurer takes the risk of those events, from a period prior to the contract. If the same express stipulation take place in the case of the annuity, it then becomes an insurance, and is valid for the same reason: La. 1824-1833.

**Error as to the Person.** Error as to the person with whom the contract is made will invalidate it, if the consideration of the person is the principal or only cause of the contract, as it always is in the contract of marriage.

In contracts of beneficence the consideration of the person is presumed by law to be the principal cause.

In onerous contracts, — such as sale, exchange, loan for interest, letting and hiring, — the consideration of the person is by law generally presumed to be an incidental cause, not a motive for a contract.

There are exceptions to the rule contained in the last preceding paragraph.

If from the nature of the onerous contract it results that any particular skill or quality be required in its execution, which the party with whom the contract is made is supposed to possess, then the consideration of the person is presumed to be the principal cause, and error as to the person invalidates the contract. Thus, if intending to employ an architect of great eminence, the party addresses himself by mistake to one of the same name, who has little or no skill, the promise made to him for compensation is void; but if anything be done by the person

thus employed, who was ignorant of the mistake, a compensation proportioned to his service is due.

Error as to the quality or character in which the party acts, as well as a mistake as to the person himself, invalidates a contract when such a quality or character is the principal cause of the agreement. Thus a compromise with one who is supposed to be the heir of a deceased creditor of the party contracting is void if he be not really the heir.

But if the person who is really entitled to the quality assumed by the one with whom the contract is made has contributed to the error by his neglect or by design, it will not vitiate the agreement. And in the case above stated a payment to, or a compromise with, one whom the true heir suffered to remain in possession of the inheritance and to act as heir, without notice, would be valid.

Contracts which could only be made by persons possessing certain powers, either delegated by contract, given by virtue of any private or public office, or vested by the operation of law, are also void when there is error as to the character, quality, or office under color of which such contract was made. Contracts entered into under forged or void powers or assignments, or with persons without authority assuming to act as public or private officers, are governed by this rule. Contracts, however, made in the name of another under void powers will be valid if ratified by the principal before the other contracting party has signified his dissent to the agreement : *La.* 1834-1840.

**Of Error as to the Nature and Object of the Contract.** Error as to the nature of the contract will render it void.

The nature of the contract is that which characterizes the obligation which it creates. Thus, if the party receives property, and from error or ambiguity in the words accompanying the delivery believes that he has purchased, while he who delivers intends only to pledge, there is no contract.

Error as to the thing which is the subject of the contract does not invalidate it, unless it bears on the substance or some substantial quality of the thing.

There is error as to the substance when the object is of a totally different nature from that which is intended. Thus, if the object of the stipulation be supposed by one or both the parties to be an ingot of silver, and it really is a mass of some other metal that resembles silver, there is an error bearing on the substance of the object.

The error bears on the substantial quality of the object when such quality is that which gives it its greatest value. A contract relative to a vase supposed to be of gold is void if it be only plated with that metal.

Error as to the other qualities of the object of the contract only invalidates it when those qualities are such as were the principal cause of making the contract : *La.* 1841-5.

**Errors of Law.** Error in law, as well as error in fact, invalidates a contract where such error is its only or principal cause, subject to the following modifications and restrictions : —

1. Although the party may have been ignorant of his right, yet if the contract made under such error fulfilled any such natural obligation as might from its nature induce a presumption that it was made in consequence of the obligation, and not from error of right, then such error shall not be alleged to avoid the contract. Thus the natural obligation to perform the will of the donor prevents the donee from reclaiming legacies or gifts he has paid under a testament void only for want of form.

2. A contract made for the purpose of avoiding litigation cannot be rescinded for error of law.

3. Error of law can never be alleged as the means of acquiring, though it may be invoked as the means of preventing loss or of recovering what has been given or paid under such error. The error under which a possessor may be as to the legality of his title shall not give him a right to prescribe under it.

4. A judicial confession of a debt shall not be avoided by an allegation of error of law, though it may be by showing an error of fact.

5. A promise or contract that destroys a prescriptive right shall not be avoided by an allegation that the party was ignorant or in an error with regard to the law of prescription.

6. If a party has an exception that destroys the natural as well as the perfect obligation, and through error of law makes a promise or contract that destroys such exception, he may avail himself of such error; but if the exception destroys only the perfect, but not the natural obligation, error of law shall not avail to restore the exception : *La.* 1846.

§ 4196. **Non est Factum.** The code of Georgia provides that a party may deny the original execution of the contract, or its existence in the shape then subsisting : Ga. 2851.

**Alteration**, if intentional, and in a material part, made by a person claiming a benefit under the contract, with intent to defraud the other party, avoids it at the option of such party : Ga. 2852. If the alteration be unintentional, or made by mistake, or in an immaterial part, or not with intent to defraud, if the contract as originally executed can be discovered, and is still capable of execution, it will be enforced by the court : Ga. So, if the alteration be made by a stranger, and not at the instance or by collusion of a party or privy, the contract, if still discoverable, will be enforced : Ga. The materiality of an alteration is a question of law ; the fact, a question for the jury : Ga. 2853.

§ 4197. **Confession and Avoidance.** Any fact going to show that the original contract is not obligatory, though executed, may be set up as a defence : Ga. 2856.

**Conditions**, precedent or subsequent, not complied with, may be a defence : Ga. 2857. So, "any act of the opposite party by which the obligation of the contract has ceased : " Ga. Where covenants are dependent, the failure of performance by the opposing party may be a good defence : Ga. 2858.

**Art. 420. Construction of Contracts.** See also Arts. 100,102.

§ 4200. **By the Court.** The code of Georgia provides that the construction of contracts is a question for the court ; matters of fact are to be found by the jury : Ga. 2754.

All contracts, public or private, are to be interpreted by the same rules, except where otherwise provided : Cal. 6635 ; Dak. Civ. C. 926.

§ 4201. **The Intention of the Parties**, so far as it is lawful, is the cardinal rule of construction : Cal. 6636 ; Ore.<sup>a</sup> Civ. C. 685 ; Dak. Civ. C. 927 ; Mon. C. Civ. P. 613 ; Ga. 2755 ; La. 1945.

If such intention be clear, and contravenes no rule of law (and does not involve an absurdity : Cal, Dak., La.), and sufficient words be used to arrive at the intention, it is to be enforced, irrespective of all technical or arbitrary rules of construction : Cal. 6638 ; Dak. Civ. C. 929 ; Ga. ; La. 1946.

If the intention of the parties differs among themselves, the meaning placed on the contract by one party, and known to be thus understood by the other party at the time, shall be held to be the true meaning : Io. 3652 ; Neb. 2,341 ; Cal. 11864 ; Ore. Civ. C. 690 ; Mon. C. Civ. P. 618 ; Ga. 2756.

It is the common intent of the parties—that is, the intention of all—that is to be sought for ; if there was a difference in this intent there was no common consent, and consequently no contract.

These rules are established by law for discovering the intent when either the words of the agreement are ambiguous or circumstances render it doubtful. They apply as well to verbal as to written agreements : Cal. 6637 ; Dak. Civ. C. 928 ; La. 1945.

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it : Cal. 6649 ; Dak. Civ. C. 940.

In cases of uncertainty not removed by the preceding rule, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party ; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party : Cal. 6654 ; Dak. Civ. C. 945.

Except where it is otherwise declared, the provisions of this title, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the interpretation of contracts ; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy : Cal. 8263 ; Dak. Civ. C. 1937.

NOTE. — <sup>a</sup> In all instruments this rule of construction applies.



§ 4202. **Rules of Interpretation: Parol Evidence** is inadmissible to add to, take from, or vary a written contract: Cal. 6625,6639; Ore. Civ. C. 682; Dak. Civ. C. 921,930; Mon. C. Civ. P. 610; Ga. 2757. See also *Evidence*, Part IV.

But all the attendant and surrounding circumstances may be proved, and if there is an ambiguity, latent or patent, it may be explained: Cal. 11860; Ore. Civ. C. 682,686; Mon. C. Civ. P. 614; Ga. So, if a part of a contract only is reduced to writing, and it is manifest that the writing was not intended to speak for the whole contract, parol evidence is admissible: Ga.

And in other states, the principal rule does not hold (1) where a mistake or imperfection of the writing is put in issue: Cal. 6640; Ore. Civ. C. 682; Dak. Civ. C. 931; Mon.; (2) where the validity of the agreement is the fact in dispute: Ore., Mon.; (3) or where the object of such evidence is to establish illegality or fraud: Cal., Ore., Dak., Mon.

**Contract**, in the principal provision and throughout the section, includes not only written agreements, but also (1) deeds: Ore., Mon.; (2) wills: Ore., Mon.

§ 4203. **Meaning of Words.** Words generally bear their usual and common signification: Cal. 11861; Ore. Civ. C. 687; Mon. C. Civ. P. 615; Ga. 2757; La. 1946. But technical words, or words of art used in a particular trade or business, will be construed, generally, to be used in reference to this peculiar meaning: Cal. 6644-5; Dak. Civ. C. 935-6; Ga.; La. 1947.

So, in several, evidence is nevertheless admissible that they have a technical, local, or otherwise peculiar signification, and were so used and understood in the particular instance; in which case the agreement shall be construed accordingly: Cal., Ore., Mon.

So, in Georgia, the local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties.

The language of a writing is to be interpreted according to the meaning it bears at the place of execution, unless the parties have reference to a different place: Cal. 11857; Ore. Civ. C. 683; Mon. C. Civ. P. 611. See also § 1007.

§ 4204. **The Construction** (see also Art. 102) which will uphold a contract in whole and in every part is to be preferred; and the whole contract should be looked to in arriving at the construction of any part: Cal. 6641; Dak. Civ. C. 932; Ga. 2757; La. 1948.

If the construction is doubtful, that which goes most strongly against the party making the provision (executing the instrument or undertaking the obligation) is to be preferred: Ore. Civ. C. 690; Ga. So, that construction is adopted which is most in favor of the party in whose favor the provision is made: Cal. 11864; Mon. C. Civ. P. 618.

The rules of grammatical construction usually govern; but to effectuate the intention they may be disregarded, sentences and words be transposed, and conjunctions substituted for each other; and in extreme cases of ambiguity, where the instrument, as it stands, is without meaning, words may be supplied: Ga.

When there is anything doubtful in agreements, we must endeavor to ascertain what was the common intention of the parties rather than to adhere to the literal sense of the terms.

When a clause is susceptible of two interpretations, it must be understood in that in which it may have some effect, rather than in a sense which would render it nugatory: La. 1950-1.

Where a contract is partly written and partly printed, the former part is entitled to most consideration: Io. 3651; Neb. 2,340; Cal. 6651,11862; Ore. Civ. C. 688; Dak. Civ. C. 942; Mon. C. Civ. P. 616; Ga.

So, where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded: Cal., Dak.

Estates and grants by implication are not favored : Ga.

When the characters in which an instrument is written are difficult to be deciphered, or the language not understood by the court, the evidence of persons skilled in deciphering the characters or who understand the language is admissible to declare the characters or meaning : Cal. 11863 ; Ore. Civ. C. 689 ; Mon. C. Civ. P. 617 ; see also in Part IV.

A written notice is to be construed according to the ordinary acceptance of its terms : Cal. 11865 ; Ore. Civ. C. 691 ; Mon. C. Civ. P. 619. Thus, a notice to the drawers, etc., that a bill or note has been protested, imports that it has been duly presented, acceptance or payment refused, and that the holder looks for payment to the person to whom the notice is given : Cal., Ore., Mon.

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties : Cal. 6643 ; Dak. Civ. C. 934.

A contract is to be interpreted according to the law and usage of the place where it is to be performed ; or if it does not indicate a place of performance, according to the law and usage of the place where it is made : Cal. 6646 ; Dak. Civ. C. 937.

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract : Cal. 6647-8 ; Dak. Civ. C. 938-9 ; La. 1959.

Particular clauses of a contract are subordinate to its general intent : Cal. 6650 ; Dak. Civ. C. 941.

Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.

Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected : Cal. 6652-3 ; Dak. Civ. C. 943-4.

Stipulations which are necessary to make a contract reasonable or conformable to usage, are implied in respect to matters concerning which the contract manifests no contrary intention.

All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded : Cal. 6655-6 ; Dak. Civ. C. 946-7.

Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together : Cal. 6642 ; Dak. Civ. C. 933 ; La. 1949.

**§ 4205. Time** is not generally of the essence of a contract, but may become so by express stipulation (or by reasonable construction : Ga.) : Dak. Civ. C. 949 ; Ga. 2757.

If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly, — as, for example, if it consists in the payment of money only, — it must be performed immediately upon the thing to be done being exactly ascertained : Cal. 6657 ; Dak. Civ. C. 948.

**§ 4206. Louisiana Law.** Terms that present two meanings must be taken in the sense most congruous to the matter of the contract.

Whatever is ambiguous is determined according to the usage of the country where the contract is made.

In contracts, the clauses in common use must be supplied, though they be not expressed.

All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act.

When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation.

In a doubtful case the agreement is interpreted against him who has contracted the obligation.

But if the doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee.

When the object of the contract is an aggregate composed of many or of different articles, there the general description or aggregate name will include all the particular articles which enter into the composition of the whole, although they were not specified, or were even unknown to both or either of the parties. A release of a share in a succession under this rule shall not be set aside on an allegation that the succession contained more or less than was supposed; where there is concealment, however, or fraud, it would be void under other rules before laid down.

The rule laid down in the last paragraph must also be taken with the further modification that, although the aggregate appellation or description be used, yet, if by some other part of the contract it appears that the intent of the parties was not to include the whole, but only that part of which they had notice, such evident intent shall correct the universality of the description. Thus, in a release of a whole share in a succession, if there be a reference to an inventory as descriptive of what that share is, the contract, notwithstanding the general terms, shall be confined to what is contained in the inventory.

When a contract contains general obligations, and the parties, in order to avoid a doubt whether a particular case comes within the scope of the agreement, have made special provision for such case, the general terms of the contract shall not on this account be restricted to the single case that is provided for: La. 1952-8; 1960-2.

**§ 4207. Of the Obligations to Perform, as Incidents to a Contract, all that is Required by Equity, Usage, or Law.** When the intent of the parties is evident and lawful, neither equity nor usage can be resorted to in order to enlarge or restrain that intent, nor can any law operate to that effect unless it be some prohibition or other provision which the parties had no right to modify or renounce.

Equity, usage, and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources.

The *equity* intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land and that which the parties have made for themselves by their contract are silent, courts must apply these principles to determine what ought to be incidents to a contract which are required by equity.

By the word *usage* mentioned in the preceding paragraphs is meant that which is generally practised in affairs of the same nature with that which forms the subject of the contract.

House-rent in some cities is generally paid by the month; in others by the quarter. In a contract for the hire of a house, without expressing when the rent was to be paid, the deficiency would be supplied by proof of the usage, but if a contrary intent appear in the contract, the usage would not contravene it.

The *law* intended by the rule before referred to means such legislative provisions as provide for those cases in which the parties have not declared their intention. When the contracting parties have not derogated from such law its provisions are to be followed. The laws directing a community of matrimonial gains and a warranty on sales are examples of this kind of legislative provision, which take effect and regulate the contract when the parties make no agreement that contravenes them: La. 1963-7.

## **Art. 421. Rescission.**

**§ 4210. General Principles.** A contract may be extinguished in like manner with any other obligation, and also in the manner prescribed by this article: Cal. 6682; Dak. Civ. C. 963.

**§ 4211. Rescission.** A contract is extinguished by its rescission: Cal. 6638; Dak. Civ. C. 964.



A party to a contract may rescind the same in the following cases only : —

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party ;

2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part ;

3. If such consideration becomes entirely void from any cause ;

4. If such consideration, before it is rendered to him, fails in a material respect, from any cause ; or,

5. By consent of all the other parties : Cal. 6689 ; Dak. Civ. C. 965.

A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation : Cal. 6690 ; Dak. Civ. C. 966.

Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules : —

1. He must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind ; and,

2. He must restore to the other party everything of value which he has received from him under the contract ; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so : Cal. 6691 ; Dak. Civ. C. 967.

§ 4212. **Alteration.** A contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration.

A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise : Cal. 6697-8 ; Dak. Civ. C. 968-9.

§ 4213. **Cancellation.** The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act.

The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act.

Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last section : Cal. 1699-1701 ; Dak. Civ. C. 970-2.

## Art. 422. Civil Law.

§ 4220. **Lesion** is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy given for this injury is founded on its being the effect of implied error or imposition ; for in every commutative contract, equivalents are supposed to be given and received : La. 1860. The law will not, however, release a person of full age who is under no incapacity from the legal effect of his voluntary contracts on account of such implied error or imposition, except (1) when, in a partition, there is a difference of more than a fourth in the value of the shares ; (2) when, in sales of immovables, the price given is less than half the value of the thing sold, the vendor may be relieved, but the sale cannot be invalidated for lesion to the injury of the purchaser : La. 1861.

Lesion can be alleged by persons of full age in no other sale than one for immovables, in which is included whatever is immovable by destination.

Persons of full age are relieved for lesion in no other contracts than those above expressed, not even in exchange, which bears some resemblance to the contract of sale.

Minors, not emancipated, are relievable against simple lesion in every species of contract. That is called *simple lesion*, in which the amount to be suffered by it is not designated by law, as it is in the cases above mentioned of partition and sale between persons of full age.

As to such contracts as they are, by virtue of their emancipation, authorized to make, they are entitled to no other relief against lesion than if they were of full age. As to all other contracts, which they can make only under certain formalities, they are in the same situation with other minors, and may have relief for simple lesion, or prosecute the action of nullity against the contract.

Lesion needs not be alleged to invalidate such contracts as are made by minors, either without the intervention of their tutors, or with such intervention, but unattended by the forms prescribed by law. Such contracts, being void by law, may be declared so, either in a suit for nullity or on exception, without any other proof than that of the minority of the party and the want of formality in the act.

But in contracts made with minors, when duly authorized, and when all the forms of law have been pursued, on alleging and proving even simple lesion, they will be relieved with the exception of the cases provided for in the next two paragraphs.

When all the formalities required by law for the alienation or the partition of the property of minors, or persons interdicted, have been fulfilled, the acts made for those purposes shall have the same force as if they had been executed by persons of full age and sound mind.

No lesion whatever, even in the case of minors, can invalidate judicial sales, or sales of an insolvent's property made by syndics or other trustees. Sales of property belonging to successions or minors, directed or authorized by courts, are judicial sales under this provision.

When lesion is alleged to invalidate a partition or sale, the party alleging it must first prove the value of the property sold, in the state in which it was at the time of the contract, according to the usual terms of credit given on sales of property of that description. He must then show how much the price given was less than such value; but if the price given was paid at longer periods than those usually given on such sales, the interest for the time exceeding such usual credit must be deducted from such price; or, if the price was paid in shorter periods than those of such usual credit, then the interest for the time such payment has fallen short of the usual credit shall be added to the price actually paid; and from a comparison of the price after these additions or deductions with the estimated value the court shall determine whether according to law applied to the circumstances of the case, there is a lesion sufficient to invalidate the contract.

In all questions of lesion the value of that which was the subject of the contract at the time of making it is the rule by which the lesion is to be ascertained. Even in the case of minors, changes in value by subsequent events are not to affect the contract.

If a minor should, at the time of the contract, declare himself of full age, it will be no bar to his obtaining relief against lesion.

A minor who is a banker, factor, trader, or artisan is not relievable against lesion in contracts made for the purpose of his trade or business, nor is he relievable against lesion in any of the stipulations of his marriage contract, if such contract be made with the consent and pursuant to the formalities in such case provided by law.

He is not relievable against obligations resulting from offences or quasi offences.

A ratification made by a person of full age of any contract made during his minority cures all defects arising as well from the want of the necessary formalities as from the want of a proper consideration. No action for nullity or lesion can be brought after such ratification.

Actions for lesion are limited to four years, to date from the time of the contract between the persons of full age, and from the age of majority in contracts of minors.

In actions brought for relief against a sale or partition made between persons of full age, or in a like action, brought for lesion only, in a sale made by a minor or on his account, the purchaser may elect either to rescind the sale or to have it confirmed on paying the full value. But this election must be made within a period to be designated in an interlocutory decree, determining the true value and the terms on which the payment is to be made.

If the purchaser elect to rescind the sale, he must restore the property with all the profits received, or which he might have received from the property from the time of bringing suit; and the seller shall repay the purchase-money which he has received, with interest from the same time, give up and cancel the securities given for such part, if any, as remains unpaid; and, moreover, pay for such improvements made by the purchaser as add a permanent value to the property, according to their value at the time of the rescission of the sale.

The purchaser, on his part, in case of rescission, is accountable for all injuries and dilapidations arising from his neglect or fault.

The judge, in pronouncing the final decree, shall make compensation between the parties of

their respective demands, and determine what balance shall be paid, and by which of the parties, according to the principles stated in the preceding paragraphs : La. 1862-1880.

**§ 4221. Revocation.** Agreements legally entered into have the effect of laws on those who have formed them. They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith.

But a contract in which anything is stipulated for the benefit of a third person, who has signified his assent to accept it, cannot be revoked as to the advantage stipulated in his favor without his consent.

The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity, or custom, is considered as incidental to the particular contract, or necessary to carry it into effect.

Contracts, as to their effects upon property or real rights, are of two kinds :—

1. Such as purport a transfer of that which is the object of the contract.
2. Such as only give a temporary right to the enjoyment of it : La. 1901-4.

**§ 4222. The Aleatory Contract** is a mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to one or more of them, depend on an uncertain event.

The law grants no action for the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing.

And as to such games, the judge may reject the demand, when the sum appears to him excessive.

In all cases in which the law refuses an action to the winner, it also refuses to suffer the loser to reclaim what he has voluntarily paid, unless there has been, on the part of the winner, fraud, deceit, or swindling : La. 2982-4.

**§ 4223. Of the Action of Nullity or of Rescission of Agreements.** In all cases in which the action of nullity or of rescission of an agreement is not limited to a shorter period by a particular law, that action may be brought within ten years.

That time commences in case of violence only from the day on which the violence has ceased; in case of error or deception, from the day on which either was discovered; and for acts executed by married women not authorized, from the day of the dissolution of the marriage or of the separation.

With regard to acts executed by persons under interdiction, the time commences only from the day that the interdiction is taken off; and with regard to acts executed by minors, only from the day on which they become of age.

A simple lesion gives occasion to rescission, in favor of a minor not emancipated, against all sorts of engagements; and in favor of a minor emancipated, against all engagements exceeding the bounds of his capacity, as is laid down under the title : *Of Minors*.

A minor is not restituable (cannot be relieved against his engagements) on the plea of lesion when it proceeds only from a casual and unforeseen event.

The mere declaration of majority made by a minor is no obstacle to his restitution.

A minor carrying on commerce or being an artisan, is not restituable against the engagements into which he has entered in the way of his business or art.

A minor is not restituable against the engagements stipulated in his marriage contract, if they were entered into with the consent or in the presence of those whose consent is requisite for the validity of his marriage.

He is not restituable against the obligations resulting from his offences or quasi offences.

He cannot make void the engagement which he had subscribed in his minority when once he has ratified it in his majority, whether that engagement was null in its form, or whether it was only subject to restitution.

When minors, persons under interdiction, or married women are admitted in these qualities to the benefit of restitution against their engagements, the reimbursement of what may have been paid, in consequence of those engagements, during minority, interdiction, or marriage, cannot be required of them unless it be proved that what was paid accrued to their benefit.

Persons of the age of majority cannot receive the benefit of restitution on account of lesion, except in cases and under conditions specially expressed by law.



When the formalities required with regard to minors or persons under interdiction, either for the alienation of immovable property, or in a partition of a succession, have been complied with, they are considered as to these acts as though they had executed them, being of full age or before interdiction: La. 2221-2231.

### Art. 423. Particular Kinds of Contracts.

§ 4230. **Charter-Party.** The contract by which a ship is let is termed a charter-party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew, and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or a part owner may be a charterer: Cal. 6959; Dak. Civ. C. 1127.

[Admiralty law is not generally incorporated in this edition, as it is controlled by United States statutes.]

§ 4231. **Government Lands.** The laws of Kansas provide that all contracts, written or verbal, made in good faith and without fraud, for the sale or purchase of improvements made on United States government lands shall be valid: Kan. 21,9; Neb. 1,38,1. So, deeds and conveyances of such improvements are valid, as if the grantor held the fee: Kan. 21,10; Neb. 1,38,2. Compare also §§ 1300,1420.

§ 4232. **Of Annuities.** The contract of *annuity* is that by which one party delivers to another a sum of money, and agrees not to reclaim it so long as the receiver pays the rent agreed upon.

This annuity may be either perpetual or for life.

The amount of annuity for life can in no case exceed the double of the conventional interest. The amount of perpetual annuity cannot exceed the conventional interest.

Constituted annuity is essentially redeemable. The parties may only agree that the same shall not be redeemed prior to a time which cannot exceed ten years, or without having warned the creditor a time before, which they shall limit.

The debtor of a constituted annuity may be compelled to redeem the same (1) if he ceases fulfilling his obligations during three years; (2) if he does not give to the lender the securities promised by the contract.

If the debtor should fail, or be in a state of insolvency, the capital of the constituted annuity becomes exigible, but only up to the amount at which it is rated, according to the order of contribution amongst the creditors.

The debtor may be compelled by his security to redeem the annuity within the time which has been fixed in the contract, if any time has been fixed, or after ten years, if no mention be made of the time in the act.

The interest of the sums lent and the arrears of constituted and life annuity cannot bear interest but from the day a judicial demand of the same has been made by the creditor and when interest is due for at least one whole year: La. 2793-2800.

§ 4233. **Recognizances, Court Contracts, etc.** See in Part IV.

### Art. 424. Obligations in General.

§ 4240. **Definitions.** An obligation is a legal duty, by which a person is bound to do or not to do a certain thing: Cal.; Dak.; La. 1757.

An obligation arises either from (1) the contract of the parties, or (2) the operation of law.

An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding: Cal. 6427-8; Dak. Civ. C. 798-9.

Obligations are of three kinds, — imperfect obligations, natural obligations, and civil or perfect obligations.

(1) If the duty created by the obligation operates merely on the moral sense, without being enforced by any positive law, such imperfect obligation has no legal operation, and creates no right of action, — as, *e. g.*, gratitude, charity, etc. (2) A natural obligation is one which can-

not be enforced by action, but is binding on the party in conscience and natural justice. (3) A civil obligation is a legal tie which gives the party with whom it is contracted a right of enforcing its performance by law : La. 1757.

Natural obligations are of four kinds : —

1. Such obligations as the law has rendered invalid for the want of certain forms or for some reason of general policy, but which are not in themselves immoral or unjust.

2. Such as are made by persons having the discretion necessary to enable them to contract, but who are yet rendered incapable of doing so by some provision of law.

3. When the action is barred by prescription, a natural obligation still subsists, although the civil obligation is extinguished.

4. There is also a natural obligation on those who inherit an estate, either under a will or by legal inheritance, to execute the donations or other dispositions which the former owner had made, but which are defective for want of form only.

Although natural obligations cannot be enforced by action, they have the following effect :

1. No suit will lie to recover what has been paid or given in compliance with a natural obligation.

2. A natural obligation is a sufficient consideration for a new contract.

Civil obligations, in relation to their origin, are of two kinds : —

1. Such as are created by the operation of law.

2. Such as arise from the consent of the parties who are bound by them, which are called contracts or conventional obligations : La. 1758–1760.

The preceding articles of this title have established rules applicable to contracts in general ; this contains an enumeration of such obligations as are usually inserted in different contracts, and the following chapters show how they may be formed, proved, and extinguished. Subsequent sections enumerate the different kinds of contracts into which the general obligations may enter, and provide rules for their government.

Independent of the division of obligations contained above, those that usually enter into particular contracts may be further distinguished by the following classification : those which are strictly personal, or heritable, or real ; simple or conditional ; limited or unlimited as to the time of performance ; disjunctive or alternative ; in relation to the parties, joint, several, or *in solido* ; in their nature, divisible or indivisible ; as to their form, penal or not penal : La. 1995–6.

§ 4241. **Interpretation of Obligations.** The rules which govern the interpretation of contracts are prescribed by Art. 420. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted : Cal. 6429 ; Dak. Civ. C. 800.

*Joint or Several Obligations.* An obligation imposed upon several persons, or a right created in favor of several persons, may be : —

1. Joint ;

2. Several ; or,

3. Joint and several.

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary. See § 4113.

A party to a joint or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him : Cal. 6430–2 ; Dak. Civ. C. 801–3. See Art. 501.

*Conditional Obligations.* (See also Art. 136.) An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

Conditions may be precedent, concurrent, or subsequent.

A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.

A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.

Before any party to an obligation can require another party to perform any act under it, he must fulfil all conditions precedent thereto imposed upon himself; and must be able and offer to fulfil all conditions concurrent so imposed upon him on the like fulfilment by the other party, except as provided by the next paragraph.

If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.

A condition in a contract, the fulfilment of which is impossible or unlawful within the meaning of the article on the object of contracts, or which is repugnant to the nature of the interest created by the contract, is void.

A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created: Cal. 6434-6442; Dak. Civ. C. 804-812.

Simple obligations are such as are not dependent for their execution on any event provided for by the parties, and which are not agreed to become void on the happening of any such event.

Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutive condition.

The contract of which the condition forms a part is, like all others, complete by the assent of the parties; the obligee has a right of which the obligor cannot deprive him; its exercise is only suspended or may be defeated according to the nature of the condition: La. 2020-1, 2028.

The creditor may, before the fulfilment of the condition, perform all acts conservatory of his rights: La. 2042.

When the obligation has been contracted on a suspensive condition, the thing which forms the subject of the contract is at the risk of the obligor, until the event which forms the condition has happened, subject, however, to the following restrictions and modifications of his responsibility:—

If the thing be entirely destroyed, without the fault of the debtor, the obligation is extinguished.

If the thing be impaired without the fault of the debtor, it is at the option of the creditor, either to dissolve the obligation, or to require the thing in the state in which it is, without diminution of the price.

If the thing be impaired through the fault of the debtor, the creditor has a right to dissolve the obligation, or to require the thing in the state in which it is, with damages: La. 2044.

A resolutive condition is implied in all commutative contracts, to take effect, in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances of the case permit, demand a specific performance.

In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutive condition is an event not depending on the will of either party, the contract is dissolved of right; but in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition: La. 2046-7.

**§ 4242. Of Limited and Unlimited Obligations, as to the Time of their Performance.** The time given or limited for the performance of an obligation is called its *term*.

A term may not only consist of a determinate lapse of time, but also of an event, provided that event be in the course of nature certain; if it be uncertain, it forms a condition.

When no term is fixed by the parties for the performance of the obligation, it may be executed immediately, unless from the nature of the act, a term, either certain or uncertain, must be implied. Thus, an obligation to pay money, without any stipulation for time, may be enforced at the will of the obligee. But a promise to make a crop of sugar is necessarily deferred until the uncertain period when the cane shall be fit to cut.



The term differs from the condition, inasmuch as it does not suspend the engagement, but only retards its execution.

What is due only at a certain time cannot be demanded before the expiration of the intermediate time; but what has been paid in advance cannot be redemanded.

The term is always presumed to be stipulated in favor of the debtor, unless it result from the stipulation, or from circumstances, that it was also agreed upon in favor of the creditor.

Whenever there is a cession of property, either voluntary or forced, all debts due by the insolvent shall be deemed to be due, although contracted to be paid at a term not yet arrived; but in such case, a discount must be made of the interest at the highest conventional rate, if none has been agreed by the contract.

If a debt be contracted to be paid at a term, and a security be given for the payment, if, from whatever cause, the security should fail, or be rendered insufficient, the creditor may, before the obligation is due, exact either that good security be given or that the debt be immediately paid.

If the contract be to give good security, and a person be afterwards given as such security who fails, the provision of the last preceding paragraph takes effect; but when security is given of a determinate person, then there is no action given on the failure of the surety.

Where a term is given or limited for the performance of an obligation, the obligor has until sunset of the last day limited for its performance, to comply with his obligation, unless the object of the contract cannot be done after certain hours of that day.

When the contract is to do the act in a certain number of days, or in a certain number of days after the date of the contract, the day of contract is not included in the number of days to be counted, and the obligor has until sunset of the last day of the number enumerated for the performance of his contract, with the exception contained in the last preceding paragraph.

Where the obligation is not to do a thing without a notice of a certain number of days, or until after so many days, neither the day of the contract nor the day of its performance is calculated.

Where the term referred to by the contract consists of one or more months, the parties, if they have not made any other explanation, shall be deemed to have meant months in the order in which they stand in the calendar after the date of the obligation, and with the number of days such months respectively have.

Where the term referred to in the contract consists of one or more years, the calendar year shall be presumed to have been intended: La. 2048-2061.

**§ 4243. Of Conjunctive and Alternative Obligations.** When several different things form the object of a contract, it is either conjunctive or alternative.

A *conjunctive* obligation is one in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately.

But if several things be comprehended in one general name in the contract, it is not conjunctive. The sale of a flock of sheep, or the stock on a farm, are examples of this exception.

Where a sum is promised to be paid at different instalments, a conjunctive obligation is created, and the payment may be severally paid or enforced. Rents, payable at fixed periods, come also under this rule.

But where the things which form the object of the contract are separated by a disjunctive, then the obligation is *alternative*. A promise to deliver a certain thing, or to pay a specified sum of money, is an example of this kind of obligation.

The debtor in an alternative obligation is discharged by the delivery of one of the two things that were comprised in the obligation.

The option belongs to the debtor, unless it has been expressly granted to the creditor.

The debtor may exonerate himself by delivering one of the two things promised, but he cannot force the creditor to receive a part of the one and a part of the other.

The obligation is pure and simple, although contracted in an alternative manner, if one of the two things promised could not be the object of the obligation.

The alternative obligation becomes pure and simple if one of the things promised be destroyed, even through the fault of the debtor, or can no longer be delivered. The price of that thing cannot be offered in its stead.

If both the things be destroyed, and the debtor be in fault with regard to one of them, he must pay the price of that one which was destroyed the last.

When, in the cases provided for in the preceding paragraph, the option was given by agreement to the creditor; either only one of the things is destroyed; and then, if it be without the fault of the debtor the creditor must have that one which remains; if the debtor be in fault, the creditor may demand the thing that remains, or the price of that which is destroyed.

Or both the things are destroyed; and then, if the debtor be in fault with regard to both, or even with regard to one of them alone, the creditor has his option to demand the price of either of them.

If both the things be destroyed without the fault of the debtor and before he has delayed the delivery, the obligation becomes extinct.

The same principles apply to cases where there are more than two things comprised in the alternative obligation.

Where several alternative obligations are divided for their execution by different terms, there the election of one alternative for one of the terms does not oblige the parties to make the same election for the others.

If an obligation or testamentary disposition be made to different obligees, or legatees, or heirs, in the alternative, such obligation shall be deemed to proceed from error in wording of the obligation or will, and shall be construed conjunctively: La. 2062-2076.

**§ 4244. Of Obligations Divisible and Indivisible.** An obligation is divisible or indivisible, according as it has for its object either a thing which in its delivery, or a fact which in its execution, is or is not susceptible of division, either material or intellectual.

The obligation is indivisible though the thing or the fact which is the object of it be by its nature divisible, if the light in which it is considered in the obligation does not admit of its being partially executed.

The stipulation *in solido* does not give to the obligation the character of indivisibility: La. 2108-2110.

If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation.

If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.

The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party.

If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful or impossible of performance, the obligation is to be interpreted as though the other stood alone: Cal. 6448-6451; Dak. Civ. C. 813-6.

**§ 4245. Of the Effects of the Divisible Obligation.** An obligation susceptible of division must be executed between the creditor and the debtor as though it were indivisible. The divisibility is applicable only with regard to their heirs, who can demand of the debt, or who are liable to pay of it, only the part which they hold or for which they are liable, as representing the creditor or the debtor.

To the principle laid down in the preceding paragraph there is an exception with regard to the heirs of the debtor, —

1. In case the debt be on a mortgage.
2. When it is of a determinate object.
3. When the debt is alternative of things at the option of the creditor, one of which is indivisible.
4. When one of the heirs is alone charged by the title with the execution of the obligation.
5. When it results, either from the nature of the engagement or from the thing which is its object, or from the end proposed by the contract, that it was the intention of the parties that the debt should not be partially discharged.

In the three former cases, the heir who is in possession of the thing due or of the property mortgaged for the debt, may be sued for the whole on the thing due or on the property mortgaged, but he has recourse against the co-heirs.

In the fourth case, the heir is alone charged with the debt; and in the fifth case, every one of the heirs may also be sued for the whole; but the one sued has his recourse against the co-heirs: La. 2111-2.

*Of the Effects of the Indivisible Obligation.* Every one of those who have conjointly contracted an indivisible debt is liable to the whole, even though the obligation was not contracted *in solido*.

The case is the same with regard to the heirs of him who has contracted such an obligation.

Every heir of the creditor may require the execution of the indivisible obligation.

He cannot alone remit the whole of the debt; he cannot alone receive the price instead of the thing. If one of the heirs has alone remitted the debt, or received the price of the thing, his co-heir cannot demand the indivisible thing without making allowance for the portion of the co-heir who has remitted the debt or has received the price.

The heir of the debtor being sued for the whole of the obligation, may ask for a delay to make his co-heirs parties to the suit, unless the debt be of such a nature that it can be discharged only by the heir sued, against whom, in that case, judgment may be given, he having recourse for indemnification against his co-heirs: La. 2113-6.

**§ 4246. Transfer of Obligations.** The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, except as below provided.

A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such: Cal. 6457-8; Dak. Civ. C. 817.

**§ 4247. Of Strictly Personal, Heritable, and Real Obligations.** An obligation is strictly personal when none but the obligee can enforce the performance or when it can be enforced only against the obligor.

It is heritable when the heirs and assigns of the one party may enforce the performance against the heirs of the other.

It is real when it is attached to immovable property, and passes with it into whatever hands it may come without making the third possessor personally responsible.

An obligation may be personal as to the obligee and heritable as to the obligor, and it may in like manner be heritable as to the obligee and personal as to the obligor.

Every obligation shall be deemed to be heritable as to both parties, unless the contrary be specially expressed or necessarily implied from the nature of the contract.

The obligation shall be presumed to be personal on the part of the obligor whenever in a contract to do he undertakes to perform anything that requires his personal skill or attention. In this case, if that which was to be done was not solely and exclusively for the use or gratification of the obligee, the obligation, although personal as to the obligor, will be heritable against the heirs of the obligee for the equivalent to be paid or given for that which was to be done.

The obligation shall be presumed to be personal as to the obligee in a contract to do or to give, when that which was to be done or given was exclusively for the personal gratification of the obligee, and could produce no benefit to his heirs.

In case of obligations purely personal as to the obligor, if he have received an equivalent that can be appreciated in money as a consideration, but dies before performance of his obligation, his heirs may be obliged to restore it or its value.

In like manner, if the obligation be purely personal as to the obligee who dies before performance, his heirs may recover from the obligor the value of any equivalent he may have received.

An obligation to pay an annuity to a certain person during the life of the obligor is personal as to both, and is extinguished by the death of either.

A merely personal obligation to do imposed by testament as the condition on which a legacy is to take effect, is void if the legatee die before performance or before he has been put in default; but the legacy will take effect.

But if what is to be done be a thing that can as well be done by the heirs of the legatee as by him, the obligation shall be heritable, and they must perform it before the legacy can



take effect. The provisions of this and the preceding article relate only to testamentary dispositions.

All contracts for the hire of labor, skill, or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there be some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee.

Contracts of mandate and partnership are mutually personal: La. 1997-2007.

**§ 4248. Of the Obligation of Giving.** The term to give, in this division of obligations, is applied only to corporeal objects that may be actually delivered from one to another; and it includes the payment of money as well as the delivery of any other article. A covenant respecting an incorporeal right comes under the definition of contracts to do or not to do, because some act besides that of delivery is necessary for the transfer of such rights.

A contract for the delivery of a promissory note payable to bearer or payable to order, and already indorsed, or any other negotiable paper of the same nature, also indorsed, or transferable by delivery only, comes under the description of a contract *to give*; but a contract to transfer a note to order not indorsed, or any other debt that requires an act of transfer, is an obligation *to do*.

The obligation of giving includes that of delivering the thing, and of keeping it safe until the delivery of it; the person who contracts to give being liable, on failure, to pay damages to the person with whom he has contracted.

The obligation of carefully keeping the thing, whether the object of the contract be solely the utility of one of the parties, or whether its object be their common utility, subjects the person who has the thing in his keeping to take all the care of it that could be expected from a prudent administrator.

This obligation is more or less extended with regard to certain contracts, the effects of which, in this respect, are explained under their respective titles.

If the obligation be to deliver an object which is particularly specified, it is perfect by the mere consent of the parties. It renders the creditor the owner, and although it be not delivered to him, puts the thing at his risk from the date of the obligation, if the contract is one of those that purport a transfer.

But if a debtor of a thing is in default for not having made the delivery, it is at his risk from the time of his default.

The debtor may be put in default in three different ways: by the term of the contract, by the act of the creditor, or by the operation of law:—

1. By the term of the contract, when it specially provides that the party failing to comply shall be deemed to be in default by the mere act of his failure.

2. By the act of the party, when at or after the time stipulated for the performance he demands that it shall be carried into effect, which demand may be made either by the commencement of a suit, by a demand in writing, by a protest made by a notary public, or by a verbal requisition made in the presence of two witnesses.

3. By the operation of law. This takes place in cases where the breach of the contract alone is by law declared to be equivalent to a default. The law having declared that the neglect to return a thing loaned for use at a stipulated time, or the application of it to another use than the one for which it was lent, puts it at the risk of the borrower; this, without any act of the lender, puts the borrower in default, and forms an example of this part of the rule.

The effects of being put in default are not only that, in contracts to give, the thing which is the object of the stipulation is at the risk of the person in default; but in the cases hereinafter provided for it is a prerequisite to the recovery of damages and of profits and fruits, or to the rescission of the contract.

In commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default must, at the time and place expressed in or implied by the agreement, offer or perform as the contract requires that which on his part was to be performed, otherwise the opposite party will not be legally put in default.

Although the contract be either not commutative, or, if commutative, the reciprocal obligations are not to be performed at the same time, yet the party wishing to put the other in default, must be himself ready, and must offer to receive the performance at the time and place stipu-

lated in the contract or implied from the nature of the act to be done, and he cannot avail himself of any demand at any other time or place ; but if the obligation be to do or give anything that may as well be given or done at one time and place as at another, then the party failing may be put in default as well after as at the time the obligation becomes due. Promissory notes and bills of exchange are not governed by this rule, but by those of commercial law.

But if the object contracted to be given be not a thing particularly specified, but is uncertain, indeterminate, or described only by quantity or number, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered. A contract to deliver a certain number of bushels of wheat, to pay a certain sum of money, or to ship a certain number of hogsheads of sugar, without further identification, comes under this rule.

There is an exception to the rule established in the last preceding paragraph ; when the object of the contract, although indeterminate in itself, makes part of a whole that is determinate and certain, and the whole of which it forms a part is lost or destroyed by inevitable accident before delivery, the loss will fall on the creditor of the thing sold. A sale of ten bales of the hundred bales of cotton in a particular store is an example of this rule ; and if all the cotton be destroyed by fire, the accident will discharge the seller from the obligation of delivering it.

In the case provided for by the last article it must appear that the designation of the mass from which the particular object of the contract is to be taken was intended by the parties as restrictive, — that is to say, that their intention was confined to that particular property, and no other of the same kind. Where such intent is not clearly expressed it shall be presumed that no such restriction was intended ; and the thing is at the risk of the debtor until delivery or default.

Although the contract contain an obligation to deliver, yet if it be one that does not purport a transfer of property, the thing is always at the risk of the obligor, provided there be no specific agreement to the contrary.

If the contract be complete, and be one that purports a transfer of the ownership of the property, its destruction before delivery or default does not exonerate the party who was to have received it from the performance or delivery of that which on his part was intended as the price or equivalent for such property.

The rule that the obligation to deliver a determinate object is perfect by the mere consent of the parties, and that the obligee is the owner from the time of such contract, is without any exception as respects immovables, not only between the parties, but as to all the world, provided the contract be clothed with the formalities required by law, that it is *bona fide*, and purports to transfer the ownership of the property.

In cases, however, of contracts which purport to transfer the ownership of immovable property, if he who transfers it is suffered by the obligee to remain in corporal possession for a longer time than is reasonably required to deliver the actual possession and to act as owner, to the injury of a third person who may afterwards contract with him or acquire rights upon his property as creditor, it will be considered as a mark of fraud, and will throw the burden of proving that the contract was made *bona fide* upon him to whom the ownership of the property was transferred by the first contract, in any controversy with creditors of the obligor or person acquiring *bona fide* intermediate rights by contract with him.

With respect to movable effects, although by the rule referred to in the two last preceding articles the consent to transfer vests the ownership of the property in the obligee, yet this effect is strictly confined to the parties until actual delivery of the object. If the vendor, being in possession, should by a second contract transfer the ownership of the property to another person, who gets the possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part *bona fide*, and without notice of the former contract.

In like manner, if movable property has been alienated by contract, but not delivered, it is liable in the hands of the obligor to seizure and attachment in behalf of his creditors.

What shall be considered a delivery of possession is determined by the rules of law applicable to the situation and nature of the property.

If the contract be one of those that do not purport to transfer the ownership of the property, but only to give a right to the temporary enjoyment of it, the right to that enjoyment vests by the mere consent of the parties, in the same manner and subject to the same rules as are above laid down for contracts which purport to transfer the ownership of the property : La. 1905-1925.

*Of the Obligations to do or not to do.* On the breach of any obligation to do or not to do, the obligee is entitled either to damages or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract; and in all these cases damages may be given where they have accrued, according to the rules established in the following paragraph.

In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts.

The obligee may require that anything which has been done in violation of a contract may be undone, if the nature of the cause will permit, and that things be restored to the situation in which they were before the act complained of was done; and the court may order this to be effected by its officers, or authorize the injured party to do it himself at the expense of the other, and may also add damages, if the justice of the case require it.

If the obligation be not to do, the obligee may also demand that the obligor be restrained from doing anything in contravention of it, in cases where he proves an attempt to do the act covenanted against : La. 1925-9.

### **Art. 425. Quasi Contracts.**

§ 4250. **Definition.** Certain obligations are contracted without any agreement, either on the part of the person bound or of him in whose favor the obligation takes place.

Some are imposed by the sole authority of the laws, others from an act done by the party obliged, or in his favor.

The first are such engagements as result from tutorship, curatorship, neighborhood, common property, the acquisition of an inheritance, and other cases of a like nature.

The obligations which arise from a fact personal to him who is bound or relative to him, result either from quasi contracts or from offences and quasi-offences.

Quasi contracts are the lawful and purely voluntary act of a man from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties.

All acts from which there results an obligation without any agreement, in the manner expressed in the preceding article, form quasi contracts. But there are two principal kinds which give rise to them, to wit : the transaction of another's business, and the payment of a thing not due : La. 2292-4.

§ 4251. **The Transaction of Another's Business.** When a man undertakes of his own accord to manage the affairs of another, whether the owner be acquainted with the undertaking or ignorant of it, the person assuming the agency contracts the tacit engagement to continue it and to complete it until the owner shall be in a condition to attend to it himself; he assumes also the payment of the expenses attending the business.

He incurs all the obligations which would result from an express agency with which he might have been invested by the proprietors.

He who has taken upon himself the management of some particular affair is not bound to manage others unconnected with that.

The duties he has undertaken do not cease even if the person for whom he acts die previous to the business being terminated; they continue until the heir can take upon himself the direction of it.

In managing the business he is obliged to use all the care of a prudent administrator.

Yet, where circumstances of friendship or of necessity have induced a person to undertake the management, that consideration may authorize the judge to mitigate the damages which may arise from the faults or the negligence of the manager.

Equity obliges the owner whose business has been well managed to comply with the engagements contracted by the manager in his name; to indemnify the manager in all the personal engagements he has contracted, and to reimburse him all useful and necessary expenses.

All persons, such even as are incapable of consent, may, by the quasi contract resulting from the act of a third person, become either the object or the subject of an obligation; because



the use of reason, although necessary on the part of the person whose act forms the quasi contract, is not requisite in those by whom, or in whose favor, the obligations resulting from the act are contracted: La. 2295-2300.

**§ 4252. Of the Payment of a Thing not Due.** He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it.

He who has paid through mistake, believing himself a debtor, may reclaim what he has paid.

To acquire this right, it is necessary that the thing paid be not due in any manner, either civilly or naturally. A natural obligation to pay will be sufficient to prevent the recovery.

A thing not due is that which is paid on the supposition of an obligation which did not exist, or from which a person has been released.

That which has been paid in virtue of a void title is also considered as not due.

The payment from which we might have been relieved by an exception that would extinguish the debt affords ground for claiming restitution.

But this exception must be such that it shall extinguish even all natural obligation. Thus he who, having the power to plead prescription, shall have made payment, cannot claim restitution.

It is considered that a thing has been paid when not due, if the payment was made by virtue of an agreement the effect of which is suspended by a condition the event of which is uncertain.

This principle must not be extended to things due on a day certain, nor to conditions which must certainly happen.

He who, through mistake, has paid the debt of another to whom he believed himself indebted, has a claim to restitution from the creditor.

This right ceases if, in consequence of the payment, the creditor has destroyed or parted with his title; but the recourse still remains to the person paying against the true debtor.

If there be any want of good faith on the part of him who has received, he is bound to restore not only the capital, but also the interest on the proceeds from the day of the payment.

If the thing unduly received is an immovable property or a corporeal movable, he who has received it is bound to restore it in kind if it remain, or its value if it be destroyed or injured by his fault; he is even answerable for its loss by fortuitous event if he has received it in bad faith.

If he who has received *bona fide* has sold the thing, he is bound to restore only the price of the sale.

If he has received in bad faith, he is bound besides this restitution to indemnify fully the person who has paid.

He to whom property is restored must refund to the person who possessed it, even in bad faith, all he had necessarily expended for the preservation of the property: La. 2301-2314.

## CHAPTER II. — BAILMENTS.

### Art. 430. General Principles.

**§ 4300. Definition.** A bailment is a delivery of goods or property for the execution of a special object, beneficial either to the bailor or bailee, or both; and upon a contract, express or implied, to carry out this object and dispose of the property in conformity with the purpose of the trust: Ga. 2058.

In all cases the bailee has a right of possession, and in most cases a special right of property in the thing bailed, which he may enforce by suit: Ga. 2059. As a rule, the contract of bailment is an entire contract; and full performance is a condition precedent to an action upon it: Ga. 2102.

§ 4301. **Property in Bailee.** In all cases, the bailee during the bailment has a right to the possession of the property, and in most cases a special right of property in the thing bailed; for a violation of these rights by any one he is entitled to his action: Ga. 2059.

A contract of hiring is a bailment conveying no interest in the property to the bailee, but a mere right of use; it is different from an estate for years (§ 2006): Ga. 2274.

§ 4302. **Care: Definitions.** There are three degrees of care mentioned in the code, viz., slight, ordinary, and great. The latter include the former. Slight care is such as persons of ordinary prudence usually exercise about their own affairs of slight importance; ordinary care, such as they usually exercise about their own affairs of ordinary importance; and great care, such as they exercise, etc., in affairs of great importance: Dak. Civ. C. 2099-2100. In Georgia, there is only the distinction between ordinary diligence, defined as above, and extraordinary diligence: Ga. 2061-2.

So, there are three degrees of negligence, — slight, ordinary, and gross: the first being the want of great care; the second, of ordinary care; and the last, of slight care: Dak. Civ. C. 2101-2. In Georgia, *gross neglect* is the want of that care which every man of common sense, however inattentive, takes of his own property: Ga. 2063.

§ 4303. **Extraordinary Care** is generally required of carriers, warehousemen, and other bailees for hire. See Arts. 434, 437, 439.

§ 4304. **Ordinary Care** is required of all bailees: Ga. 2060.

In all cases of bailments, after proof of loss, the burden of proof is on the bailee to show proper diligence: Ga. 2064.

§ 4305. **Bailees' Liens** resemble factors' liens (§ 4387), and have the same rank: Ga. 1937. They are of the same nature as artisans' liens (§ 4641): Cal. 8051; Dak. Civ. C. 1806.

## Art. 431. Hiring.

§ 4310. **Hiring in General.** Hiring is a contract by which one gives to another the temporary possession and use of property (or the use of the labor or industry of himself or servant: Ga.) other than money for reward, and the latter agrees to return the same to the former at a future time: Cal. 6925; Dak. Civ. C. 1103; Ga. 2085. Or where one contracts for the labor or services of another about a thing bailed to him for a specified purpose: Ga.

The products of a thing hired during the hiring belong to the hirer: Cal. 6926; Dak. Civ. C. 1104; Ga. 2086.

An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same: Cal. 6927; Dak. Civ. C. 1105; Ga. 2088.

The hirer of a thing must use ordinary care for its preservation in safety and in good condition: Cal. 6928; Dak. Civ. C. 1106; Ga. 2089.

The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence: Cal. 6929; Dak. Civ. C. 1107.

When a thing is let for a particular purpose the hirer must not use it for any other purpose: Cal. 6930; Dak. Civ. C. 1108; Ga. 2089; and if he does, the letter may hold him responsible for its safety during such use in all events, or may treat the contract as thereby rescinded: Cal., Dak.

The letter of a thing may terminate the hiring and reclaim the thing before the end of the term agreed upon, —

1. When the hirer uses or permits a use of the thing hired in a manner contrary to the agreement of the parties; or,

2. When the hirer does not within a reasonable time after request make such repairs as he is bound to make: Cal. 6931; Dak. Civ. C. 1109.

The hirer of a thing may terminate the hiring before the end of the term agreed upon, —

1. When the letter does not within a reasonable time after request fulfil his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into good condition, or repairing; or,

2. When the greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the ordinary negligence of the hirer: Cal. 6932; Dak. Civ. C. 1110.

The hiring of a thing terminates, —

1. At the end of the term agreed upon;
2. By the mutual consent of the parties;
3. By the hirer acquiring a title to the thing hired superior to that of the letter: Cal. 6933; Dak. Civ. C. 1111; or,
4. By the destruction of the thing hired: Cal.; Dak.; Ga. 2092.

If the hiring of a thing is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his death or incapacity to contract. In other cases it is not terminated thereby: Cal. 6934; Dak. Civ. C. 1112.

When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing (unless such use is merely nominal, and of no benefit to him): Cal. 6935; Dak. Civ. C. 1113; Ga. 2092.

The hirer of things acquires a qualified ownership in them for the time which entitles him to their possession and enjoyment, even as against the owner: Ga. 2086. The contract may be for the return of the thing hired or of like property of the same kind and quality. In the former case, the risk of death or inevitable accident is with the bailor, and he can retake possession immediately at the expiration of the term of hiring; in the latter case, the risk is with the bailee, and he must deliver the thing hired before the bailor's interest is reverted: Ga. 2087. If a bailor send his own agents with the thing (as a driver for his horse), the hirer is bound, either to the bailor or third persons, only for the consequences of his own directions and for gross neglect: Ga. 2089. For a violation of the engagements of either party the other may abandon the contract; and in case the hirer puts the thing to a different use, the bailor may sue as for a conversion, even though the hirer be an infant: Ga. 2090. For an interference with the possession, the right of action is in the hirer; for any injury to the property or interference with his rights of property, the bailor also has a right of action: Ga. 2091. The hirer cannot remove the things out of the state, nor put them to a hazardous use: Ga. 2093. No hirer of a thing has a right to relet it to another, except with the consent of the bailor. If he does so, the bailor may either take immediate possession or waive this right, and hold the hirer bound to extraordinary care and diligence on the part of himself and the hirer from him: Ga. 2094. It is not subject to an execution on a judgment since the contract of hire against the owner: Ga. 2095.

One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer, and not the natural result of its use: Cal. 6955; Dak. Civ. C. 1123; Ga. 2088.

A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.

If a letter fails to fulfil his obligations as prescribed above, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him: Cal. 6956-7; Dak. Civ. C. 1124-5.

At the expiration of the term for which personal property is hired the hirer must return it to the letter at the place contemplated by the parties at the time of hiring: Cal. 6958; Dak. Civ. C. 1126; Ga. 2089; or, if no particular place was so contemplated by them, at the place at which it was at that time: Cal., Dak.

§ 4311. **Bailment for Labor.** The hire of labor or services is the essence of every bailment in which goods are delivered to another, and compensation paid for care, attention, or labor bestowed on them. It includes the contracts of forwarding and commission merchants, factors, wharfingers, mechanics, and all agents in such transactions: Ga. 2096. In all such cases the bailee is not only bound to exercise skill in the labor or work bestowed, but also ordinary care in keeping the articles: Ga. 2097. If the identical article is to be returned, though materially changed by the labor bestowed, the title remains with the bailor; if the bailee furnishes a portion of the materials, the title to the structure is in the party furnishing the larger



portion of them ; but if the contract does not contemplate the use of that material specially (as silver given for plate to be made), the title is in the bailee until the article is delivered : Ga. 2098. If materials are furnished to be manufactured on shares, the title remains in the bailor until the delivery to him of his portion of the manufactured goods : Ga. 2099. The bailee for labor and service is entitled to the possession of the goods during bailment, and has a special lien upon them for his labor until he parts with the possession (see also § 4641) : Ga. 2100. If the thing bailed for labor be destroyed without fault in the bailee, the loss falls upon the bailor, and the bailee may demand compensation for the labor expended and materials used upon it : Ga. 2101.

## Art. 432. Deposit.

§ 4320. **Nature and Creation of Deposit.** A deposit may be voluntary or involuntary, and for safe-keeping or for exchange.

A voluntary or naked deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary : Cal. 6813-4 ; Dak. Civ. C. 1033-4 ; Ga. 2103.

An involuntary deposit is made, —

1. By the accidental leaving or placing of personal property in the possession of any person without negligence on the part of its owner (so, in Ga. 210-3) ; or,

2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person.

The person with whom a thing is deposited in the manner described in the last section is bound to take charge of it, if able to do so.

A deposit for keeping is one in which the depositary is bound to return the identical thing deposited.

A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited : Cal. 6815-8 ; Dak. Civ. C. 1035-8.

§ 4321. **Obligations of the Depositary.** A depositary must deliver the thing to the person for whose benefit it was deposited on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required below.

A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time.

A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him.

A depositary must give prompt notice to the person for whose benefit the deposit was made of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him.

A depositary who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit ; and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing to his prejudice.

If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share thereof, if it can be done without injury to the thing : Cal. 6822-7 ; Dak. Civ. C. 1039-1044.

§ 4322. **Deposit for Keeping.** A depositor must indemnify the depositary, —

1. For all damage caused to him by the defects or vices of the thing deposited ; and,  
2. For all expenses necessarily incurred by him about the thing other than such as are involved in the nature of the undertaking.

A depositary of living animals must provide them with suitable food and shelter, and treat them kindly.

A depositary may not use the thing deposited, or permit it to be used, for any purpose without the consent of the depositor. He may not, if it is purposely fastened by the depositor, open it without the consent of the latter, except in case of necessity.

A depositary is liable for any damage happening to the thing deposited during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been thus used.

If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable and retain the proceeds as a deposit giving immediate notice of his proceedings to the depositor.

If a thing is lost or injured during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, so far as he has information concerning them, or wilfully misrepresents the circumstances to him, the depositary is presumed to have wilfully or by gross negligence permitted the loss or injury to occur.

So far as any service is rendered by a depositary, or required from him, his duties and liabilities are prescribed by the title on employment and service.

The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth: Cal. 6833-6840; Dak. Civ. C. 1045-1052.

**§ 4323. Gratuitous Deposit.** Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited.

An involuntary deposit is gratuitous, the depositary being entitled to no reward.

A gratuitous depositary must use at least slight care for the preservation of the thing deposited (so, he is responsible for gross negligence: Ga. 2104).

The duties of a gratuitous depositary cease,—

1. Upon his restoring the thing deposited to its owner; or,
2. Upon his giving reasonable notice to the owner to remove it, and the owner failing to do so within a reasonable time. But an involuntary depositary, under subdivision 2 of section § 4320, cannot give such notice until the emergency which gave rise to the deposit is past: Cal. 6844-7; Dak. Civ. C. 1053-6.

A deposit of money in a bank is not gratuitous, the use of money being a valuable consideration; a naked deposit would be that of money in a sealed package: Ga. 2105.

If one, in addition to safe-keeping, undertakes gratuitously to carry money or other articles to another place, his liability is the same as that of a naked depositary: Ga. 2106. A naked depositary may at any time terminate the bailment by a redelivery of the articles to the bailor: Ga. 2107. He may not use the deposit without increasing his responsibility, unless such use is necessary for its preservation or from the circumstances the consent of the depositor may reasonably be presumed: Ga. 2108. He is entitled to be reimbursed all charges and expenses incurred by reason of the deposit, and may retain possession until paid: Ga. 2109. A broker has a general lien, dependent upon possession, on all property in his hands for the balance due him: Cal. 8054; Dak. Civ. C. 1808.

**§ 4324. Storage.** A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire: Cal. 6851; Dak. Civ. C. 1057.

A depositary for hire must use at least ordinary care for the preservation of the thing deposited: Cal. 6852; Dak. Civ. C. 1058; Ga. 2110.

In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week, and to half a month's hire for the storage of any other property during any fraction of a half month.

In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time, and by the depositary upon reasonable notice.

Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit so continuing: Cal. 6851-5; Dak. Civ. C. 1057-61.

A depositary for hire is liable like other bailees for hire, and has a lien: Ga. 2110.

**§ 4325. Finding.** One who finds a thing lost is not bound to take charge of it, but if he does so he is thenceforward a depositary for the owner, with the rights and obligations of a depositary for hire.

If the finder of a thing knows or suspects who is the owner, he must, with reasonable diligence, give him notice of the finding; and if he fails to do so, he is liable in damages to the owner, and has no claim to any reward offered by him for the recovery of the thing, or to any compensation for his trouble or expenses.

The finder of a thing may, in good faith, before giving it up, require reasonable proof of ownership from any person claiming it.

The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it.

The finder of a thing may exonerate himself from liability at any time by placing it on storage with any responsible person of good character at a reasonable expense.

The finder of a thing may sell it if it is a thing which is commonly the subject of sale, when the owner cannot, with reasonable diligence, be found, or, being found, refuses upon demand to pay the lawful charges of the finder in the following cases:—

1. When the thing is in danger of perishing or of losing the greater part of its value; or,
2. When the lawful charges of the finder amount to two thirds of its value.

A sale under the provisions of the last section must be made in the same manner as the sale of a thing pledged.

The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof.

The provisions of this article have no application to things which have been intentionally abandoned by their owners: Cal. 6864-6872; Dak. Civ. C. 1064-1072.

**§ 4326. Deposit for Exchange.** A deposit for exchange transfers to the depositary the title to the thing deposited, and creates between him and the depositor the relation of debtor and creditor merely: Cal. 6878; Dak. Civ. C. 1073.

**§ 4327. Civil Law: Of Deposit in General, and of its Divers Kinds.** A *deposit*, in general, is an act by which a person receives the property of another, binding himself to preserve it and return it in kind.

There are two species of deposit, —

That properly so called, and sequestration: La. 2926-7.

**Of the Deposit properly so called.** *Of the Nature and Essence of the Contract of Deposit.* The object of a deposit must be properly some movable thing. The deposit is essentially gratuitous. If the person, with whom the deposit is made receive a compensation, it is no longer a deposit, but a hiring. The deposit is perfected only by the delivery, real or fictitious, of the thing deposited. The fictitious delivery is sufficient, when the depositary is already possessed, in some other right, of the thing agreed to be left in deposit with him. The deposit is voluntary or necessary: La. 2928-2931.

*Of Voluntary Deposit.* The voluntary deposit takes place by the mutual consent of the person making the deposit and the person receiving it. The voluntary deposit can only be regularly made by the owner of the thing deposited, or with his consent expressed or implied. Consent is implied when the owner has carried or sent the thing to the depositary, and the latter, knowing that the thing had been sent, has not refused to receive it. The owner, without whose knowledge the deposit has been made, may reclaim his property in the hands of the depositary, who cannot refuse to deliver it, but must call on the person who made the deposit, that he may oppose the restitution. The voluntary deposit can only take place between persons capable of contracting. Nevertheless, if a person capable of contracting accept a deposit from a person who is incapable, he incurs all the obligations of a real depositary, and may be sued by the tutor or curator of the person who has made the deposit. If the deposit was made by a person capable of contracting, to another person not having that capacity, he who has made the deposit has only an action of revendication for the thing, as long as it remains in the hands of the depositary, or an action of restitution for the amount of the benefit the depositary has derived from it: La. 2932-6.

*Of the Obligations of the Depositary.* The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property. This provision is to be rigorously enforced: (1) Where the deposit has been made by the request of the depositary. (2) If it has been agreed that he shall have a reward for preserving the deposit. (3) If the deposit was made solely for his advantage. (4) If it has been expressly agreed that the depositary should be answerable for all neglects: La. 2937-8.



The depositary is not answerable, in any case, for accidents produced by overpowering force, unless he has delayed improperly to restore the deposit. The depositary cannot make use of the thing deposited, without the express or implied permission of the depositor: La. 2939-2940.

If the thing be of the nature of those which are consumed by use, and the depositor has given permission to the depositary to use them, the contract is no longer a deposit, but a loan for consumption, and becomes subject to the rules which govern that contract. If the things deposited be animals, the depositary may employ them for the benefit of the depositor, unless the latter has directed otherwise. The depositary should not seek to know what are the things confided to him, if they are shut up in a box, or in a sealed cover: La. 2941-3.

The depositary ought to restore the precise object which he received. Thus a deposit of coined money must be restored in the same specie in which it was made, whether it has sustained an increase or diminution of value. The depositary is only bound to restore the thing in the state in which it is at the moment of restitution. Deteriorations, not effected by any act of his, are to the loss of the depositor. A depositary, from whom the thing deposited has been taken away by force and who has received a price, or anything in its stead, must restore what he has received in exchange. The heir of a depositary, who has sold *bona fide* a thing which he knew not to be a deposit, is bound only to restore the price which he has received, or to make over his claim against the purchaser, if the price be not paid. If the thing deposited has been productive, and the proceeds have been received by the depositary, he is bound to restore them. He owes no interest for the money deposited in his hands, except from the day on which he became a defaulter by delaying to restore it. The depositary must restore the thing deposited only to him who delivered it, or in whose name the deposit was made, or who was pointed out to receive it: La. 2944-9.

He cannot require him who made the deposit to prove that he was the owner of the thing. Yet if he discovers that the thing was stolen and who the owner of it is, he must give him notice of the deposit, requiring him to claim within due time. If the owner, having received due notice, neglects to claim the deposit, the depositary is fully exonerated on returning it to the person from whom he received it. If the person who made the deposit be deceased, the thing deposited can be restored only to his heir; if there be several heirs, it must be delivered to each of them for his respective part and portion, unless the thing deposited be indivisible, in which case they must agree among themselves. If the depositor has changed condition, as if a woman marries or a person of full age falls under interdiction, the deposit can be restored only to the person who has the administration of the rights and property of the depositor. If the deposit has been made by a tutor, a husband, or by any other administrator, it can be restored after the function of that administrator has ceased, only to him whom he represented: La. 2950-2.

When the contract specifies a place where the deposit is to be restored, it must be delivered at that place, but the expense of conveyance to the place of delivery must be borne by the depositor. If the contract does not specify the place where the deposit must be restored, it shall be restored at the place where such deposit has been made. The deposit must be restored to the depositor as soon as he demands it, even though the contract may have specified the time for its being restored, unless there be in the hands of the depositary an attachment on the property or an opposition made on the owner. The depositary cannot withhold the thing deposited on pretence of a debt due to him from the depositor on an account distinct from the deposit, or by way of offset. But he may retain the deposit until his advances are repaid, as well as any other claims which he may have arising from the deposit. When several persons have received the same object in deposit, each of them is bound to restore the whole. The unfaithful depositary is not admitted to the benefit of a surrender. All the obligations of the depositary cease on his discovering and proving that he himself is the owner of the thing deposited: La. 2953-9.

*Of the Obligations and Rights of Him by Whom the Deposit has been Made.* He who has made a deposit is bound to reimburse the depositary the money he has advanced for the safe-keeping of the thing, and to indemnify him for all that the deposit has cost him. He is to indemnify the depositary for the losses which the thing deposited may have occasioned him. The depositor has a right to reclaim the thing deposited, when it exists in kind in the hands of the depositary or his assigns. If the depositary or his assigns have disposed of the thing, and the price remains due, the depositor has a right to it in preference to any other creditor of the depositary. The distinction formerly established by law between the perfect and the imperfect

deposit is abolished. The only real deposit is that where the depositary receives a thing to be preserved in kind, without the power of using it, and on the condition that he is to restore the identical object : La. 2960-3.

He who deposits a thing in the hands of another still remains the owner of it.

Consequently his claim to it is preferred to that of the other creditors of the depositary, and he may demand the restitution of it, if he can prove the deposit, in the same manner as is required in agreements for sums of money, and if the thing reclaimed be identically the same which he deposited.

If the depositary abuses his trust by alienating the thing confided to his care, or if his heirs sell it, not knowing that it had been given in deposit, the depositor retains his privilege on the price which shall be due.

He who, having in his possession the property of another, whether in deposit or on loan or otherwise, has been obliged to incur any expense for its preservation, acquires on this property two species of rights.

Against the owner of the thing his right is in the nature of that pledge, by virtue of which he may retain the thing until the expenses which he has incurred are repaid.

He possesses this qualified right of pledge, even against the creditors of the owner, if they seek to have the thing sold. He may refuse to restore it unless they either refund his advance or give him security that the thing shall fetch a sufficient price for that purpose.

Finally, he who has incurred these expenses has a privilege against these same creditors, by virtue of which he has preference over them out of the price of the thing sold for the amount of such necessary charges as he shall have incurred for its preservation. This is the privilege in question in the present paragraph : La. 3222-6.

**§ 4328. Of the Necessary Deposit.** The *necessary* deposit is that which has been compelled by some accident, — such as fire, falling down of a house, pillage, shipwreck, or other casualty. The deposition on oath or affirmation of a single competent or credible witness may be sufficient to prove a necessary deposit, even when the amount of the thing deposited exceeds \$500 : La. 2964.

An innkeeper is responsible as depositary for the effects brought by travellers who lodge at his house; the deposit of such effects is considered as a necessary deposit. An innkeeper is responsible for the effects brought by travellers, even though they were not delivered into his personal care, *provided*, however, they were delivered to a servant or person in his employment. He is responsible if any of the effects be stolen or damaged, either by his servants or agents, or by strangers going and coming in the inn : La. 2964-7.

He is not responsible for what is stolen by force and arms, or with exterior breaking open of doors, or by any other extraordinary violence : La. 2970.

**§ 4329. Of Sequestration.** Sequestration is either conventional or ordered by the judge : La. 2972.

*Sequestration* is a kind of deposit which two or more persons engaged in litigation about anything make of the thing in contest to an indifferent person, who binds himself to restore it when the issue is decided to the party to whom it is adjudged to belong.

The depositary in this case is called the sequestrator.

A sequestration may be not gratuitous, and then it is rather a contract of hiring than of deposit.

When it is gratuitous it is a real contract of deposit, subject to all the rules which apply to that contract, save the differences hereafter explained.

A sequestration has this difference from a deposit, that it may have for its object not only movables, but also immovables : La. 2973-6.

## Art. 433. Loans.

**§ 4330. Consumption or Use.** Loans are of two kinds, — for consumption and for use. The former is when the article is to be returned, not in specie, but in kind; this is a sale, and not a bailment : Ga. 2125.

A loan is generally entirely for the benefit of the borrower; but sometimes it is for the joint benefit of the lender and borrower, and occasionally for the exclusive benefit of the lender, as

when one lends a horse to another to transact business for the lender. In the two latter cases the responsibility of the borrower is varied, and less stringent, according to the circumstances and purpose of the loan : Ga. 2127.

§ 4331. **Title.** The borrower acquires no property in the thing loaned, but only the right to possess and use it. For any interference with this right he may maintain an action : Ga. 2129.

A loan being for the personal benefit and use of the borrower, he cannot transfer the possession to another without the consent, express or implied, of the lender ; hence, if it be for a definite time, the borrower has no such interest as is subject to levy and sale : Ga. 2130.

The lender may not revoke a loan for a definite time so long as the borrower meets fully his engagements ; a loan at will or indefinitely may be revoked at any time : Ga. 2131.

A loan for use is a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use : Cal. 6884 ; Dak. Civ. C. 1074 ; Ga. 2126.

A loan for use does not transfer the title to the thing ; and all its increase during the period of the loan belongs to the lender : Cal. 6885 ; Dak. Civ. C. 1075 ; Ga. 2133.

§ 4332. **Care.** A borrower for use must use great care for the preservation in safety and in good condition of the thing lent : Cal. 6886 ; Dak. Civ. C. 1076 ; Ga. 2128.

One who borrows a living animal for use must treat it with great kindness, and provide everything necessary and suitable for it.

A borrower for use is bound to have and to exercise such skill in the care of the thing lent as he causes the lender to believe him to possess : Cal. 6887-8 ; Dak. Civ. C. 1077-8.

§ 4333. **Duties of Borrower.** A loan may be made to a married woman with the husband's consent. The husband is bound as if he were the borrower, but has no control over the property : Ga. 2134. The loan must be used strictly in the manner and for the purpose contemplated by the parties. A violation by the borrower is a conversion : Ga. 2135.

A borrower for use must repair all deteriorations or injuries to the thing lent which are occasioned by his negligence, however slight.

The borrower of a thing for use may use it for such purposes only as the lender might reasonably anticipate at the time of lending.

The borrower of a thing for use must not part with it to a third person without the consent of the lender : Cal. 6889-6891 ; Dak. Civ. C. 1079-1081.

The borrower of a thing for use must bear all its expenses during the loan, except such as are necessarily incurred by him to preserve it from unexpected and unusual injury. For such expenses he is entitled to compensation from the lender (who may, however, exonerate himself by surrendering the thing to the borrower : Cal., Dak.) : Cal. 6892 ; Dak. Civ. C. 1082 ; Ga. 2132.

§ 4334. **Of the Lender.** The lender of a thing for use must indemnify the borrower for damage caused by defects or vices in it which he knew at the time of lending, and concealed from the borrower.

The lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose. But if, on the faith of such an agreement, the borrower has made such arrangements that a return of the thing before the period agreed upon would cause him loss exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss, if he compels such return, the borrower not having in any manner violated his duty.

If a thing is lent for use for a specified time or purpose, it must be returned to the lender without demand as soon as the time has expired or the purpose has been accomplished. In other cases it need not be returned until demanded.

The borrower of a thing for use must return it to the lender at the place contemplated by the parties at the time of lending ; or if no particular place was so contemplated by them, then at the place where it was at that time : Cal. 6893-6 ; Dak. Civ. C. 1083-6.

§ 4335. **Loan for Exchange.** A loan for exchange is a contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing at a future time, without reward for its use.



A loan which the borrower is allowed by the lender to treat as a loan for use, or for exchange, at his option, is subject to all the provisions of this chapter.

By a loan for exchange the title to the thing lent is transferred to the borrower, and he must bear all its expenses, and is entitled to all its increase.

A lender for exchange cannot require the borrower to fulfil his obligations at a time, or in a manner different from that which was originally agreed upon.

§ 4334 applies to a loan for exchange: Cal. 6902-6; Dak. Civ. C. 1037-1091.

§ 4336. **Loan of Money.** A loan of money is a contract by which one delivers a sum of money to another,\* and the latter agrees to return at a future time a sum equivalent to that which he borrowed. A loan for mere use is governed by the principles in this article.

A borrower of money, unless there is an express contract to the contrary, must pay the amount due in such money as is current at the time when the loan becomes due, whether such money is worth more or less than the actual money lent: Cal. 6912-3; Dak. Civ. C. 1092-3.

§ 4337. **The Death of the Parties** determines all indefinite loans, but not loans for a definite time; the death of the borrower terminates all loans to him: Ga. 2136.

§ 4338. **Loans Pass Title as Against Creditors.** In several states, where any loan of personalty is pretended to have been made to any person with whom, or those claiming under him, possession shall have remained five years (or, in Texas, Florida, *two* years; in Mississippi, *three* years) without demand made and pursued at law by the lender; or where any reservation or limitation is pretended to have been made of a use or property by way of condition, reversion, remainder, or otherwise, in goods or chattels the possession whereof shall have remained with another as aforesaid, the absolute property shall be taken to be with the possession; and such loan, reservation, or limitation void as to creditors of, and purchasers from, the person so remaining in possession, unless declared by deed, will, or other writing duly recorded: Ill. 59,7; Va. 114,3; W.Va. 96,3; Ky. 44,1,4; Mo. 2500; Ark. 3377; Tex. 2468; Ala. 2173; Miss. 1293; Fla. 30,4.

So, in one other, possession of goods and chattels continued for five years without demand made and pursued at law, as against the creditors of the possessor, is deemed conclusive evidence that the absolute property is in such possessor, unless the contrary appear by deed recorded or will in writing proved: Tenn. 2431. So, in Alabama, if continued three years; and a simple writing is sufficient: Ala. 2174.

And in two others, when a loan is pretended to have been made to any person with whom possession has remained five years, the goods loaned are deemed his property unless a reservation of the lender's right was recorded in the land record office within six months after the loan was made: O. 4197; Kan. 43,4.

§ 4339. **Civil Law of Loan.** There are two kinds of loans: —

The loan of things which may be used without being destroyed; and the loan of things which are destroyed by being used. The first kind is called loan for use, or *commodatum*. The second kind is called loan for consumption, or *mutuum*. This *second* kind is still subdivided into gratuitous loan and loan on interest: La. 2891-2.

*Of the Loan for Use, or Commodatum: Of the Nature of the Loan for Use.* The loan for use is an agreement by which a person delivers a thing to another, to use it according to its natural destination, or according to the agreement under the obligation on the part of the borrower to return it after he shall have done using it. This loan is essentially gratuitous, otherwise it would be a letting or hiring. The lender remains proprietor of the thing lent. Everything which is in commerce, and which is not consumed by use, may be the object of this agreement. The obligations entered into by the loan for use are binding upon the heirs of the lender and of the borrower. But if the loan has only been made on account of the borrower, and to him personally, then his heirs cannot continue to possess the thing lent: La. 2893-7.

*Of the Engagements of the Borrower for Use.* The borrower is bound to keep and preserve in the best possible order the thing lent. He can use it only in the manner for which it is fitted by its nature, or which is allowed by the agreement, under the penalty of damages. If the

borrower employs the thing to another use or for a longer time than has been agreed on, he shall be liable for the loss which may happen, although the same might have happened by chance.

If the thing lent be destroyed by a chance which might have been prevented by the borrower in making use of his own, or if, unable to preserve both, he has preferred preserving his own, he is answerable for the loss of the other. If the thing has been valued at the time of lending it, the loss which results, even by chance, is on account of the borrower, unless there has been a contrary agreement. If the thing be made worse by the effects of the use alone for which it was borrowed, and without any fault on the part of the borrower, he is not answerable for the same.

The borrower is not at liberty to keep the thing as a compensation for what the lender owes him. If, in order to use the thing, the borrower be compelled to go to some expense, he has no right to be reimbursed by the lender. If several persons have jointly borrowed the same object, they are bound for it *in solido* to the lender: La. 2393-2905.

*Of the Obligations of the Lenders for Use.* The lender can take back the thing lent only after the time agreed on; or, if no agreement has been entered into in that respect, after it has been employed to the use for which it was borrowed. Nevertheless, if during the interval, or before the borrower has done with the thing, the lender be in an urgent and unforeseen need of this thing, the judge may, according to circumstances, compel the borrower to return it to him. If during the loan the borrower was obliged for the preservation of the thing to go to some extraordinary expense, necessary and so urgent that he could not give notice of the same to the lender, the lender shall be bound to reimburse him for the same. When the thing lent has defects of such a nature that it may occasion injury to the person who uses it, the lender is answerable for the consequences if he knew the defects and did not apprise the borrower of them.

*Of the Nature of the Loan for Consumption.* The loan for consumption is an agreement by which one person delivers to another a certain quantity of things which are consumed by the use, under the obligation, by the borrower, to return to him as much of the same kind and quality. By the effect of this loan the borrower becomes the owner of the thing lent, and if it be destroyed, in whatever manner the same may have happened, the loss is on his account. Anything which is such that it may be returned of the same kind and quality may be given as a loan for consumption; but things which, although of the same kind, still may differ from each other in quality, — as beasts and the like, — cannot be lent after this manner: La. 2910-2.

The obligation which results from the loan of money can never be more than the numerical sum mentioned in the contract. If there has been augmentation or diminution in the value of the money before the time of the payment, the debtor is bound to return nothing more than the numerical sum which was lent to him in such money as has currency at the time of the payment. The above rule does not obtain if the loan has been made in bullion. If provisions have been lent, whatever be the increase or diminution of their price, the debtor is still bound to return the same quantity and quality, and he is bound to return no more: La. 2913-5.

*Of the Obligations of the Lender for Consumption.* In the loan for consumption the lender is subject to the responsibility above established with respect to the vices of the thing lent for use. The lender cannot claim the thing lent before the time agreed on. If no term has been agreed on for the restitution, the judge may grant a delay according to circumstances. No delay shall be granted if the loan has been stipulated as exigible at will. If it was agreed only that the borrower should pay when he could, or when he should have the means so to do, he ought to be sentenced to pay as soon as he appears to be able so to do: La. 2916-9.

*Of the Engagements of the Borrower for Consumption.* The borrower is obliged to restore the thing lent in the same quantity and condition and at the place and time agreed on. If no spot has been fixed on for the restitution, it must be made at the place where the loan was made. If it be impossible for him to fulfil his engagement, he is bound to pay the value of the things lent, taking into consideration the time and place when they ought to have been returned according to the agreement. If the time and place have not been regulated, the payment is made according to the price which the thing is worth at the time and place where the demand is made. If the borrower does not return the things lent or their value at the time appointed, he shall be bound to pay interest from the time that a judicial demand of it has been made: La. 2920-2.

**Art. 434. Carriage.**

§ 4340. **Carriage in General.** The contract of carriage is a contract for the conveyance of property, persons, or messages from one place to another.

Carriage is either: (1) inland; or, (2) marine.

Carriers upon the ocean and upon arms of the sea or the great lakes are marine carriers. All others are inland carriers.

Rights and duties peculiar to carriers by sea are defined by acts of Congress: Cal. 7085-8; Dak. Civ. C. 1208-1211.

§ 4341. **Obligations of Carriers in General.** Carriers without reward are subject to the same rules as employees without reward, except so far as is otherwise provided by this title.

A carrier without reward who has begun to perform his undertaking, must complete it in like manner as if he had received a reward, unless he restores the person or thing carried to as favorable a position as before he commenced the carriage: Cal. 7089-7090; Dak. Civ. C. 1212-3.

A carrier of persons without reward must use ordinary care and diligence for their safe carriage: Cal. 7096; Dak. Civ. C. 1214; Ga. 2065.

*Carriage for Reward.* A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill: Cal. 7100; Dak. Civ. C. 1215; Ga. 2067.

A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care.

A carrier of persons for reward must not overrowd or overload his vehicle.

A carrier of persons for reward must give to passengers all such accommodations as are usual and reasonable, and must treat them with civility, and give them a reasonable degree of attention.

A carrier of persons for reward must travel at a reasonable rate of speed, and without any unreasonable delay, or deviation from his proper route: Cal. 7100-4; Dak. Civ. C. 1215-9.

A carrier of passengers, using extraordinary diligence as above, is not liable for injuries to the person: Ga. 2067.

§ 4342. **Carriage of Property.** Property carried is called freight; the reward, if any, to be paid for its carriage is called freightage; the person who delivers the freight to the carrier is called the consignor; and the person to whom it is to be delivered is called the consignee: Cal. 7110; Dak. Civ. C. 1220.

*Obligations of the Carrier.* A carrier of property for reward must use at least ordinary care and diligence in the performance of all his duties (a carrier without reward must use at least slight care and diligence: Cal., Dak.): Cal. 7114; Dak. Civ. C. 1221; Ga. 2065.

A carrier must comply with the directions of the consignor or consignee to the same extent that an employee is bound to comply with those of his employer.

When the directions of a consignor and consignee are conflicting, the carrier must comply with those of the consignor in respect to all matters except the delivery of the freight, as to which he must comply with the directions of the consignee, unless the consignor has specially forbidden the carrier to receive orders from the consignee inconsistent with his own.

A marine carrier must not stow freight upon deck during the voyage, except where it is usual to do so, nor make any improper deviation from or delay in the voyage, nor do any other unnecessary act which would avoid an insurance in the usual form upon the freight.

A carrier of property must deliver it to the consignee, at the place to which it is addressed, in the manner usual at that place.

If there is no usage to the contrary at the place of delivery, freight must be delivered as follows:—

1. If carried upon a railway owned or managed by the carrier, it may be delivered at the station nearest to the place to which it is addressed;
2. If carried by sea from a foreign country, it may be delivered at the wharf where the ship moors, within a reasonable distance from the place of address; or, if there is no wharf, on board a lighter alongside the ship; or,
3. In other cases, it must be delivered to the consignee or his agent, personally, if either can, with reasonable diligence, be found: Cal. 7114-9; Dak. Civ. C. 1221-6.



If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest post-office: Cal. 7120; Dak. Civ. C. 1227.

If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfil the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, on account of the consignee, and giving notice thereof to him: Cal. 7121; Dak. Civ. C. 1228.

A carrier of live-stock is generally bound to feed and water the same: Tex. 284. The carrier is bound to deliver the goods as at common law in the same order and condition as when received, to the consignee, unavoidable wear, tear, and deterioration alone excepted; if he fails so to do, he is liable as at common law for damages: Tex. 280.

**§ 4343. Bill of Lading.** A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

All the title to the freight which the first holder of a bill of lading had when he received it, passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

When a bill of lading is made to "bearer," or in equivalent terms, a simple transfer thereof, by delivery, conveys the same title as an indorsement. Compare §§ 4372, 4701.

A bill of lading does not alter the rights or obligations of the carrier, as defined in this chapter, unless it is plainly inconsistent therewith.

A carrier must subscribe and deliver to the consignor, on demand, any reasonable number of bills of lading, of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so, the consignor may take the freight from him, and recover from him, besides, all damage thereby occasioned.

A carrier is exonerated from liability for freight by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer.

When a carrier has given a bill of lading, or other instrument substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight: Cal. 7126-7132; Dak. Civ. C. 1229-1235.

A carrier is, by the laws of Texas, bound to give the shipper a bill of lading stating the quantity, character, order, and condition of the goods: Tex. 280.; Ala. 2139. (See also § 4359.)

**§ 4344. Freightage.** A carrier may require his freightage to be paid upon his receiving the freight; but if he does not demand it then, he cannot until he is ready to deliver the freight to the consignee.

The consignor of freight is presumed to be liable for the freightage; but if the contract between him and the carrier provides that the consignee shall pay it, and the carrier allows the consignee to take the freight, he cannot afterwards recover the freightage from the consignor.

The consignee of freight is liable for the freightage, if he accepts the freight with notice of the intention of the consignor that he should pay it.

No freightage can be charged upon the natural increase of freight.

If freightage is apportioned by a bill of lading or other contract made between a consignor and carrier, the carrier is entitled to payment, according to the apportionment, for so much as he delivers.

If a part of the freight is accepted by a consignee, without a specific objection that the rest is not delivered, the freightage must be apportioned and paid as to that part, though not apportioned in the original contract.

If a consignee voluntarily receives freight at a place short of the one appointed for delivery, the carrier is entitled to a just proportion of the freightage, according to distance. If the carrier, being ready and willing, offers to complete the transit, he is entitled to the full freightage. If he does not thus offer completion, and the consignee receives the freight only from necessity, the carrier is not entitled to any freightage.

If freight is carried further, or more expeditiously, than was agreed upon by the parties, the

carrier is not entitled to additional compensation, and cannot refuse to deliver it, on the demand of the consignee, at the place and time of its arrival.

A carrier has a lien for freightage, which is regulated by the title on liens: Cal. 7136-7144; Dak. Civ. C. 1236-1244.

**§ 4345. General Average.** A carrier by water may, when in case of extreme peril it is necessary for the safety of the ship or cargo, throw overboard, or otherwise sacrifice, any or all of the cargo or appurtenances of the ship. Throwing property overboard for such purpose is called jettison, and the loss incurred thereby is called a general average loss.

A jettison must begin with the most bulky and least valuable article, so far as possible.

A jettison can be made only by authority of the master of a ship, except in case of his disability, or of an overruling necessity, when it may be made by any other person.

The loss incurred by a jettison, when lawfully made, must be borne in due proportion by all that part of the ship, appurtenances, freightage, and cargo for the benefit of which the sacrifice is made, as well as by the owner of the thing sacrificed.

The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost as the value of his part of the property affected bears to the value of the whole. But an adjustment made at the end of the voyage, if valid there, is valid everywhere.

In estimating values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one half the amount due on delivery, and the cargo as at the time and place of its discharge; adding, in each case, the amount made good by contribution.

The owner of things stowed on deck, in case of their jettison, is entitled to the benefit of a general average contribution only in case it is usual to stow such things on deck upon such a voyage.

The rules herein stated concerning jettison are equally applicable to every other voluntary sacrifice of property on a ship, or expense necessarily incurred, for the preservation of the ship and cargo from extraordinary perils: Cal. 7148-7155; Dak. Civ. C. 1245-1252.

**§ 4346. Carriage of Messages.** A carrier of messages for reward, other than by telegraph, must deliver them at the place to which they are addressed, or to the person for whom they are intended: Cal. 2161; Dak. Civ. C. 1253. Such carrier, by telegraph, must deliver them at such place and to such person, provided the place of address or the person for whom they are intended, is within a distance of two miles from the main office of the carrier in the city or town to which the messages are transmitted, and the carrier is not required, in making the delivery, to pay on his route toll or ferriage; but for any distance beyond one mile from such office, compensation may be charged for a messenger employed by the carrier: Cal.

A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages: Cal. 7162; Dak. Civ. C. 1254. A carrier by telegraph must use the utmost diligence therein: Dak.

**§ 4347. Common Carriers in General.** Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.

A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry: Tex. 279; Cal. 7163-9; Dak. Civ. C. 1255-6; Ga. 2069.

A common carrier must not give preference, in time, price, or otherwise, to one person over another, except where expressly authorized by statute: Cal. 7170.

A common carrier must always give a preference in time, and may give a preference in price, to the United States and to the State.

A common carrier must start at such time and place as he announces to the public, unless detained by accident or the elements, or in order to connect with carriers on other lines of travel.

A common carrier is entitled to a reasonable compensation and no more, which he may require to be paid in advance. If payment thereof is refused, he may refuse to carry.

The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract. See, for other states, *Railroads*, in Part III.

A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants: Cal. 7171-5; Dak. Civ. C. 1258-1262.

A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated (and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried: Cal.); but his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same: Cal. 7176; Dak. Civ. C. 1263.

A common carrier is not responsible for loss or miscarriage of a letter, or package having the form of a letter, containing money or notes, bills of exchange, or other papers of value, unless he be informed at the time of its receipt of the value of its contents: Cal. 7177.

The Georgia code declares every person a *carrier* who undertakes to transport goods (or passengers) to another place for a compensation: Ga. 2065; N.M. 1548. A *common carrier* is one who does so continuously for any period of time, or any distance of transportation: Ga. 2066. Railroads are declared common carriers: R.I. 158,21; so, foreign express companies: Ind. 2912; Ga. 2083; express companies carrying money, etc.: Ind. 1883,88; omnibuses: Io. 2183; transfer companies: Io.; persons owning or operating sleeping-cars: N.H. 1883, 40,1; see, generally, in Part III. A *common carrier* is bound to extraordinary diligence: Ga. 2066. So, in Georgia, of a carrier of passengers: Ga. 2067. A common carrier is bound for the safe transportation and delivery of goods: Ga. 2073. And also that the same be done without unreasonable delay: Ga.

In Missouri, whenever any property is received by a common carrier to be transferred from one place to another within or without the state, or when a railway or other transportation company issues receipts or bills of lading in the state, such carrier or company is liable for any loss or damage to such property caused by its negligence or the negligence of any other common carrier or company to which such property may be delivered or over whose line it may pass: Mo. 598. And the carrier or company issuing the receipt may recover the amount of such loss or damage over from such other company: Mo. See in Part III.

Generally, it is a misdemeanor for a common carrier to refuse goods or passengers; see in Part V. But he may require compliance with reasonable regulations adopted for his own safety and the benefit of the public: Ga. Thus he may require the nature and value of the goods delivered to him to be made known: Ga. 2080; and any fraudulent acts, sayings, or concealment by his customers will release him from liability: Ga.

So, carriers of passengers may refuse to admit or may eject from their conveyances (1) all persons refusing to comply with reasonable regulations: Ga. 2082; (2) all persons guilty of improper conduct: Ga.; (3) all bad, dissolute, doubtful, or suspicious characters: Ga.; (4) all persons seeking to interfere with their business or interest: Ga.

(For special provisions relating to railroads, etc., see Part III.) A common carrier cannot limit his legal liability as such in any way whatever by any notice given, either by publication (Tex.), by regulation (Tex.), or by entry on receipts given or tickets sold: Ill. 27,1; Io. 2184; Tex. 278; Ga. 2068; S.C. 1333.

And any such condition on the ticket must be printed in nonpareil or larger type: Ind. 2904.

And even any special agreement made to that effect is, in one state, void: Tex. But in others, he may make an express contract, and will then be governed thereby: Cal., Dak., Ga.

Thus, a carrier of passengers may limit the value of the baggage to be taken for the fare paid: Ga. 2081.

[But in case of loss, though no extra freight has been demanded or paid, the carrier is responsible for the value of the baggage, if the same be only articles of personal use: Ga.]

§ 4348. **Common Carriers of Persons.** A common carrier of persons, unless his vehicle is fitted for the reception of passengers exclusively, must receive and carry a reasonable amount of luggage for each passenger, without any charge except for an excess of weight



over one hundred pounds to a passenger. Stage lines are required to carry only sixty pounds : Cal. 7180, Amt.

Luggage may consist of any articles intended for the use of a passenger while travelling, or for his personal equipment.

The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property.

A common carrier must deliver every passenger's luggage, whether within the prescribed weight or not, immediately upon the arrival of the passenger at his destination; and, unless the vehicle would be overcrowded or overloaded thereby, must carry it on the same vehicle by which he carries the passenger to whom it belonged, except that where luggage is transported by rail, it must be checked and carried in a regular baggage car; and whenever passengers neglect or refuse to have their luggage so checked and transported, it is carried at their risk.

A common carrier of persons must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time.

A common carrier of persons must provide every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows.

A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable.

A common carrier may demand the fare of passengers either at starting or at any subsequent time.

A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping-place, or near some dwelling-house : Cal. 7180-8; Dak. Civ. C. 1264-1272.

A passenger upon a railroad train who has not paid his fare before entering the train, if he has been afforded an opportunity to do so, must upon demand pay ten per cent in addition to the regular rate : Cal. 7189.

After having ejected a passenger, a carrier has no right to require the payment of any part of his fare.

A common carrier has a lien upon the luggage of a passenger for the payment of such fare as he is entitled to from him. This lien is regulated by the title on liens : Cal. 7190-1; Dak. Civ. C. 1273-4.

The carrier of passengers is responsible only for baggage placed in his custody; but a passenger cannot relieve himself [*sic*] from liability for freight by assuming to take care of his own baggage. And all railroads are required to give checks for baggage to any station on the lines under their control : Ga. 2071-2. See, generally, *Railroads*, etc., in Part III.

Common carriers are, in Iowa, declared liable for damages to baggage caused by careless handling, and also to \$5 a day additional damages for every day's detention caused thereby to the traveller, or by a suit brought to recover the same : Io. 2183.

**§ 4349. Common Carriers of Property.** Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time that he accepts until he relieves himself from liability pursuant to § 4342, for the loss or injury thereof from any cause whatever, except, —

1. An inherent defect, vice, or weakness, or a spontaneous action of the property itself;
2. The act of a public enemy of the United States or of the State;
3. The act of the law; or,
4. Any irresistible superhuman cause.

A common carrier is liable, even in the cases above excepted, if his ordinary negligence exposes the property to the cause of the loss.

A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence.

A marine carrier is liable in like manner as an inland carrier, except for loss or injury caused by the perils of the sea or fire.

The liability of a common carrier by sea is further regulated by acts of Congress.

Perils of the sea are from (1) storms and waves; (2) rocks, shoals, and rapids; (3) other obstacles, though of human origin; (4) changes of climate; (5) the confinement necessary at

sea; (6) animals peculiar to the sea; and (7) all other dangers peculiar to the sea: Cal. 7194-9; Dak. Civ. C. 1275-1280.

A common carrier of gold, silver, platina, or precious stones, or of imitations thereof, in a manufactured or unmanufactured state; of time-pieces of any description; of negotiable paper or other valuable writings; of pictures, glass, or chinaware; of statuary, silk, or laces, or of plated ware of any kind, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight: Cal. 7200; Dak. Civ. C. 1281 (nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading: Cal.).

If a common carrier accepts freight for a place beyond his usual route he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery.

If freight addressed to a place beyond the usual route of the common carrier who first received it is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor.

In respect to any service rendered by a common carrier about freight other than its carriage and delivery, his rights and obligations are defined by the titles on deposit and service: Cal. 7201-3; Dak. Civ. C. 1282-4.

If, from any cause other than want of ordinary care and diligence on his part, a common carrier is unable to deliver perishable property transported by him, and collect his charges thereon, he may cause the property to be sold in open market to satisfy his lien for freightage: Cal. 7204.

In Texas, the code declares that the duties and liabilities of carriers are the same as prescribed by the common law, except where specified otherwise: Tex. 277.

Where common carriers receive goods for transportation into their warehouses or depots they shall forward them in the order in which they are received, the first received to be first forwarded, without giving preference to one over the other: Tex. 283.

**Loss of Goods.** In case of loss, the presumption of law is against a common carrier: Ga. 2066. No excuse avails him except (1) the act of God: Ga.; or (2) of public enemies of the state: Ga.

§ 4350. **Common Carriers of Messages.** See, for other states, *Telegraph Companies*, in Part III.

A carrier of messages by telegraph must, if it is practicable, transmit every such message immediately upon its receipt. But if this is not practicable, and several messages accumulate upon his hands, he must transmit them in the following order:—

1. Messages from public agents of the United States or of this state on public business;
2. Messages intended in good faith for immediate publication in newspapers, and not for any secret use;
3. Messages giving information relating to the sickness or death of any person;
4. Other messages in the order in which they were received.

A common carrier of messages otherwise than by telegraph must transmit messages in the order in which he receives them, except messages from agents of the United States or of this state on public business, to which he must always give priority. But he may fix upon certain times for the simultaneous transmission of messages previously received: Cal. 7207-8; Dak. Civ. C. 1285-6.

§ 4351. **Louisiana Law of Carriers and Watermen.** Carriers and watermen are subject, with respect to the safe-keeping and preservation of the things intrusted to them, to the same obligations and duties which are imposed on tavern-keepers in the title: *Of Deposit and Sequestration* (Arts. 432, 439).

They are answerable not only for what they have actually received in their vessel or vehicle, but also for what has been delivered to them at the port or place of deposit, to be placed in the vessel or carriage.

The price of a passage agreed to be paid by a woman for going by sea from one country to another shall not be increased in case the woman has a child during the voyage, whether her pregnancy was known or not by the master of the ship.

Carriers and watermen are liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events.

The masters of ships and other vessels and their crews have a privilege on the ship for the wages due to them on the last voyage: La. 2751-5.

§ 4352. **The Time of Liability** of a carrier commences (1) with the delivery of the goods: Ga. 2070; either to himself or his agent: Ga.; or at the place where he is used, or agrees, to receive them: Ga.; (2) from the commencement of the trip or voyage: Tex.<sup>a</sup> 281.

The carriers' liability as such ceases (1) with their delivery at destination according to the direction of the person sending: Ga.; (2) or according to the custom of the trade: Ga.; (3) after the storage of goods unclaimed at their place of destination: Mo. 6280; Cal. 3155; Col. 3435. Before the trip, railways and other common carriers having depots or warehouses for storing goods, are liable only as warehousemen: Tex.

If the carrier at the point of destination uses due diligence to notify the consignee, and the goods are not taken by him (within twenty-four hours after notice: Nev.), and have in consequence to be stored in the depot or warehouse of the carrier, he is thereafter liable only as warehouseman: Tex. 282; Nev. 1875,42,2. He may insure at consignee's expense: Ala. 2142.

And in Minnesota, he may in such case deliver the goods to any public warehouseman: Minn. 1885,202. See also *Railways*, etc., in Part III.

NOTE. —<sup>a</sup> But such commencement is declared to be when the bill of lading is signed: Tex. 283.

§ 4353. **Liens.** (See also § 4354.) The carrier has a lien on the goods for freight: Minn. 90,17; Kan. 58,3; Mo. 6277; Cal. 3152; Ore. 1878, p. 102, § 2; Col. 2119; Dak. Civ. C. 1806; Wy. p. 462, § 2; Uta. 1190; Ga. 2077,1986; N.M. 1547.

And he may retain possession of the goods until the freight is paid: Minn., Cal., Ore., Ga.

But such lien does not exist until the carrier has complied with his contract as to transportation: Ga. He can recover *pro rata* for the actual distance transported, when the consignee voluntarily receives the goods at an intermediate point: Ga. The carrier of passengers has a lien on the baggage both for its freight and for the passenger's fare: Ga. 2079.

§ 4354. **Sale of Goods.** See also in Part III., *Railroads*, etc. The following persons having a lien on goods for carriage, storage, or labor, may sell them at public auction: (1) in many states, railroads, canals, express, and other transportation companies, and common carriers: R.I. 139,5; N.Y. 1837,300,1; 1885,444; N.J. *Liens*, 46 and 51; Pa. *Common Carriers*, 6; O. 3221; Ind. 2900; Ill. 141,1; Wis. 1637; Io. 2177; Minn. 19,11; Kan. 58,3; Md. 67,20,1 and 3; Del. V. 13,164,1; Va. 61,33; Tenn. 2788; Mo. 6277; Tex. 285; Cal. 3152; Ore. 18,19-20; 1878, p. 102, § 2; Nev. 1875,42,1; Col. 3432; Wash. 1980; Dak. Civ. C. 1228a; Uta. 1191; Ga. 2084a; Ariz. 3661; S.C. 1663; Ala. 2141.

(2) In many others, commission merchants, factors, and warehousemen having a lien for charges or advances: Pa. *Liens*, 1; O.; Mich. 2075; Wis.; Io.; Minn.; Kan.; Neb. 1,92,1; Del.; Mo. 6281; Cal. 3156; Ore. 18,15; Nev.; Col.; Wash. 3252; Fla. 196,1.

(3) In several, innkeepers, etc.: N.Y. 1879,530; N.J. *Inns*, 69; Ill.; Mich.; Wis.; Minn.; Kan.; Neb.; Cal. 6862; Nev. 148; Wash.; Dak.; (4) warehousemen: Vt. 4063; N.Y. 1879,336,1; O.; Ill.; Mich.; Kan. 23,145; Del.; Wis.; Ore.; Col.; Wash.; Dak.; Ala. 2143; (5) wharf-keepers: Vt., Ct., O., Mich., Wis., Minn., Neb., Ore., Wash., Fla.; (6) railroad or steamboat companies: Mass. 96,1; Vt.; Ct. 18,9,2; N.Y. 1854,282,10; N.J. *Railroads*, etc. 43; Va.; Mo. 803; Miss. 1055; (7) express companies: Mass. 96,8; Vt.; Ct. 18,9,3; N.Y. 1855,523; N.J. *Railroads*, 48; O.; Io.; Minn.; Va.; N.C. 2789; Tenn.; Cal.; (8) other bailees: Kan.; (9) So of goods left with any person, they may be sold as herein: Ct.



§ 4355. **Time of Sale.** (For citations, see also § 4354.) Such sale may be made either (A) when the consignee or owner refuses to pay costs, freight, and charges (1) sixty days after demand : N.Y.<sup>d</sup> 1837,300,2-3; Pa. *ib.* 6; Wis. 1639; Del.; Nev.<sup>d,e</sup> 1875,42,5; (2) three months after demand : N.J.;<sup>d</sup> Ill. 141,1; Mich. 2077; Col.<sup>d,e</sup> 3433; Dak.<sup>c,d,e</sup> 1228*a*; (3) when the goods remain unclaimed for a year after reception : Mass. 96,6 and 8; N.Y.;<sup>g</sup> Wis. 1638; Minn. 19,13 and 25; Ore. 18,17; Wash. 3253-4; (4) when the goods have been in possession of the carrier, etc., four months, the owner refusing to pay charges as before : N.J.;<sup>f,g</sup> so, six months : Vt. 4063; N.J.;<sup>d,f,g</sup> O. 3223; Io. 2178; Kan. 58,3; Tenn. 2789; Nev. (in the case of *personal baggage* only); Uta. 1191; three months : Md.; Tex. 285; Ore. 1878, p. 102, § 3; one year : N.Y.<sup>e</sup> 1883,421; sixty days : Mo. 6278; Cal. 3153; thirty days : Mo.;<sup>f</sup> Wash. 1982; ninety days : Ala. 2141.

(5) Twice each year, — on the first Mondays of January and July; six months after notice, as below, upon order of the mayor and aldermen or selectmen of the city or town, after examination of the goods, and further advertisement if required : Mass. 96,2.

Trunks and valises must be held six months before being advertised for sale : Nev.<sup>d,e</sup>

There must be notice of the sale (1) by publication : Mass.; N.Y.;<sup>g</sup> N.J.;<sup>g,d,f</sup> Pa.; O. 3224; Ill.; Minn. 19,14 and 25; Del.; Tenn.; Mo.; Tex. 286; Cal.; Ore.; Nev.;<sup>d,e</sup> Col.;<sup>d,e</sup> Wash. 3255; Dak.;<sup>c,d,e</sup> Uta. 1192; (2) by posting : N.J.;<sup>f,g</sup> Pa.; O.; Minn. 19,17; Del.; Mo.;<sup>f</sup> Tex.; Ore. 18,21; Nev.<sup>e</sup> 149; (3) as in the case of sales of personal property under execution : Wash. 1985.

And there must be special personal notice to the owner or consignee if known : Vt.; N.Y.;<sup>c</sup> O.; Ill.; Mich. 2076; Wis. 1639; Io.; Minn.<sup>a</sup> 19,14; Kan. 58,6; Neb. 1,92,2; Tenn.; Mo.; Cal.; Ore. 18,18; Nev.;<sup>d,e</sup> Col.;<sup>d,e</sup> Wash.; Dak.<sup>c,d,e</sup>; Ala.

So, personal notice to the owner by mail or service : N.Y.<sup>e</sup> *ib.* 2; Wis. 1639; Tenn. 2790; Ore.; Ariz.

(B) When the owner and consignee is unknown or cannot be found, (1) upon order of court : Pa. *ib.* 7; *Liens*, 2; Io.; Del. *ib.* 2; Miss.; (2) the time of sale as in A : Mass.; Vt.; N.J.;<sup>d</sup> O.; Wis. 1640; Io.; Minn.; Tenn.; Ore.; Nev.; (3) when the goods remain unclaimed for six months : Ct.; N.Y.;<sup>c</sup> N.J.<sup>c,f,g</sup> *Railroads*, 45; Ill.; N.C.;<sup>g</sup> Mo.;<sup>f</sup> Cal.<sup>e</sup> 6862; Dak.;<sup>c,d,e</sup> Ga. 2084*a*; (4) for three months : Ind.; Mich. 2077; Neb. 1, 92,3; Md.; Tex.; Col. 3433; Fla. 196,1; Ariz. 3661; (5) for one year : R.I. 139,5; N.Y.;<sup>f</sup> Wis. 1638; Minn. 19,13,25; Ore. 18,17; Nev.<sup>e</sup> 148; S.C.; (6) for sixty days : Va.; Mo.; Cal. 3153; (7) for two years : N.Y.<sup>e</sup>

There must be notice of the sale, either (1) by publication : Vt. 4065; R.I.; Ct.; N.Y.<sup>c,f,g</sup> 1879,530,2; N.J.;<sup>c,d,f,g</sup> Ind.; Ill.; Mich.; Wis.;<sup>b</sup> Io. 2179; Minn. 19,14 and 25; Kan. 58,6; Neb.; Va.; N.C.;<sup>g</sup> Tenn.; Mo.; Tex. 236; Cal.; Ore.; Nev.; Col.;<sup>d,e</sup> Wash.; Dak.;<sup>c,d,e</sup> S.C.; Ga.; Ala.; Fla.; Ariz.; (2) by posting : N.J.;<sup>d,f</sup> Ind. 2901; Io.; Minn. 19,17; Md.; Mo.;<sup>f</sup> Tex.; Wash. 3258; Fla.; (3) as the court order : Pa.; (4) as in A : Mass., Dak.<sup>c,d,e</sup>

(C) Perishable goods may be sold (1) immediately upon order of court : N.J.;<sup>d,f</sup> Pa.; Wis.;<sup>h</sup> Del. *ib.* 2; Ore. 18,27; Wash.<sup>h</sup> 3264; Miss.; (2) immediately, and without any order of court : Mass. 96,5; R.I.<sup>b</sup> 139,6; Ct. 18,9,1 and 4; N.Y. 1854,282, 11; 1857,444,4; N.Y.<sup>g</sup> *ib.* 2; N.J.<sup>d</sup> *ib.* 52; O. 3229; Ill. 141,2; Io. 2180; Minn.<sup>h</sup> 19, 23; Kan. 23,145; 58,4; Tex. 289; Nev.<sup>d,e</sup> 1875,42,4; Col.<sup>d,e</sup> 3437; Wash. 1981; Dak.<sup>c,d,e</sup> 1228*b*; Ga.<sup>h</sup> 2084*b*; Ariz.<sup>d</sup> 3664; (3) if not claimed in thirty days : Wis., Minn., Kan., Ore., Wash.; (4) if not claimed in ten days : Fla.; (5) in five days : Ind. 2903; (6) in sixty days : Ala. 2140.

And no notice, as in A and B, is necessary, except that personal notice must be given or mailed to the consignee or owner, if known : Mass., R.I., N.J.,<sup>d</sup> Io., Col.,<sup>d,e</sup> Dak.,<sup>c,d,e</sup> Ga. But in others' ten days' notice is required (except when subject to immediate decay : Minn., Ore.) : Minn., Ore., Wash. And in one, five days' notice, as in A, is always required : Tex.

Public warehousemen may sell damaged grain which has been stored for a year or more, and become damaged while stored, for account of parties having claim thereto : Kan. 23,156.

In others, there must be notice by publication : Ct.,<sup>d,e</sup> N.Y., N.J.,<sup>f</sup> Kan., Ga., Fla., Ariz. ; twenty-four hours' notice to the owner : Ga., Ariz. ; and by posting : N.J.<sup>f</sup>

Live-stock, remaining unclaimed (for forty-eight hours after arrival : Tex.), may be sold by the carrier upon giving five days' notice : Tex. 288 ; Ga.

NOTES. — <sup>a</sup> Notice by publication is all that is necessary in the case of railways. <sup>b</sup> When the owner cannot be found and his address is unknown. <sup>c</sup> In the case of innkeepers only. <sup>d</sup> Of carriers, etc., under § 4354, (1). <sup>e</sup> Or warehousemen. <sup>f</sup> Of railways. <sup>g</sup> Of express companies. <sup>h</sup> When subject to *immediate* decay.

§ 4356. **Effect.** The proceeds of such sale are to be applied first to the satisfaction of the charges legally incurred on the goods and the expenses of the process : Mass. 96, 3 and 9 ; Vt. 4066 ; R.I. ; Ct. 18,9,1-2 ; N.Y. ; <sup>c,d,f,g</sup> N.J.<sup>c,d,f,g</sup> *Railroads*, 46 and 50 ; Pa. *ib.* 8 ; O. 3225 ; Ind. 2901 ; Mich. 2082 ; Wis. 1644 ; Io. 2181 ; Minn. 19,19 ; Kan. 58,8 ; Neb. 1,92,8 ; Md. 67,20,1 ; Del. *ib.* 3 ; Va. ; N.C.<sup>g</sup> 2789 ; Tenn. 2791 ; Mo. 6278 ; Tex. 236 ; Cal. 3153,6862 ; Ore. 18,23 ; Nev. 148 ; 1875,42,5 ; Col.<sup>d,e</sup> 3433 ; Wash. 1983,3260 ; Dak.<sup>d</sup> 1228*a* ; Uta.<sup>d</sup> 1191 ; Ga. 2084*a* ; Miss. 1055 ; Fla. 196,2 ; Ariz. 3665 ; S.C. 1685 ; Ala. 2142. See also § 4354 for citations.

The remainder is paid (1) to the state treasurer (N.Y. 1857,444), who holds it five years subject to the claim of the owner or his representatives, and then pays it into the state treasury : Mass. ; R.I. 139,7. So, in Vermont; but he holds it only two years subject to such claim : Vt. 4066-7. So, in others, (2) substituting county treasurer (N.Y.<sup>c</sup> 1879,530,4-5) ; and if unclaimed during such period, it belongs to the county : N.J.<sup>d</sup> *ib.* 48 ; *Railroads*,<sup>f</sup> 44 (two years) ; Mich. 2085-6 ; Wis. 1645 ; Io. 2181-2 (ten years) ; Minn. 19,20-22 ; Kan. ; Neb. 1,92,9 and 11 ; Mo. 6279 ; Cal. 3154 ; Ore. 18,26 and 25 ; Wash. 4362-3 ; 148 ; Nev. 1875, 42,6 (one year) ; so, Col. 3434 ; so, Miss. 1055 ; so, Fla. 196,2-3 ; Ariz. (six months). But in the case of railways (or vessels : Mass.), the surplus proceeds may always be claimed by the owner ; until claimed they belong to the railway company : Mass. 96,7 ; Minn.<sup>f</sup> 19,26.

And in the case of express companies, the proceeds are paid to the owner if he make claim within three years ; otherwise, to the state treasurer : Mass. ; Ct. 18,9,5-6 (five years). So, of all carriers, etc. : Va. 61,34.

(3) The surplus is paid to the owner if he make claim (a) within sixty days of the sale : Cal. ; (β) within thirty days : N.J. ; <sup>c</sup> (γ) within five years after the sale : N.Y.<sup>c,g</sup> *ib.* 3 ; Ind. ; Tex. ; (δ) within one year : Ct. ; N.J. ; <sup>g</sup> O. ; Mo.<sup>f</sup> 803 ; Cal. ; <sup>c</sup> Col. ; <sup>d,e</sup> (ε) within seven years : N.Y. ; <sup>d</sup> (ζ) two years : N.J. ; <sup>d</sup> (η) at any time, on demand : N.Y. ; <sup>c,f</sup> Pa.<sup>c</sup> *Liens*, 3 ; Minn.<sup>f</sup> 19,26 ; Kan. ; Md. ; Del. ; N.C. ; <sup>g</sup> Mo. ; Tenn. ; Dak. ; <sup>d</sup> Uta ; <sup>d</sup> S.C. ; Ala. ; (θ) six months : R.I., Nev. ; <sup>c</sup> (ι) within a year after payment to county treasurer : Nev.<sup>d,e</sup> (4) It is deposited in a bank in the names of the consignor and consignee, and can only be drawn out by consent of both : Ga. 2084*c*. (5) It is paid to the overseers of the poor : N.Y.<sup>d,e,g</sup> *ib.* 4 ; N.J.<sup>c</sup> (6) It is paid to the state treasurer : N.J.,<sup>d</sup> O., Ind., Mich. ; and may be claimed from him at any time within five years : O. 3230.

NOTES. — See § 4355, notes.

§ 4357. **Stoppage in Transitu.** (See also § 4576.) This right exists whenever the vendor in a sale on credit seeks to resume the possession of goods while they are in the hands of a carrier or middle-man, in their transit to the vendee or consignee, on his becoming insolvent : Ga. 2075. The right continues until the vendee obtains actual possession of the goods : Ga.

The carrier cannot dispute the title of the person delivering the goods to him by setting up an adverse title in himself, or a title in third persons which is not being enforced against him : Ga. 2076.

§ 4358. **Effect** of a stoppage in transitu is to relieve the carrier from his obligation to deliver : Ga. 2074. And thenceforward he is only bound to ordinary diligence in the care of the goods : Ga.

§ 4359. **Bills of Lading.** In several states, no master or agent of a vessel, nor any railroad, or other person, shall sign or give any bill of lading, receipt, or other

voucher for merchandise, unless actually shipped or received for shipment: N.Y. 1858,326,5; N.J. 1881,90,5; Md. 35,16; Mo. 557; Ala. 1881,108,5; La. D. 2481.

So, in many other states where it is made a penal offence. See in Part V.

And no property can be delivered except on surrender and cancellation of the bill of lading: N.Y. 1859,353; Mo. 559; see also § 4373.

In several, all the similar provisions of Art. 437 apply equally to the case of carriers or bills of lading: N.Y. 1859,353; N.J. *ib.* 6; Pa. *Bailees*, 1; Mo. 561; La. D. 2484. In some states, bills of lading are declared negotiable instruments: Md. 35,12; Mo. 558. Compare §§ 4372,4701. Any condition written on or attached to the bill to the contrary notwithstanding: Mo.; La. D. 2486.

And so, in Maryland, full title to the property and all rights incident thereto shall vest in each holder for value *bona fide*, unaffected by the rights or equities between prior holders of which he had no notice.

Unless the words *non-negotiable* be written on the face of the bill: Md.; Mo. 559.

They may be transferred by indorsement of the bill and delivery of the property; and the transferee is deemed the owner so far as to give validity to any lien or pledge or transfer made or created on the faith thereof: Mo. (See § 4343.)

§ 4360. **Discrimination.** The laws of two states provide that no common carrier shall discriminate against any person or corporation or other carrier: Mass. 73,1; R.I. 139,1; S.C. 1335. See also *Railroads*, etc., in Part III.

§ 4361. **Insurance.** By the law of Pennsylvania, carriers may insure the lives and persons of passengers, and issue tickets to that effect: Pa. *Common Carriers*, 10. See in Part III.

## Art. 437. Warehousemen.

§ 4370. **Definitions.** A *private warehouseman* (termed class B in Indiana, and class C in Illinois) is one who keeps a warehouse where each person's grain is kept apart, stored in a separate bin; a *public warehouse* (class A, in Indiana; A and B, in Illinois) is where the grain is stored in bulk or mixed: Ind. 6526; Ill. 114,120-1; Minn. 1885,144,1; Kan. 23,149; Ky. 1880, Apr. 28, § 1.

A public warehouseman is any one who advertises or offers to receive the merchandise of other parties on storage for hire: Me. 31,8; Ct. 1878,40,1; Tenn. 2792.

Every private warehouseman must keep the grain of every person separate and distinct from other grain of like nature, and upon surrender of the warehouse receipt shall deliver the identical grain described therein: Kan. 23,151.

No warehouseman may mix different qualities or grades of produce together: Minn. *ib.* 5 and 14; Ky. *ib.* § 14; Ore. 1885, p. 62, § 3.

But public warehousemen may store grain in bulk or mix it: Kan. 23,152.

The provisions of this article apply to grain stored in elevators and petroleum in barrels; and the owner of the elevator, etc., is a warehouseman: Pa. *Bailees*, 6.

Public warehousemen must receive all grain offered for storage without discrimination: Ind. 6527; Ill. 120,125; Ky. *ib.* § 5; Minn. *ib.* 5. The same is frequently required by penal statutes.

§ 4371. **Receipts to be Genuine.** (A) In many states, no warehouseman (and in New York, New Jersey, Pennsylvania, Kansas, Missouri, California, Wyoming, Louisiana, no wharfinger; in New York, New Jersey, Pennsylvania, no public or private inspector; and in Connecticut, New York, New Jersey, Pennsylvania, Kansas, Maryland, Missouri, California, Wyoming, Louisiana, no custodian of property or other person) shall issue any receipt, acceptance of an order, or other voucher, for any produce, goods, etc., to any owner or claimant,



unless such goods have actually been received by the warehouseman and are under his control at the time: Ct. 1878,40,2; 1883,97; N.Y. 1858,326,1; N.J. 1881,90,1; Pa. *Bailees*, 2; Ind. 6530,6544; Ill. 114,128; Io. 2172; Minn. 124,14; 1885,144,7; Kan. 23,146 and 153; Md. 35,16; Ky. *ib.* § 7; Tenn. 2793; Mo. 553; Cal. 6855; Vol. 3, p. 236, § 1; Ore. 1885, p. 61, § 2; Wy. 35,144; Ala. 1881,108,1; La. D. 2477. [Falsely making or altering a warehouse receipt is generally a criminal offence in all states. See in Part V.]

Nor, in many, can he issue such receipt, etc., as security for money loaned unless the goods are actually in his custody as above: Ct. *ib.* 3; N.Y. *ib.* 2; N.J. *ib.* 2; Ind. 6545; Kan. 23,147; Mo. 554; Cal. *ib.* § 2; Wy. 35,145; Ala. *ib.* 2; La. D. 2478.

Nor, in many, any second receipt while a first is outstanding uncanceled, except as a duplicate: Ct. *ib.* 4; N.Y. *ib.* 3; N.J. *ib.* 3; Pa. *ib.* 3; Ind. 6528,6546; Ill. 114,126; Io. 2174; Minn. *ib.* 6; Kan. 23,153; Md. 35,17; Ky. *ib.* § 6; Tenn. 2794; Mo. 555; Cal. *ib.* § 3; Ore.; Wy. 35,146; Ala. *ib.* 3; La. D. 2479.

In such case the word *duplicate* must be written on the face of the receipt: Ct., N.Y., N.J., Ind., Ill., Minn., Kan., Ky., Tenn., Mo., Ore., Ala.

Nor, in many, can he sell, incumber, or remove such goods without the written consent of the person holding the receipt: Mass. 72,10; Ct. *ib.* 5; N.Y. *ib.* 4; N.J. *ib.* 4; Pa. *ib.* 4; Ind. 6547; Ill. 38,125; Io. 2175; Kan. 23,148; Mo. 556; Cal. *ib.* § 4; Ore. 1885, p. 62, § 4; Wy. 35,147; Ala. *ib.* 4; La. D. 2480. See also in Part V., as it is frequently a criminal offence.

Nor can he issue a receipt for greater amount than is actually delivered: Ind., Ill., Minn., Kan., Ky. Nor any receipt be reissued upon which grain has once been delivered: Ind., Ill., Kan., Ky.

So, in Iowa, such property must remain in store until otherwise ordered by the holder of the receipt or voucher, subject only to the condition thereof and the contract between the parties as to the time of remaining in store: Io. 2173.

Every warehouseman, public or private, must give the owner a receipt setting forth the quantity, kind, and grade of grain stored; and such receipt is conclusive as against the warehouseman: Ind. 6528; Ill. 114,126; Minn. *ib.* 6; Kan. 23, 150; Ky.; Ore. 1885, p. 61, § 1; Ala. 2139.

(B) So, in Maryland, every warehouse receipt (or bill of lading) issued by any person or corporation, or his or its agent duly authorized, for goods actually received for storage (or transportation, if a bill of lading) is conclusive evidence in the hands of any *bona-fide* holder for value who was without actual notice to the contrary, that all of the goods, etc., in said instrument mentioned, had been actually received by and were actually in the custody of such warehouseman at the time of issuing said instrument, according to the tenor thereof and for the purposes and effects therein stipulated or provided, notwithstanding that the fact may be otherwise, or that the agent may have had no authority to issue any such instrument except for goods actually received and in possession at the time: Md. 35,13.

And in others, all warehouse receipts, certificates, and other evidences of the deposit of property issued by any warehouseman, wharfinger, or other person engaged in storing property for others, are, in the hands of the holder thereof, presumptive evidence of title to said property, both in law and equity: Io. 2171; Minn. 124,14.

Transgression of the provision of this article is, in most states, made a penal offence, or a felony. See Part V.

§ 4372. **Warehouse Receipts** may, in most states, be transferred by indorsement: Ct. *ib.* 6; N.Y. 1858,326,6; N.J. *ib.* 6; Pa. *Bailees*, 1; Ind. 6537; Ill. 114, 142; Wis.<sup>a</sup> 4194; Minn. 1885,144,9; Kan.<sup>b</sup> 23,154; Neb. 1,92,13; Mo. 559; Cal. *ib.* § 5; La. D. 2482; Ala. 1881,108,6.

So, in others, they are declared negotiable instruments: Mass. 72,5; Pa.; Ind. 6543; Wis.<sup>b</sup> 1676; Md. 35,12; Tenn. 2796; Mo. 558; Ore. 1885, p. 62, § 5; La.<sup>a</sup> D. 2485.

And in two states, full title to the property and all rights incident thereto shall vest in each *bona-fide* holder for value without notice, unaffected by the equities existing between previous parties: Md., Tenn.

So, in two, the title to goods stored in a *public* warehouse, passes to a purchaser or pledgee by the indorsement (but not in blank: Me.) and delivery to him of the receipt, signed by the person to whom such receipt was originally given, or an indorsee: Mass. 72,6; Me. 31,4. And such indorsement must, to be valid against creditors of the person, be recorded on the books of the warehouseman: Me. 31,6.

But in others such transferee is taken to be owner only so far as to give validity to any pledge, lien, or transfer by him created: Ct., N.Y., N.J., Pa., Wis., Mo., Ala., La. But no property shall be delivered except on surrender and cancellation of original receipt, or indorsement thereon for partial delivery: N.Y.; N.J.; Pa.; Ind. 6529; Wis.; Minn.; Ala.; La. See also § 4373.

And warehouse receipts are exempt from the provision of this section if *non-negotiable* or other words of similar effect be written thereon: Ct.; N.Y.; N.J.; Pa.; Wis.; Minn. 124,17; Md.; Tenn. 2797; Mo.; Cal. *ib.* § 8; Ala.; La.

And every such indorsement is deemed a warranty of title by the indorser: Ind.

In Maryland, the principles of §§ 4359,4370,4371, apply to every acceptance of an order and every other voucher whatever for any goods, etc., as on storage or deposit with any wharfinger, warehouseman, or other person, which does not on its face provide that it shall not be negotiable: Md. *ib.* 14.

NOTES. — <sup>a</sup> They may be transferred by delivery, with or without indorsement. <sup>b</sup> "To the same extent and in the same manner as bills of exchange or promissory notes."

§ 4373. **Delivery.** No person or corporation having issued any such receipt for goods in his custody may, in many states, part with or deliver them, except to the holder of such receipt or other instrument, or upon his order, and the presentation of the instrument with his indorsement: Ct.; N.Y.; N.J.; Pa. *ib.* 4; Ind. 6531; Ill. 114,130; Minn. 124,18; Md. 35,17; Ky. *ib.* § 9; Mo. 559; Cal. *ib.* § 7; Ore. 1885, p. 62, § 6.

So, in several, he cannot remove such goods from store (except to preserve from fire, etc.), without the return and cancellation of the receipt: Ill. 114,143; Ky.; Tenn. 2795; Mo.

And they are required thereupon to cancel and destroy said instrument, or, in case of partial delivery of the goods, to indorse such fact thereupon, with the names of the persons to whom the delivery was made, and the quantity delivered: Pa. *ib.* 1; Ind.; Ill. 114,127; Kan. 23,153; Md.; Cal. *ib.* § 6; Ala. *ib.* 8. See also § 4372.

This section does not apply to property replevied or removed by operation of law: Ct. *ib.* 8; N.Y. *ib.* 8; N.J. *ib.* 8; Pa. *Bailees*, 8; Mo. 562; La. D. 2487; Ala.

§ 4374. **Elevator Receipts** vest title in the person to whom they are issued and subsequent *bona-fide* holders: Md. 35,19.

§ 4375. **Warehouseman's Lien.** Any person keeping or storing personal property has a common lien (Art. 447) upon it (1) for his reasonable charges: N.Y. 1885,526; Minn. 90,17; Mo. 6277; Ore. 1878, p. 102, § 2; Col. 2119; Mon. G. L. 1179; Wy. p. 462, § 2; Uta.<sup>a</sup> 1884,18.

(2) So, commission merchants and warehousemen have a lien for advances made by them on the goods: Mo. 6281; Col. 2119 and 3436. Compare § 4354.

No warehouseman may pledge, hypothecate, or negotiate any loan upon any such receipt to a greater amount than he has actually advanced thereon: Tenn. 2798; compare § 4384.

NOTE. — <sup>a</sup> Only where there has been a special contract for the charges, in the noted states.

§ 4376. **Storage a Bailment.** When grain is delivered for storage it is deemed a bailment, not a sale, though mixed with other grain or removed from the warehouse: Minn. 124,13. Such grain cannot be seized in an action against the bailee: Minn.

So, where grain or other property is stored in a public warehouse in such a manner that different lots or parcels are mixed together so that the identity thereof cannot be accurately preserved, the warehouseman's receipt for any portion of such grain, etc., is deemed a valid title to so much thereof as is designated in the receipt, without regard to any separation or identification: Mass. 72,7; Me. 31,9. Compare § 4371.

§ 4377. **Agency.** Every note, certificate, or warehouse receipt signed by the agent of any person under a general or special authority, shall bind such person, and be negotiable, as if he had signed it: Wis. 1677.

§ 4378. **Warehouseman's Liability.** No public or private warehouseman (class A or B; see § 4370) is (1) liable for loss by fire, if he exercised reasonable care: Ind. 6532; Ill. 114,134; Minn. 1885,144,14; Ky. *ib.* § 13; (2) nor for the damage caused by heating of grain, if properly stored: Ind., Ill., Minn., Ky.

A warehouseman is a depositary for hire, bound for ordinary diligence: Ga. 2112.

A wharfinger is also a depositary for hire, and subject to the same principles as in this article provided: Cal. V. 3, p. 237, § 9; Ga. 2113.

No warehouseman can limit his legal liability by language inserted in the receipt: Ill. 114,129; Minn. *ib.* 8; Ky. *ib.* § 8; Tenn. 2796; La. D. 2486.

## Art. 438. Factors and Consignees.

§ 4380. **Shipper deemed Owner.** In a few states, every person in whose name merchandise is shipped (for sale, by a person in the lawful possession thereof at the time of shipment, in Massachusetts) is deemed the true owner so far as to entitle the consignee for a lien thereon for moneys advanced or securities given to the shipper for or on account of such consignment: Mass. 71,2; Me. 31,1; R.I. 136,1; N.Y. 1830, 179,1; O. 3214; Wis. 3345; Md. 34,1.

Unless the consignee had notice by bill of lading or otherwise that the shipper was not the actual and *bona-fide* owner thereof: Mass.; R.I.; N.Y. *ib.* 2; O. 3215; Wis.; Md. 34,2.

When a person intrusted with merchandise, and having authority to sell or consign the same, ships or otherwise transmits or delivers it to any other person, such person has a lien thereon for any money or merchandise advanced or negotiable security given by him on the faith of such consignment to or for the use of the person in whose name the consignment or delivery was made, and for any money, negotiable security, or merchandise received for the use of such consignee by the person in whose name the consignment or delivery was made, (1) if such consignee had at the time of such advance or receipt probable cause to believe that the person in whose name the merchandise was shipped, transmitted, or delivered was the actual owner thereof, or had a legal interest therein to the amount of said lien: Mass. 71,3; (2) unless such consignee had notice, by bill of lading or otherwise, at such time that the person was not the actual owner: Pa. *Factors*, 1,2.

§ 4381. **Consignee deemed Owner.** And in many states, every factor, agent (or other person, in Maryland), intrusted with the bill of lading, custom-house permit, or warehouseman's receipt, or (in Massachusetts, Maine, Rhode Island, New York, Pennsylvania, Ohio, Wisconsin, and Kentucky) who has possession of any merchandise for the purpose of sale, or (in New York, Ohio, and Wisconsin) as a security for advances to be made or obtained thereon, without documentary evidence of title, (A) is deemed the true owner thereof so far as to give validity to any contract made by him with any third person for the sale, pledge (except in Massachusetts, Maine, and Kentucky), or disposition of such merchandise, or



for any money advanced or negotiable instrument, or other written obligation, given by such person upon the faith thereof, and notwithstanding (except in Maine, Rhode Island, New York, Pennsylvania, Ohio, Maryland, and Kentucky) that such person has notice that the consignee is an agent or factor: Mass. 71,1 and 4; Me. 31,1; R.I. 136,2; N.Y. 1830,179,3; Pa. *Factors*, 2; O. 3216; Md.<sup>a</sup> 34,3; Ky. 1880, May 5, §§ 1 and 6.

But such loan or advance must be made in good faith, and (1) with probable cause to believe that the agent had authority to make such loan or pledge, and was not acting fraudulently against the owner: Mass.; (2) with no notice that such agent, etc., was not the owner: R.I. (B) In some, such factor, etc., etc., has a lien upon the property for all such advances, liability incurred, commissions or other moneys due him for services as such factor, etc.: Wis. 3346; Mo. 6281; compare § 4375.

And in two states, any person may contract with any agent or factor intrusted with the goods, or the consignee, for the purchase thereof, and may receive the same, and pay for them; and such contract or payment shall be good against the owner, if made in the usual course of business, and the person had no notice that the agent was not authorized to sell the goods and receive the purchase-money, notwithstanding he had notice that the other was an agent or factor: R.I. 137,4; Md. 34,4.

NOTE.—<sup>a</sup> See, however, § 4385.

§ 4382. **Precedent Debts.** But any person who accepts such merchandise or document in deposit or pledge for any antecedent debt due to him from such factor (with notice that he is such factor only: Pa.) acquires no right in the goods other than (1) that possessed by the agent or factor against the owner at the time of such deposit: Mass. 71,5; Me. 31,2; R.I. 136,3; N.Y. 1830, 179,4; Pa. *Factors*, 4; O. 3217; Md. 34,5; Ky. 1880, May 5, § 2; (2) or than the value of any security surrendered at the time of transfer, whichever may be greatest: Ky.

If he had such notice that the agent had no authority, he acquires no interest in the goods: Pa.; Md. 34,6; Ky. 1880, May 5, § 3.

§ 4383. **Rights of Owner.** The true owner may, notwithstanding §§ 4380, 4381, demand and receive such goods from the third person upon repayment of the money advanced or restoration of the security given by such third person, or price paid, or upon paying the value of the goods; and from the factor upon satisfying his agent's lien for expenses, etc., and may also recover any balance remaining in the hands of the factor or third person from the proceeds of a sale of the goods: Mass. 71,6; Me. 31,3; R.I. 136,5; N.Y. 1830,179,5; Pa. *Factors*, 5; O. 3218; Md. 34,10 and 13; Ky. 1880, May 5, § 5.

So, he may recover the goods from the factor or his assignee previous to any pledge or sale thereof (in case of insolvency: Mass.): Mass.; R.I.; Pa.; Md. *ib.* 9.

And the owner redeeming or paying for such goods as in this section provided will be held to have discharged his debt to the factor *pro tanto* (in case of the factor's insolvency, in Maryland): R.I.; Md. 34,11.

So, when the agent has made a contract for the sale of the goods, or has delivered them in pursuance of any contract to any third person (and, in Maryland, becomes insolvent before payment made), the owner may demand the purchase-money of such third person: R.I.; Md. 34,7.

And he will receive it free of any set-off, except such as arose (1) in course of dealing with said agent acting as such for the same principal: Md.; or (2) from previous advances of money, materials, or labor for the use of said principal: Md.; (3) he is subject to the set-offs existing on the part of the third person as against the factor, etc.: R.I.

And in no case can there be a set-off of a debt due to said factor, unless the third person received it as a pledge without knowledge that the factor had no authority to sell or deposit the same: Md. *ib.* 8.

§ 4384. **Duties of Factors, etc.** Nothing above contained authorizes a common carrier, warehouseman, or other person to whom goods are committed for transporta-

tion or storage only to sell or hypothecate the same : R.I. 136,3 ; N.Y. 1830,179,6 ; O. 3219 ; Ky. 1880, May 5, § 4 ; La. D. 2488. Compare § 4375. And such action is commonly declared a felony or misdemeanor ; see Part V.

A factor is an agent, as defined above.

In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted, —

1. To insure property consigned to him uninsured ;
2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit ; but not to pledge, mortgage, or barter the same ; and,
3. To delegate his authority to his partner or servant, but not to any person in an independent employment.

A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership : Cal. 7367-9 ; Dak. Civ. C. 1337-9.

§ 4385. **Agricultural Produce.** In Maryland, no consignment whatever of agricultural productions by the grower, producer, or other owner to any commission merchant, factor, or consignee for the purpose of sale for the owner's use vests in the agent any other title than the right to sell and deliver the same to a fair and *bona-fide* purchaser for value ; and every mortgage, deposit, or pledge by such agent of such goods is void, and the title remains in the owner : Md. 34,12 and 14.

If the agent become insolvent, the title to such produce does not pass to his assignee, but remains as above : Md. *ib.* 15.

This section does not, however, impair the agent's lien for advances actually made to the owner, either in money or goods : Md. *ib.* 16.

§ 4386. **General Regulations.** In Texas, no factor or commission merchant to whom any cotton, sugar, or produce or merchandise of any kind is consigned, for sale on commission or otherwise, shall purchase the same or reserve any interest therein upon the sale of the same, directly or indirectly : Tex. 2363.

All drawbacks and rebatements of insurance, freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service of or to any cotton, grain, or other produce or article of commerce, paid, allowed, or contracted for to any common carrier, shipper, merchant, factor, agent, or middle-man not the true and absolute owner thereof, are prohibited : Tex. 2371.

§ 4387. **Factors' Lien.** Factors have a general lien, dependent on possession, on property in their hands (ranking the same as pawnees' liens (§ 4522) : Ga.) : Cal. 8053 ; Dak. Civ. C. 1807 ; Ga. 1987. Compare §§ 4381,4383. See also §§ 4354,4375.

A factor's lien extends to all balances on general account, and to the proceeds of a sale as well as to the goods themselves : Ga. 2111.

§ 4388. **General Principles.** A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser.

A factor must obey the instructions of his principal to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee.

A factor may sell property consigned to him on such credit as is usual ; but, having once agreed with the purchaser upon the term of credit, may not extend it.

A factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser ; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds.

A factor who receives property for sale, under a general agreement or usage to guarantee the sales or the remittance of the proceeds, cannot relieve himself from responsibility therefor without the consent of his principal: Cal. 7026-7030; Dak. Civ. C. 1163-1172.

A factor is an agent, as defined above.

In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted:—

1. To insure property consigned to him uninsured;
2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter the same; and,
3. To delegate his authority to his partner or servant, but not to any person in an independent employment.

A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership: Cal. 7367-9; Dak.

Peculiar confidence is reposed in a factor; he has liberal discretion according to the trade usage, and is bound to great diligence and good faith: Ga. 2111.

### Art. 439. Innkeepers.

§ 4390. **Definitions.** In Florida, *hotels* are defined to be houses kept for the accommodation of twenty-five or more lodgers or boarders: Fla. 114,1.

The term *inn* includes all taverns, hotels, and houses of public general entertainment for guests: Ga. 2114.

All persons entertained for hire in an inn are guests: Ga. 2116.

§ 4391. **Liability.** An innkeeper is liable for all losses of or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn: Cal. 6859; Dak. Civ. C. 1062.

An innkeeper is bound to extraordinary diligence in preserving the property of his guests intrusted to his care, and is liable for the same if stolen when the guest has complied with all reasonable rules of the inn: Ga. 2117.

It is not necessary to show actual delivery to the innkeeper. Depositing goods in a public room, set apart for such articles, or leaving them in the room of the guest, or placing a horse in a stable, is a delivery to the innkeeper; if, however, the guest delivers his goods to a servant under special charge to him to keep the same, the innkeeper is not liable therefor: Ga. 2118.

In case of loss, the presumption is want of proper diligence in the landlord. Negligence, or default by the guest himself, of which the loss is a consequence, is a sufficient defence. The innkeeper cannot limit his liability by a public notice; he may adopt reasonable regulations for his own protection, and the publication of such to his guests binds them to comply therewith: Ga. 2120.

§ 4392. **Relief from Liability.** An innkeeper may generally relieve himself from the common-law liability for money and valuables of his guests lost or stolen, which have not been delivered to him for safe-keeping, by posting a notice that he keeps a safe for that purpose: R.I. 204,30; N.Y. 1855,421; 1883,227,1; N.J. *Inns*, 70; Pa. *Inns*, 18; O. 4427, Amt.; Ill. 71,1-2; Mich. 2095; Wis. 1725; Io. 1880,181,1; Minn. 124,21; Neb. 1,39,1-2; Md. 67,17,6-7; Del. V. 14, 417,1; Ky. 1874, Feb. 5, § 1; Tenn. 2787; Cal. 6860; Dak. Civ. C. 1063; Ga. 2119; La. 2968; D. 1701-2; Ala. 1549,1550.

So, he is not liable except after delivery to him of such property, or offer of delivery: N.H. 1885,97; Mass.<sup>a</sup> 102,12; 1885,358; Me. 27,7; O.; Wis.; Ky.; Mo. 5785.

No innkeeper is liable for the loss of any baggage or other property of his guests caused by fire, (1) not intentional, produced by the innkeeper or any of his servants: N.Y.<sup>c</sup> 1866,658; Wis. 1726; Mo. 5786. So, he is not liable (2) except in the absence of ordinary and reasonable care: Mass. 102,15; Me. 27,6.



In Florida, he is not liable for the loss of any property unless a special deposit was made and written receipt given: Fla. 114,4.

It is always a defence that the loss was occasioned by negligence of the guest, or by his non-compliance with the reasonable and proper regulations of the inn, of which he had actual notice: Mass. 102,16; Me. 27,8.

An innkeeper is a depositary for hire, but his liability is subject to more stringent rules: Ga. 2115.

No animal belonging to a guest and destroyed by fire while on the innkeeper's premises shall be deemed of a greater value than \$300 without a special agreement: N.Y. 1866,458,2.

No hotel-keeper is liable for the loss of wearing-apparel or merchandise for more than \$500 when it occurred without his fault or negligence, nor for the loss of any article not within the guest's room, unless specially intrusted to the care of his servants: N.Y. 1883,227,2.

No innkeeper is liable for goods stolen from a room left unlocked or unbolted, when he posts a notice requiring such bolting, etc.: Pa. *ib.* 19; Del. *ib.* 2.

**Exceptions.** But he will still be liable for a loss of goods not delivered to him (1) which occurs by the hand or negligence of himself or his servants: O.; Ill.; Mich.; Wis.; Io.; Minn. 124,22; 1883,30; Neb.; Md.; Ky.; Mo.; Cal.; La.; (2) for the loss of such jewelry, money, etc., as is usual and prudent for a guest to retain about his person or in his room: Pa., Ill., Mich., Io., Neb.; Del.; La.; (3) which occurs by the theft of himself or his servants: O.; Mo. 5786; (4) which goods are needed by the guest for present use: Cal., Dak.; (5) for the loss of articles worn or carried upon the person to a reasonable amount, personal luggage, and money necessary for travelling expenses and personal use: N.H., Mass.<sup>b</sup> Me.

NOTES. — <sup>a</sup> And then only to the amount of \$5,000, unless there is a special contract. <sup>b</sup> To an amount not exceeding \$1,000. <sup>c</sup> Such property being stored in a barn or other outbuilding with the guest's knowledge.

§ 4393. **Lien.** (See also §§ 4354–5.) Hotel and inn keepers have, by the laws of most states, a lien (1) on the baggage and valuables of their guests for the proper charges due them: N.H. 139,1; Me. 91,46; N.Y. 1879,530,1; N.J. *Inns*, 68; Pa.<sup>b</sup> *Inns*, 17; Ill. 82,48; Wis. 3344; Io. 1880,181,2; Va.<sup>a</sup> 1879,84,1; Tenn. 2784; Mo. 3198; Tex. 3182; Cal. 6861; Nev. 147; Col. 2118; Dak. Civ. C. 1062; Wy. 1882,50; Uta.<sup>a</sup> 1194; Ga. 2122; Fla. 114,6; N.M. 1542.

(2) On the goods or personal property of the guest: N.H.; Me.; N.J.; Pa.;<sup>b</sup> Wis. 3344; Tenn.; Wy.; Uta.; N.M.; (3) on his personal baggage: Pa.; Ga. 1986; (4) on his horse: Pa. *ib.* 16; (5) on his wages: Mo.

*Except*, in two states, there is no such lien as against seamen or mariners: N.H., Mass.

So, in many states, boarding-house keepers: N.H.; Mass. 192,31; Me.; Ct.<sup>a</sup> 18, 7,23; N.Y. 1860,446; N.J.; Pa.; Ill.; Wis.; Va.;<sup>a</sup> Tenn.; Mo.; Tex.; Cal.; Nev.; Col.; Dak.; Wy.; Uta.; Ga.; N.M. In Iowa, eating-house keepers.

They have the right of possession of such baggage, etc., until paid: Ct., Pa., Va., Cal., Wy., Uta., Ga. Even though the goods were stolen: Ga.

Innkeepers may sell baggage left behind when a person indebted for board has left and been absent six months: Nev. 147; so, three months: N.Y., Pa.; compare § 4355.

It is enforced by sale of the articles subject to lien: Me., Ct., N.J., Va., Uta., Fla.

Those are called innkeepers who keep a tavern or hotel, and make a business of lodging travellers.

Innkeepers have a privilege, or more properly a right of pledge, on the property of travellers who take their board or lodging with them, by virtue of which they may retain the property and have it sold, to obtain payment of what such travellers may owe them, on either of the accounts above mentioned.

Innkeepers enjoy this privilege on all the property which the traveller has brought to the inn, whether it belongs to him or not, because this property has become their pledge by the fact of its introduction into the inn. This privilege extends even to coined money which may be found in the apartment of the traveller who has died in their house.

The term *travellers* applies to strangers and such as being transiently in a place where they have no domicile, take their board and lodging at an inn.

The innkeeper who retains the property of a traveller for tavern expenses due to him cannot sell it of his own authority; he must apply to a tribunal to have his debt ascertained, and the property seized and sold for the payment of it : La. 3232-6.

NOTES. — <sup>a</sup> In the noted states, this lien only exists when a special agreement is made for the price of board. <sup>b</sup> Only for two weeks' board.

§ 4394. **Duties.** It is commonly a misdemeanor for an innkeeper to refuse guests. Compare also § 6054, and see in Part V.

Every innholder must at all times be furnished with suitable provision and lodging for strangers, and with stable-room, hay, and provender for their horses and cattle, and with pasturing if required by the terms of his license; and he shall grant such reasonable accommodation as occasion requires to strangers, travellers, and others : Mass. 102, 5; Me. 27,5; Vt. 3944. So, "he must keep good entertainment for man and beast : " Pa. *Inns*, etc. 1.

The innkeeper who advertises himself as such is bound to receive, as far as he can accommodate, all persons of good character offering themselves as guests who are willing to comply with his rules. Persons entertaining only a few individuals, or simply for the accommodation of travellers, are not innkeepers, but simply depositaries for hire, bound to ordinary diligence : Ga. 2121.

Innkeepers are required to give checks for baggage : Ga. 2123.

### CHAPTER III. — TRANSFERS AND LIENS.

#### Art. 450. Gifts.

§ 4500. **General Principles.** A gift is a transfer of personal property, made voluntarily, and without consideration : Cal. 6146; Dak. Civ. C. 639. To constitute a valid gift, there must be the intention to give by the donor, acceptance by the donee, and delivery of the article given, or some act accepted by the law in lieu thereof : Ga. 2657. If the donation be of substantial benefit, the law presumes the acceptance, unless the contrary be shown. A parent, guardian, or friend may accept for an infant : Ga. 2658.

§ 4501. **Delivery.** No gift, except by deed or will, is valid (even as against the giver) unless actual possession shall have come to and remained with the donee or his agent (compare § 4597) : Va. 112,1; W.Va. 82,1; Tenn. 2430; Mo. 2499; Ark. 3376; Tex. 2467; Cal. 6147; Dak. Civ. C. 640; Ala. 2176; Miss. 1293. See § 4508.

Or, if not capable of manual delivery, unless the means of obtaining possession and control are given, or symbolical delivery made : Cal., Dak. And if donor and donee reside together possession by the donee at their common residence is not sufficient : Va., W.Va., Ala.

When the law requires a conveyance in writing to the validity of a gift, or the conveyance is made for a good consideration, such conveyance, executed and delivered, will dispense with the necessity of a delivery of the article given. A gift in writing, without good consideration and without delivery, is void : Ga. 2659. Actual manual delivery is not essential to the validity of a gift. Any act which indicates a renunciation of dominion by the donor and the transfer of dominion to the donee is a constructive delivery : Ga. 2660.

§ 4502. **Revocation.** A gift other than a *donatio causa mortis* (Art. 252) cannot be revoked by the giver : Cal. 6148; Dak. Civ. C. 641.

**Conditions.** Impossible, illegal, and immoral conditions are void, and do not invalidate a perfect gift : Ga. 2661. See § 4104.

§ 4503. **Gifts by Insolvents, etc.** (See also Art. 459, and in Part IV., *Insolvency*.) In several states, every gift, conveyance, assignment, transfer, or charge which is not upon consideration deemed valuable in law is void, as to creditors existing (1) at the time : Va. 114,2; W.Va. 96,2; Ky. 44,1,2; Ark. 3376; Tex. 2466; Miss. 1293.

(2) Or subsequently: Ark.; (3) or as against purchasers: Ark.; Ga. 2632.

But as to subsequent creditors or purchasers with notice, it is not void merely because voluntary or without consideration: Va.; W.Va.; Ky.; Tex.; Miss. 1294. An insolvent person cannot make a valid gift to the injury of his existing creditors; and where possession, partially or entirely, remains with the donor, every *parol gift* is void against *bona-fide* creditors and purchasers without notice: Ga. 2662; S.C. 2021.

No voluntary gift or settlement of property by one indebted is deemed or taken to be void in law as to creditors of the donor or settlor prior to such gift, etc., merely because of such indebtedness, if at the time property fully sufficient and available for satisfaction of his then existing creditors be retained by him; but such indebtedness, both to prior and subsequent creditors, is evidence only from which an intention of fraud may be inferred: N.C. 1547; Tex.

But every voluntary deed, or conveyance not for value, made by a debtor insolvent at the time is void: Ga. 1952.

**§ 4504. Gifts by Minors, etc.** Gifts of persons just arriving at age to their parents, guardians, trustees, attorneys, etc., are to be scrutinized with great jealousy, and upon the slightest evidence of persuasion or influence shall be declared void, at the instance of the donor or his legal representatives, at any time within five years of the gift: Ga. 2666.

If a gift be made for a specific purpose, expressed or secretly understood, and such purpose is illegal, or from other cause fails or cannot be accomplished, the donee shall hold as trustee for the donor or his next of kin: Ga. 2667.

**§ 4505. Presumption of Gift.** The delivery of personal property by a parent into the exclusive possession of a child living separate from the parent shall create a presumption of a gift to the child. It may be rebutted by evidence of an actual contract of lending or from circumstances from which such a contract may be inferred: Ga. 2663.

The exclusive possession by a child of lands originally belonging to the father, without payment of rent for the space of seven years, shall create a conclusive presumption of a gift, and convey title to the child, unless there is evidence of a loan or of a claim of dominion by a father acknowledged by the child, or of a disclaimer by the child: Ga. 2664.

If the child be a married daughter, the contract of loan referred to in the two preceding paragraphs must be assented to by the husband to rebut the presumption of a gift: Ga. 2665.

**§ 4506. Deeds of Personalty.** The laws of Georgia declare that a deed is not generally necessary to convey title to personal property: Ga. 2696. The principles applicable to deeds of land generally apply to deeds of personalty: Ga. But an attesting witness is not necessary: Ga.

**§ 4507. Seals.** All distinctions between sealed and unsealed instruments are abolished (see also § 1564): Cal. 6629; Dak. Civ. C. 925.

In Missouri, every instrument expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be deemed sealed: Mo. 662.

See, for other states and other provisions, §§ 1564-5, 4131.

**§ 4508. Record.** In three states, all deeds of gift or deeds of trust of personalty are void as against creditors and subsequent purchasers for value until duly recorded: Va. 114,5; Mo. 2501; Miss. 1293; Ala. 2170.

For the time, manner, and place of record the law is the same as in the case of chattel mortgages. See Art. 453.

Every voluntary alienation or charge upon personal property, unless the actual possession in good faith accompanies the same, is void as to a purchaser without notice, or any creditor, prior to the recording such transfer, etc., in the office of the county court where such alienor resides: Ky. 44,1,3. Compare § 4580.

See also §§ 4131, 4501, 4597, 4599.



**Art. 451. Civil Law of Donations Inter Vivos.**

§ 4510. **Note.** This law applies as well to real as to personal property, and as well to donations *mortis causa* or by will as to gifts *inter vivos*. See § 2520, note <sup>a</sup>. For the disposable portion, see Art. 441.

§ 4511. **General Dispositions.** Property can neither be acquired nor disposed of gratuitously unless by donations *inter vivos* or *mortis causa*, made in the forms hereafter established.

A donation *inter vivos* (between living persons) is an act by which the donor divests himself at present and irrevocably of the thing given in favor of the donee who accepts it.

A donation *mortis causa* (in prospect of death) is an act to take effect when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable : La. 1467-9.

§ 4512. **Of the Capacity necessary for Disposing and Receiving by Donation Inter Vivos or Mortis Causa.** All persons may dispose or receive by donation *inter vivos* or *mortis causa*, except such as the law expressly declares incapable : La. 1470.

To make a donation either *inter vivos* or *mortis causa* one must be of sound mind.

The minor under sixteen years cannot dispose of any property, save, however, dispositions made by marriage contract : La. 1475-6. Compare §§ 2602, 2604.

See also §§ 2604, 2610, 2615, 2616, 2617, 2619, 2621, 2623, which apply also to donations *inter vivos*.

In order to be capable of receiving by donation *inter vivos*, it suffices to be conceived at the time of donation : La. 1482.

§ 4513. **Of Dispositions Reprobated by Law in Donations Inter Vivos and Mortis Causa.** (See also § 2625.) In all dispositions *inter vivos* and *mortis causa* impossible conditions, those which are contrary to the laws or to morals, are reputed not written.

Substitutions and *fidei commissa* are and remain prohibited.

Every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir, or the legatee.

In consequence of this article the trebellianic portion of the civil law, that is to say, the portion of the property of the testator which the instituted heir had a right to detain when he was charged with a *fidei commissa* or fiduciary bequest, is no longer a part of our law.

The disposition by which a third person is called to take the gift, the inheritance, or the legacy, in case the donee, the heir, or the legatee does not take it, shall not be considered a substitution and shall be valid.

The same shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked ownership to another : La. 1519-1522.

§ 4514. **Of Donations Inter Vivos.** There are three kinds of donations *inter vivos* : —

The donation purely gratuitous, or that which is made without condition and merely from liberality.

The onerous donation, or that which is burdened with charges imposed on the donee.

The remunerative donation, or that the object of which is to recompense for services rendered.

The onerous donation is not a real donation, if the value of the object given does not manifestly exceed that of the charges imposed on the donee.

The remunerative donation is not a real donation, if the value of the services to be recompensed thereby, being appreciated in money, should be little inferior to that of the gift.

In consequence, the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one half that of the charges or of the services.

The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals.

A donation *inter vivos* can comprehend only the present property of the donor. If it comprehends property to come, it shall be null with regard to that.

Every donation *inter vivos* made on conditions, the execution of which depends on the sole will of the donor, is null.

It is also null, if it was made on condition of paying other debts and charges than those that existed at the time of the donation, or were expressed either in the act of donation or in the act that was to be annexed to it.

In case the donor has reserved to himself the liberty of disposing of any object comprised in the donation or of a stated sum on the property given, if he dies without having disposed of it, that object or sum shall belong to the heirs of the donor, any clause or stipulation to the contrary notwithstanding.

The four preceding paragraphs are not applicable to donations by marriage contract.

The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself.

The donor may stipulate the right of return of the objects given, either in case of his surviving the donee alone, or in case of his surviving the donee and his descendants.

That right can be stipulated for the advantage of the donor alone.

The effect of the right of return is, that it cancels all alienations of the property given that may have been made by the donee or his descendants, and causes the property to return to the donor, free and clear of all incumbrances and mortgages, except, however, the mortgage for the dowry and matrimonial agreements, if the other property of the husband, being the donee, be not sufficient, and only in case the donation was made to him by the same marriage contract which gave rise to such rights and mortgages: La. 1523-1535.

§ 4515. **Of the Form of Donations Inter Vivos.** An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights, or actions, under the penalty of nullity.

No feigned delivery of immovables given shall have effect against third persons.

A donation *inter vivos*, even of movable effects, will not be valid, unless an act be passed of the same, as is before prescribed.

Such an act ought to contain a detailed estimate of the effects given.

The manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality.

A donation *inter vivos* shall be binding on the donor, and shall produce effect only from the day of its being accepted in precise terms.

The acceptance may be made during the lifetime of the donor by a posterior and authentic act, but in that case the donation shall have effect, with regard to the donor, only from the day of his being notified of the act establishing that acceptance.

Yet, if the donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects given, the donation, though not accepted in express terms, has full effect.

If the donee be of full age, the acceptance may be made by him, or in his name by his attorney in fact having special power to accept the donation which is made, or a general power to accept the donations that have been or may be made.

The acceptance can only be made by the donee personally, or by his attorney in fact during his life. If he refuse or neglect to accept, his creditors cannot accept it in his stead, under the pretext that the refusal has been in fraud of their rights.

If the donee die before having accepted, the acceptance cannot be made by his heirs, and the donation remains without effect.

A married woman cannot accept a donation without the consent of her husband, and in case of the husband's refusal, without being authorized by the judge, conformably to what is prescribed in the title: *Of Husband and Wife* (Art. 645).

A donation made to a minor, not emancipated, must be accepted by his tutor.

Nevertheless, the parents of a minor, whether he be or be not emancipated, and the other legitimate ascendants, even in the lifetime of the parents, though they be not tutors to the minor, may accept for him.

If a donee, being of full age, be under interdiction, the acceptance is made for him by his curator.

A person deaf and dumb, knowing how to write, may accept for himself or by an attorney in fact.

If he cannot write, the acceptance shall be made by a curator appointed by the judge for that purpose.

Donations made for the benefit of a hospital, of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments.

A donation, duly accepted, is perfect by the mere consent of the parties; and the ownership of the objects given is transferred to the donee, without the necessity of any other delivery.

The property given passes to the donee with all its charges, even those which the donor has imposed between the time of the donation and that of the acceptance.

The universal donee is bound to pay the debts of the donor, which existed at the time of the donation, but he can discharge himself therefrom by abandoning the property given.

If the whole of the effects of the donor have been given to several donees, each for a certain proportion, each of them is bound for the debts for the portion of which he is the donee.

When the donation comprehends property that may legally be mortgaged, the act of donation, as well as the act of acceptance, whether the acceptance be made by the same or a separate act, must be registered, within the time prescribed for the registry of mortgages, in a separate book kept for that purpose by the register of mortgages, which book shall be open to the inspection of all parties requiring it.

This registry shall be made at the instance of the husband, when the property has been given to his wife; and if the husband does not comply with this formality, the wife may cause it to be complied with, without requiring authorization for that purpose.

When the donation is made to minors, to persons under interdiction, or to public establishments, the registry shall be made at the instance of the tutors, curators, or administrators.

The want of registry may be pleaded by all persons concerned, except the donor, those persons whose duty it was to cause the registry to be made, and their representatives.

Minors, persons under interdiction, or married women, are not entitled to relief for the want of acceptance or registry of donations; but they have in such case their recourse against their tutors, curators, or husbands; and even in case of the insolvency of such tutors, curators, or husbands, they shall not be entitled to relief by way of restitution: La. 1536-1553.

**§ 4516. Of the Exception to the Rule of the Irrevocability of Donations Inter Vivos.** Donations *inter vivos* are liable to be revoked or dissolved on account of the following causes:—

1. The ingratitude of the donee.
2. The non-fulfilment of the eventual conditions, which suspend their consummation.
3. The non-performance of the conditions imposed on the donee.
4. The legal or conventional return.

Revocation on account of ingratitude can take place only in the three following cases:—

1. If the donee has attempted to take the life of the donor.
2. If he has been guilty towards him of cruel treatment, crimes, or grievous injuries.
3. If he has refused him food when in distress.

An act of revocation for cause of ingratitude must be brought within one year from the day of the act of ingratitude, imputed by the donor to the donee, or from the day that the act was made known to the donor.

The revocation cannot be sued for by the donor against the heirs of the donee, nor by the heirs of the donor against the donee, unless, in the latter case, the suit was brought by the donor, or he died within the year in which the act of ingratitude was committed.

Revocation for cause of ingratitude affects neither the alienation made by the donee nor the mortgages, nor the real incumbrances he may have laid on the thing given, provided such transactions were anterior to the bringing of the suit of revocation.

In case of revocation for cause of ingratitude, the donee shall be obliged to restore the value of the thing given, estimating such value according to its worth at the time of bringing the action, and the fruits from the day that it is brought.

Donations in consideration of marriage are not revocable for cause of ingratitude, when there are children of that marriage.

When there are not, the revocation takes place with regard to the donee, but without impairing the rights resulting from the marriage in favor of the other party to the marriage.

When an eventual condition, which suspends the execution of a donation, can no longer be accomplished, as if the donation was to be executed on the arrival of a certain vessel, and the vessel is lost, the donation is dissolved of right.



But if the conditions be potestative, that is, if the donee is obliged to perform or prevent them, their non-fulfilment does not, of right, operate a dissolution of the donation; it must be sued for and decreed judicially.

An action of revocation or rescission of a donation on account of the non-execution of the conditions imposed on the donee, is subject only to the usual prescription, which runs only from the day that the donee ceased to fulfil his obligations.

In case of revocation or rescission on account of the non-execution of the conditions the property shall return to the donor free from all incumbrances or mortgages created by the donee; and the donor shall have against any other persons possessing the immovable property given, all the rights that he would have against the donee himself.

In all cases in which the donation is revoked or dissolved, the donee is not bound to restore the fruits by him gathered previous to the demand for the revocation or rescission.

But in case of the non-fulfilment of conditions, which the donee is bound to fulfil, if it be proved to have proceeded from his fault, he may be condemned to restore the fruits by him received since his neglect to fulfil the conditions: La. 1559-1569.

**Art. 452. Pledges.** (The statutes regulating the business of pawnbroking are not incorporated in this article. See in Part III.)

§ 4520. **Definitions.** Pledge is a deposit of personal property by way of security for the performance of a debt or another act: Cal. 7986; Dak. Civ. C. 1757; Ga. 2138.

Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge: Cal. 7987; Dak. Civ. C. 1758.

The lien of a pledge is dependent on possession; and no pledge is valid until the property pledged is delivered to the pledgee or to a pledge-holder, as hereafter prescribed: Cal. 7988; Dak. Civ. C. 1759; Ga. 2138; La. D. 2905.

Promissory notes or obligations may be delivered in pledge; but the delivery of title-deeds creates no pledge: Ga. 2138; La. D. 2904.

The receiver in pledge of promissory notes is such a *bona-fide* holder as will protect him under the same circumstances as a purchaser from the equities between the parties, but not from the true owner, if fraudulently transferred, though without notice to him: Ga. 2139.

§ 4521. **General Principles.** The increase of property pledged is pledged with the property (Cal.; Dak.; Ga. 2147).

One who has a lien upon property may pledge it to the extent of his lien.

One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value.

Property may be pledged as security for the obligation of another person than the owner, and in so doing the owner has all the rights of a pledgor for himself, except as hereinafter stated.

A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledge-holder.

One who pledges property as security for the obligation of another cannot withdraw the property pledged otherwise than as a pledgor for himself might; and if he receives from the debtor a consideration for the pledge, he cannot withdraw it without his consent.

A pledge-holder for reward cannot exonerate himself from his undertaking; and a gratuitous pledge-holder can do so only by giving reasonable notice to the pledgor and pledgee to appoint a new pledge-holder, and in case of their failure to agree, by depositing the property pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same.

A pledge-holder must enforce all the rights of the pledgee, unless authorized by him to waive them.

A pledgee, or a pledge-holder for reward, assumes the duties and liabilities of a depositary for reward.

A gratuitous pledge-holder assumes the duties and liabilities of a gratuitous depositary.

Where a debtor has obtained credit, or an extension of time, by a fraudulent misrepresentation of the value of property pledged by or for him, the creditor may demand a further pledge to correspond with the value represented, and in default thereof may recover his debt immediately, though it be not actually due.

When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed (Cal. ; Dak. ; Ga. 2140).

Before property pledged can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found.

A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend.

Notice of sale may be waived by a pledgor at any time, but is not waived by a mere waiver of demand of performance.

A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged by a positive refusal to perform after performance is due, but cannot waive it in any other manner, except by contract.

The sale by a pledgee of property pledged must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property, and must be for the highest obtainable price.

A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations ; but he may collect the same when due.

Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee the pledgor may require it to be sold, and its proceeds to be applied to such satisfaction when due.

After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation and the necessary expenses of sale and collection, and must pay the surplus to the pledgor on demand.

When property pledged is sold by order of the pledgor before the claim of the pledgee is due, the latter may retain out of the proceeds all that can possibly become due under his claim until it becomes due.

A pledgee or pledge-holder cannot purchase the property pledged except by direct dealing with the pledgor.

Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court, and in that case may be authorized by the court to purchase at the sale : Cal. 7989-8011 ; Dak. Civ. C. 1760-1782.

The sale must be at auction, with thirty days' notice : Ga. 2140. The general property in the goods remains in the pawner, but the pawnee has a special property for the purposes of the bailment. The death of neither party interferes with their respective interests : Ga. 2142. The pawnee may transfer his debt, and with it the possession of the thing pawned, and the purchaser stands precisely in his situation : Ga. 2143.

**§ 4522. Rights of Pledgee.** The lien of a pawnee is inferior to the lien for taxes, liens of which such pawnee had notice, special liens for rent, laborers' liens, judgment or record liens : Ga. 1937.

The pawnee may use the goods pawned, provided their use does not unpair their real value ; he has a lien on them for the money advanced, though not for other debts due to him ; he may retain possession until his lien is satisfied, and has a right of action against any one interfering therewith : Ga. 2141.

The pawner must pay all necessary expenses and repairs on the property ; but if the pawn itself has been profitable, or the pawnee has used it to his own advantage, the pawner may require him to account for such profits : Ga. 2146.

**§ 4523. Duties of Pledgee.** He is bound to ordinary care and diligence ; if the property pledged be promissory notes or evidences of debt, the pawnee must exercise ordinary diligence in caring for and securing the same : Ga. 2145.

§ 4524. **Sale.** The pledgee may sell in the same way and under the same law as a mortgagee of personal property (Art. 453): Mass. 192,10-11; Me. 92,57-8. Where no time is limited for the payment of the debt or redemption he may sell at any time by public auction: N.H. 139,3. Where a time is limited the pledgee may sell at any time thereafter in the same way: N.H. 139,4.

Generally these matters are provided for under the laws regulating pawnbrokers. Notice of sale must generally be given by publication, posting, or personal notice.

The pledgor of personal property may authorize the sale or other disposition of the property without intervention of the courts: La. D. 2907.

§ 4525. **The Surplus Proceeds** of the sale after payment of the lien and expenses are to be paid to the pledgor, general owner, or person entitled thereto, on demand: N.H. 139,7; Me. 91,58.

§ 4526. **Civil Law of Pledge.** The *pledge* is a contract by which one debtor gives something to his creditor as a security for his debt.

There are two kinds of pledge, —

The pawn.

The antichresis.

A thing is said to be pawned when a movable thing is given as security; and the antichresis when the security given consists in immovables: La. 3133-5.

**General Provisions.** Every lawful obligation may be enforced by the auxiliary obligation of pledge.

If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it.

If the obligation is null, so also is the pledge.

The obligation of pledge annexed to an obligation which is purely natural is rendered valid only when the latter is confirmed and becomes executory.

Pledge may be given not only for an obligation consisting in money, but also for one having any other object, — for example, a surety. Nothing prevents one person from giving a pledge to another for becoming his surety with a third.

A person may give a pledge not only for his own debt, but for that of another also.

A debtor may give in pledge whatever belongs to him.

But with regard to those things in which he has an ownership which may be divested or which is subjected to incumbrance, he cannot confer on the creditor by the pledge any further right than he had himself.

To know whether the thing given in pledge belonged to the debtor reference must be had to the time when the pawn was made.

If at the time of the contract the debtor had not the ownership of the thing pledged, but has acquired it since, by what title soever, his ownership shall relate back to the time of the contract, and the pledge shall stand good.

One person may pledge the property of another, provided it be with the express or tacit consent of the owner.

But this tacit consent must be inferred from circumstances so strong as to have no doubt of the owner's intention, — as if he was present at the making of the contract, or if he himself delivered to the creditor the thing pawned.

Although the property of another cannot be given in pledge without his consent, yet so long as the owner refrains from claiming it, the debtor who has given it in pledge cannot seek to have it restored until his debt has been entirely discharged.

Tutors of minors and curators of persons under interdiction, curators of vacant estates and of absent heirs, testamentary executors and other administrators named or confirmed by a judge, cannot give in pledge the property confided to their administration without being expressly authorized in the manner prescribed by law.

An attorney cannot give in pledge the property of his principal without the consent of the latter, or an express power to that effect.

Nevertheless, where the power of attorney contains a general authority to mortgage the property of the principal, this power includes that of giving it in pledge.

The property of cities and other corporations can only be given in pledge according to the rules and subject to the restrictions prescribed on that head by their respective acts of incorporation.



A partner cannot for his own concerns give in pledge the partnership property without the consent of his associates. He cannot do it even for the partnership concerns without such consent, unless he be vested with the management of the copartnership.

This rule admits of exception in matters of commercial partnership.

It is essential to the contract of pledge that the creditor be put in possession of the thing given to him in pledge, and consequently that actual delivery of it be made to him, unless he has possession of it already by some other right.

But this delivery is only necessary with respect to corporeal things; as to incorporeal rights, such as credits which are given in pledge, the delivery is merely fictitious and symbolical: *La.* 3136-3153.

If a credit non-negotiable be given in pledge, notice of the same must be given to the debtor: *La. D.* 2906.

**§ 4527. Of Pawn.** One may pawn every corporeal thing which is susceptible of alienation. One may even pawn money as a security for performing or refraining to perform an act.

One may, in fine, pawn incorporeal movables, such as credits and other claims of that nature.

When a debtor wishes to pawn a claim on another person he must make a transfer of it in the act of pledge, and deliver to the creditor to whom it is transferred the note or instrument which proves its existence, if it be under private signature, and must indorse it if it be negotiable.

The pawn invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of his debtor, out of the product of the movable, corporeal, or incorporeal which has been thus burdened.

But this privilege shall take place against third persons only in case the pawn is proved by an act made either in a public form or under private signature; provided such act has been recorded in the manner required by law; provided also that whatever may be in the form of the act it mentions the amount of the debt, as well as the species and nature of the thing given in pledge, or has a statement annexed thereto of its number, weight, and measure.

When a debtor wishes to pawn promissory-notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith.

All pledges of movable property may be made by private writing accompanied by actual delivery; and the delivery of property on deposit in a warehouse shall pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge so made without further formalities shall be valid as well against third persons as against the pledgors thereof, if made in good faith.

If a credit not negotiable be given in pledge, notice of the same must be given to the debtor.

Nevertheless, the acts of pledge in favor of the banks of this state shall be considered as forming authentic proof, if they have been passed by the cashiers of those banks or their branches, and contain a description of the objects given in pledge, in the manner above directed.

When the thing given in pledge consists of a credit not negotiable, to enable the creditors to enjoy the privilege above mentioned it is necessary not only that the proof of the pledge be made by an authentic act or by act under private signature, duly recorded, but that a copy of this act shall have been duly served on the debtor of the credit given in pledge.

On the other hand, this notification of the act of pledge to the person owing the debt pledged shall not be necessary if the debt is evidenced by a note or other instrument payable to the bearer or to order; because in that case it will suffice that the note or instrument shall have been indorsed by the person pledging it to invest the creditor with the privilege above mentioned.

In no case does this privilege subsist on the pledge, except when the thing pledged, if it be a corporeal movable, or the evidence of the credit, if it be a note or other instrument under private signature, has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties.

When several things have been pawned the owner cannot retake one of these things without satisfying the whole debt, though he offers to pay a certain amount of it in proportion to the thing which he wishes to get.

The creditor who is in possession of the pledge can only be compelled to return it when he has received the whole payment of the principal as well as the interest and costs.

The creditor cannot, in case of failure of payment, dispose of the pledge; but when there have been pledges of stock, bonds, or other property for the payment of any debt or obligation, it shall be necessary, before such stocks, bonds, or other property so pledged shall be sold for the payment of the debts for which such pledge was made, that the holder of such pledge be compelled to obtain a judgment in the ordinary course of law, and the same formalities in all respects shall be observed in the sale of property so pledged as in ordinary cases; but in all pledges of movable property, or rights, or credits, stocks, bonds, or other movable property, it shall be lawful for the pledgor to authorize the sale or other disposition of the property pledged in such manner as may be agreed upon by the parties without the intervention of courts of justice; provided that all existing pledges shall remain in force and be subject to the provisions of this act.

Any clause which should authorize the creditor to appropriate the pledge to himself, or dispose thereof without the aforesaid formalities, shall be null.

Until the debtor be divested from his property (if it is the case) he remains the proprietor of the pledge, which is in the hands of the creditor only as a deposit to secure his privilege on it.

The creditor is answerable agreeably to the rules which have been established under Title VI. for the loss or decay of the pledge which may happen through his fault.

On his part, the debtor is bound to pay to the creditor all the useful and necessary expenses which the latter has made for the preservation of the pledge.

The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor; but he cannot appropriate them to his own use; he is bound, on the contrary, to give an account of them to the debtor, or to deduct them from what may be due to him.

If it is a credit which has been given in pledge, and if this credit brings interest, the creditor shall deduct this interest from those which may be due to him; but if the debt for the security of which the claim has been given brings no interest itself, the deduction shall be made on the principal of the debt.

If the credit which has been given in pledge becomes due before it is redeemed by the person pawning it, the creditor, by virtue of the transfer which has been made to him, shall be justified in receiving the amount and in taking measures to recover it. When received, he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge.

The pawn cannot be divided, notwithstanding the divisibility of the debt between the heirs of the debtor and those of the creditor.

The debtor's heir who has paid his share of the debt cannot demand the restitution of his share in the pledge so long as the debt is not fully satisfied.

And respectively the heir of the creditor who has received his share of the debt cannot return the pledge to the prejudice of those of his co-heirs who are not satisfied.

If the proceeds of the sale exceed the debt, the surplus shall be restored to the owner; if, on the contrary, they are not sufficient to satisfy it, the creditor is entitled to claim the balance out of the debtor's other property.

The debtor who takes away the pledge without the creditor's consent commits a sort of theft.

When the creditor has been deceived on the substance or quality of the thing given in pledge, he may claim another thing in its stead or demand immediately his payment, though the debtor be solvable.

The creditor cannot acquire the pledge by prescription, whatever may be the time of his possession: La. 3154-3175.

The creditor acquires the right of possessing and retaining the movable which he has received in pledge as a security for his debt, and may cause it to be sold for the payment of the same.

Hence proceeds the privilege which he enjoys on the thing.

For the exercise of this privilege it is necessary that all the requisites stated above should be fulfilled: La. 3220-1.

**Art. 453. Mortgages of Personal Property.<sup>a</sup>**

§ 4530. **Record.** Chattel mortgages<sup>b</sup> must, in nearly all states, be filed or recorded, or (1) the mortgage will not be valid, except as between the parties,<sup>c,d,e</sup> unless the property mortgaged is delivered to and retained by the mortgagee:<sup>f</sup> N.H. 137,2,5,12; Mass. 192,1; 1883,73; Me. 91,1; Vt. 1966; R.I. 176,9; N.Y.<sup>e</sup> 1833,279,1; N.J.<sup>e</sup> 1878,234; 1881,179,4; 1885,244,4; O.<sup>e</sup> 4150; Ind. 4913; Ill. 95,1; Mich.<sup>e</sup> 6193; Wis. 2313; Io.<sup>e</sup> 1923; Minn.<sup>e</sup> 39,1; Kan.<sup>e</sup> 68,9; Neb.<sup>e</sup> 1,32,14; Md.<sup>d,g</sup> 44,45; Del. V. 15,477,1; Va.<sup>e,f</sup> 114,5; W.Va.<sup>e,f</sup> 96,5; N.C.<sup>e,f</sup> 1254; Tenn.<sup>e</sup> 2809; Mo. 2503; Ark.<sup>e</sup> 4742,4750; Tex.<sup>e</sup> 4341; 1879, 127,1; Cal.<sup>e</sup> 7957; Ore. 6,46-8; Nev. 294; 1885,54; Col.<sup>e</sup> 163 and 172; Wash.<sup>d,f</sup> 1987; Dak.<sup>e</sup> Civ. C. 1744; Ida. 1874-5, p. 662,3; 1885, p. 74,3; Mon.<sup>e</sup> 1881, p. 3, §§ 1,4; Wy.<sup>e</sup> 1882,11,2 and 5; Uta.<sup>e</sup> 1884,21,1 and 3; Ga. 1956; Fla.<sup>d</sup> 31,1; N.M.<sup>e</sup> 1587; Ariz. 3645-6; S.C.<sup>e</sup> 2346; Ala. 2162.

(2) In several states, if not recorded, the power of sale cannot be exercised; see § 4537, A.

But such record, etc., is not necessary (1) of mortgages of ships: N.H. 137,16; Mass. 192,3; Me. 91,6; Mo. 2504; Cal. 7971; Nev. 295; Dak. Civ. C. 1756; Ariz. 2131; or (2) of goods at sea or abroad, if the mortgagee takes possession after arrival: N.H., Mass., Me., R.I., Mo., Nev.,<sup>f</sup> Ariz.; or (3) in contracts of bottomry or respondentia: N.H.; Me.; R.I.; Mo.; Cal. 7942; Dak. Civ. C. 1725; Nev.; Ariz.; (4) or of choses in action: Tenn. 2810; Ala. 2165.

But in New York, mortgages or incumbrances on boats on canals must be so recorded with the auditor of the canal department: N.Y. 1864,412,1; and mortgages on ships in the office of the collector of customs where the ship is registered (U. S. R. S. 4192): Cal. 7958; Dak. Civ. C. 1756.

For other states, see also § 4599, all the provisions of which apply to mortgages as well as sales: N.Y., Mich., Wis.

**Possession.** In the absence of stipulations to the contrary, the mortgagee of personal property is entitled to the possession thereof: Io. 1927; Kan. 68,15; Ark. 4754; N.M. 1593. So, in others, the mortgage must specially provide for the mortgagor to retain possession: Ill.; Col. 165; Mon. *ib.* 1; Wy. *ib.* 9.

*Except* (1) the case of machinery, furniture, hay, tobacco, etc., stored in a building mortgaged by real-estate mortgage duly recorded: Ct. 18,7,7; 1875,52; (2) musical instruments used in a band: Ct. 1881,133; (3) brick in kilns or yards: Ct. 1885,54.

NOTES. — <sup>a</sup> In many states, the laws of real-estate mortgages apply generally to chattel mortgages also: Va., W.Va., Ark., Cal., Dak., Ga. See Title 2, Chapter VIII. <sup>b</sup> In a few states, the provisions of this article extend to all bills of sale, deeds of trust, and other conveyances of personal property which have the effect of a mortgage or lien thereon: Col. 169; Mon. *ib.* 8; Uta. *ib.* 8 and 12. <sup>c</sup> In the noted states, unless recorded, it will not be valid "as against creditors or purchasers for value." <sup>d</sup> In these, an unrecorded mortgage is absolutely void, even as between the parties. <sup>e</sup> Or as against persons having actual notice. <sup>f</sup> In states so noted, the possession of the mortgagee makes no difference; and the mortgage must be recorded in any case. <sup>g</sup> This section applies also to sales.

§ 4531. **Time of Record.** In a few states, the mortgage, to be valid against creditors, must be so recorded (1) within ten days from its date: Ind., Del.; (2) within fifteen days: Mass. 192,1; 1883,73; (3) twenty days: Md. 44,50; forty days: S.C.; (4) the mortgage must be recorded "forthwith:" Kan. 68,9; Tex.; N.M.; (5) the mortgagee is allowed one day for each twenty miles of distance from the record office to his residence: Ida. *ib.* 15; Ariz. (thirty miles) 3650; when required to be recorded in more than one place, such second record may be made at any time within ten days of the first: Mass. 192,2; 1883,73; (6) except as between the parties, the mortgage takes effect only from the time of record, and the mortgage first recorded has preference: Wis. 2314; Md. 44,52; Va. 114,5; N.C.; Tex. 4341; 1879, 127,1. So, probably, in the other states. In Arkansas, there is a process by which a mortgage may be filed without being recorded, and have effect for one year: Ark. 4751.



§ 4532. **The Place of Record** is, in most states, the county clerk's office (or, in New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, New York, Ohio, Michigan, Wisconsin, and Minnesota, the town clerk's office; or, in New Jersey, Ohio, Illinois, Iowa, Kansas, North Carolina, Missouri, Arkansas, California, Washington, Dakota, Idaho, and Arizona, the registry of real-estate deeds) (1) of the county (or town) where the mortgagor resides (Io. 192; Mo. 2503; Ark. 4742; Nev. 1885,54); or if he be out of the State, in the county or town where the property is (see also § 4530 for citations): N.H. 137,2 and 5; Mass. 1883,73; Me.; Vt.; R.I.; N.Y. 1879,233,2; N.J. 1881,179,5; 1885,244,5; O. 4151; Ill. 95,4; Mich. 6193; Wis. 2314; Minn. 39,2; 1883,38,1; Kan. 68,9; Neb. 1,32,14; Md. 44,50; N.C. 1254; Tenn. 2844; Tex. 1879,127,1; Cal. 7959; Ore. 6,46; Mon. *ib.* 3; Uta. *ib.* 3; Ga. 1956; Ariz. 3645; S.C.; Ala.

(2) Always (also) in the county where the property is: Minn.; Del.; Va.; W.Va.; Cal. 7957; Nev. 1885,54; Col. 165; Wash. 1988; Dak. Civ. C. 1744; Ida. 1885, p. 74,3; Wy. 1882,11,3; Ga.; Miss. 1210; Fla.; N.M.; Ariz.; Ala.

With the register, in New York City: N.Y. 1882,410,1753 (3) And it must also be recorded in the town, etc., where the mortgagor has his place of business: Mass.

(4) Mortgages of choses in action must be recorded in the county, etc., where the mortgagee resides: N.C.

If the goods mortgaged be subsequently removed to another county, the mortgage must be also recorded in that county (1) within four months of removal: Tex.; Ala.; (2) within thirty days thereof: Cal. 7965; Wash. 1938; (3) within ten days: Ida. 1885, p. 75,4; (4) immediately: Wy. 1882,11,4; (5) within a year: Va. 114,8; Miss. 1210; (6) within three months: W.Va. 96,7.

**The Effect** of such record is to give legal notice to all persons as to so much of the mortgaged property as is in the county where the record is: Dak. Civ. C. 1745. So, probably, in other states enumerated under § 4532 (2).

For the purposes of this article property in transit from the possession of the mortgagee to the county of the residence of the mortgagor, or to a location for use, is, during a reasonable time for such transportation, to be taken as situated in the county in which the mortgagor resides or where it is intended to be used.

For a like purpose personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located.

A single mortgage of personal property, embracing several things of such character, or so situated that by the provisions of this article separate mortgages upon them would be required to be recorded in different places, is only valid in respect to the things as to which it is duly recorded: Cal. 7960-2; Dak. Civ. C. 1746.

§ 4533. **Form. Acknowledgment, and Signature.** In many states, a chattel mortgage must be acknowledged by the mortgagor: Ill. 95,2; Minn. 39,3; Md. 44,47,50; Del. V. 15, 477,1; Cal. 7957; Col. 164; Wash. 1987; Dak.; Ida. 1885, p. 74,2; Mon. *ib.* 2; Wy. 1882, 11,1; Uta. *ib.* 2; Fla. 31,1; or proved in the same manner as deeds of real estate: N.J. 1880,178,2; 1881,179,6; 1885,244,6; Ind. 4913; Io. 1923; Va.; W.Va.; Mo.; Cal.; Wy.; Ga.; Fla. It must be signed by two (in Utah by one) attesting witnesses: Dak. Civ. C. 1749; Uta. It must be sealed: Md., Del. No witness is required: Ga.

Except as it is otherwise in this article provided, mortgages of personal property may be acknowledged or proved and certified, recorded in like manner and with like effect as grants of real property; but they must be recorded in books kept for personal mortgages exclusively.

A certified copy of a mortgage of personal property once recorded may be recorded in any other county, and when so recorded the record thereof has the same force and effect as though it was of the original mortgage: Cal. 7963-4; Dak. Civ. C. 1747.

A mortgage of personal property may be made in substantially the following form: —

This mortgage, made the — day of —, in the year —, by A. B., of —, by occupation a —, mortgagor, to C. D. of —, by occupation a —, mortgagee, witnesseth:

That the mortgagor mortgages to the mortgagee [here describe the property], as security for the payment to him of — dollars, on [or before] the — day of —, in the year —, with interest thereon [or, as security for the payment of a note or obligation, describing it, etc.].

A. B.

Cal. 7956 ; Dak. Civ. C. 1742.

No chattel mortgage upon household furniture is valid unless signed by the wife of the mortgagor and two witnesses : Wis. 1885,218.

§ 4534. **Affidavit.** In several states, no such mortgage is valid except as between the parties, unless (1) the mortgagee before record make the affidavit of good faith required of a mortgagee of real estate (§ 1861) : Md. 44,54 ; (2) both the mortgagor and mortgagee (in Ohio, the mortgagee only) shall make an affidavit that the mortgage is made for the purpose of securing the debt specified in the consideration thereof, and for no other purpose, and that the same is a just debt due the mortgagee from the mortgagor : N.H. 137,6 ; Vt. 1967 ; N.J. ; O. 4154 ; Nev. 294 ; 1885,54 ; (3) the mortgagor (and all the parties thereto : Cal., Wash.) must make affidavit that the mortgage is *bona fide*, and made without any design to defraud and delay creditors : Del. V. 15,477,4 ; Cal. 7957 ; Nev. ; Wash. 1987 ; Ida. *ib.* 1 ; Mon. *ib.* 1 ; Uta. *ib.* 1 ; Ariz.<sup>a</sup> 3644 ; or, if the mortgage be given to indemnify the mortgagee against a liability assumed, or to secure any other agreement, such shall be stated specifically in the condition of the mortgage, and the affidavit varied accordingly : N.H. 137,9 ; Vt. 1969 ; O.

This affidavit must be appended to the mortgage (and recorded therewith : N.H., Vt.) : N.H. 137,10 ; Vt. ; Nev. ; Ida. So, it is probably implied in the other states above.

NOTE. — <sup>a</sup> As to the kinds of mortgages enumerated in § 4542 only.

§ 4535. **Duration.** (A) In many states, a mortgage of personalty ceases to be valid (unless filed anew or a new affidavit is made within the last thirty days, or other short period before) one year after the original record : N.Y. 1833,279,3 ; N.J. *Mortgages*, 41 ; O. 4155 ; Mich. 6196 ; Kan. 68,11 ; Ore. 6,48 ; Nev. 1885, 54 ; Mon. *ib.* 4 ; Uta. *ib.* 5 ; N.M. 1589.

In others, it is valid for two years from the time of record, unless filed anew as above : Ill. 95,4 ; Wis. 2315 ; Minn. 39,3 ; 1879,65,3-4 ; Col. 165.

In one, five years : Neb. 1,32,16 ; in two, three years : Del. V. 15,477,1 ; Dak. Civ. C. 1748.

And in several, on the expiration of every such period respectively, it must be so filed anew : N.Y. ; Mich. 6197 ; Wis. 2316 ; Ore. 6,49 ; Nev. ; Dak. ; N.M. ; after the first period of two years, it must be so filed anew each year : Minn.

(B) Every mortgage so recorded is valid for the term for which it was given, but must be filed anew within two months thereafter, and thereafter yearly : Wy. 1882,11,6 ; if not renewed (or foreclosed), it ceases to be valid, except as between the parties : Wy. *ib.* 10 ; N.M. 1590.

§ 4536. **Payment of Debt.** In Maryland, every mortgage of personal property is held to contain an implied covenant by the mortgagor to pay the debt and interest specified : Md. 44, 51.

Upon condition broken, the mortgagee is entitled to immediate possession : Ore. 39,1.

All chattel mortgages duly recorded imply a covenant to pay the debt, etc., by the mortgagor, and when foreclosed, if any deficiency remain after the sale, the mortgagor is liable for it in an action at law : Wy. 1882,12,19.

§ 4537. **Method of Foreclosure.** (A) In some states, the mortgagee may sell upon default, there being a power of sale in the mortgage : Minn. 1879,65,1 ; Neb. 1,12,1-2 ; N.C. 1273 ; Mo. 3310 ; Mon. *ib.* 9 ; Wy. *ib.* 12 ; Uta. *ib.* 9.

But not if he has brought suit for the debt, (1) unless it has been discontinued or judgment unsatisfied : Neb. 1,12,2 ; Wy. *ib.* 12 ; (2) in any case : Kan. 63,17.

(B) Foreclosure in all cases may be by notice and sale (without process in court): N.H. 137,19; Me. 91,4,6; Vt. 1977; Io. 3307; Kan. 68,17; Mo.<sup>a</sup> 3309; Cal. 7967; Ore.<sup>a</sup> 39,2; Wash. 1991; Dak. Civ. C. 1743; 1885,32; Ida. 1885, p. 75,7; N.M. 1595; Ala. 1883,122,1.

(C) Otherwise the mortgage is foreclosed by action like mortgages of real property: N.J. 1881,162; Ill. 95,11; Del. V. 15,477,2; Mo. 3297; Cal.; Ore.; Nev.; Wash. 619; 1991; Dak.; Ida. 1885, p. 75,6; Mon. *ib.* 9; Uta. *ib.* 9; Fla. 153,5.

(D) If the mortgage provides the manner of foreclosure, it is to be so foreclosed accordingly: Ore.

(E) But in a few states, his remedy (in the absence of special power of sale) is by notice of condition broken and foreclosure by lapse of a certain limited time thereafter without redemption: Mass. 192,9; Me. 91,4-6; Minn. 39,10-12. Such time is sixty days after the notice above referred to: Mass., Minn.

(F) Foreclosure is by execution and sale issued as a matter of course by the clerk of court upon the mortgagor's filing with him the mortgage and an affidavit of the sum due: Ga. 3971.

(G) If the mortgagee is in possession, the mortgagor may demand such sale: Kan. 68,18; N.M. 1596.

NOTE. — <sup>a</sup> Provided the debt do not exceed a certain limited sum.

§ 4538. **Sale.** In most states, the mortgagee (or officer) must give the mortgagor notice of the foreclosure or sale, (1) by mail: N.H.<sup>a</sup> 137,19; Vt.<sup>a</sup> 1978; (2) personal notice: N.H.; <sup>b</sup> Mass. 192,7; Me.; Vt.; <sup>b</sup> Io. 3309; Minn. 1879,65,1; Mo.<sup>c</sup> 3309; Wash. 1993; Ida. *ib.* 8; (3) notice by publication: Mass.; <sup>c</sup> Me.; <sup>c</sup> Io. 3310; Neb. 1, 12,3; Wash. 1994; Ida. *ib.* 9; Wy. *ib.* 13; 1884,13,1; S.C.; Ga. 3972; Ala.; (4) by posting: N.H.; Vt.; Minn.; <sup>c</sup> Kan. 68,17; Neb.; <sup>d</sup> Dak. 1885,32; N.M. 1595; S.C.; Ala.

Such notice must be (1) ten days before the sale: Vt., Kan., Dak.; (2) four days before: N.H.; (3) sixty days before: Me.; (4) twenty days before: Neb., N.C., Wy.; (5) thirty days before: Mo.; (6) the time is as in sales under execution: Io. 3311; Ore. 39,2; Wash.; Uta.<sup>e</sup>

NOTES. — <sup>a</sup> Only when the mortgagor resides out of town. <sup>b</sup> When in town. <sup>c</sup> When no personal notice is given. <sup>d</sup> When there is no newspaper. <sup>e</sup> When sold under § 4537, without process of court.

§ 4539. **Manner of Sale.** It must generally be (1) by public auction: Vt. 1976; Minn.; Neb. 1,12,6; Wy. *ib.* 16; and so, probably, in other states, except as below.

(2) As in sales under execution: Io. 3311; Ore. 37,2; Wash.; Uta.; Ga. 3972.

The mortgagee may, generally, purchase at the sale: N.H. 137,21; Mich. 6200; Minn. 1885,171; Neb. 1,12,7; Dak. 1885,32; Mon. *ib.* 9; Wy. *ib.* 18; Uta.

The surplus is, in all states, paid to the mortgagor.

§ 4540. **Redemption.** The mortgagor may redeem (1) at any time after condition broken and before sale, by paying debt, interest, and charges: N.H. 137,18; Mass. 192,5-6; Me. 91,3; Vt. 1976; Minn. 39,8-9. He may so redeem only within sixty days after condition broken, and before sale: R.I. 176,11-12. (2) At any time before legal foreclosure: Ida. *ib.* 4; Ariz. 3647. (3) Within two years after breach: S.C. 2347.

The effect of the sale is to extinguish all equity of redemption: Neb. 1,12,8. No mortgagor can redeem after five years' possession by the mortgagee: Ky. 71,4,17.

§ 4541. **Discharge.** A mortgage may be discharged (1) by presenting to the recorder a deed or certificate from the mortgagee that the mortgage is satisfied, whereupon he shall make entry to that effect: Vt. 1970; N.Y. 1879,171,1; Minn. 39,13; Tex. 1879,127,5; Mon. *ib.* 11.

(2) It may be discharged by an entry made by the mortgagee or his agent on the margin of the index: Mich. 6201; Neb. 1,32,15; Ark. 4755; Tex.; Fla. 153,14.

(3) They are released in the same way as mortgages of realty (§ 1905): N.J. 1880, 178,5; 1881,179,9; Ill. 95,8; Kan. 68,16; Md. 44,53; Uta. *ib.* 2; N.M. 1594. (4)



So, a refusal to release subjects the mortgagor to the same penalties (§ 1902): Ark., N.M.

§ 4542. **What may be Mortgaged.** (A) The following specified articles of property may be mortgaged according to this article: (1) Personal property of every description: N.H. 137,1; Vt. 1965; Nev.<sup>a</sup> 1885,54; Wash. 1986; Ida. *ib.* 1; 1885, p. 74, § 1; Wy. 1882,11,7; N.M. 1586. (2) Crops, whether matured or not: N.H., Nev., Wash., Ariz. But not, in others, until they are matured and gathered: N.M. See also § 1853. (3) Rolling-stock of a railway: Wash.; Ariz. 3644. (4) Machinery: Wash., Ariz. (5) Boats and vessels: Wash. (6) Possessory claims to public lands: Wy. (7) Mining claims: Wy. (8) Cattle or herds: Wy., Ariz. (9) Furniture of hotels and boarding-houses, to secure the purchase-money: Ariz. (10) Saw-mill, grist-mill, and steamboat machinery: Cal. 7955, Amt.; Ariz. (11) Printing-presses and material: Ariz. (12) Instruments of a surgeon or physician: Ariz. (13) Libraries of all persons: Ariz. (14) Farm-stock and tools: Ariz. The following kinds of personal property must be mortgaged by a deed executed, acknowledged, and recorded like real estate: (1) machinery used in a shop, mill, or factory: Vt. 1980; Ct. 18,7,7; (2) household furniture or hay or tobacco, with or without the building: Ct. 1875,52; (3) hotel furniture and fixtures: Ct. 1878,90.

Mortgages may be made upon: (1) locomotives, engines, and other rolling-stock of a railroad; (2) steamboat machinery, the machinery used by machinists, foundrymen, and mechanics; (3) steam-engines and boilers; (4) mining machinery; (5) printing presses and material; (6) professional libraries; (7) instruments of a surgeon, physician, or dentist; (8) upholstery and furniture used in hotels, lodging or boarding houses, when mortgaged to secure the purchase-money of the articles mortgaged; (9) growing crops; (10) vessels of more than five tons burden; (11) instruments, negatives, furniture, and fixtures of a photograph gallery; (12) machinery, casks, pipes, etc., used in the manufacture of wine, fruit brandy, syrup, or sugar: Cal. Amt. V. 3, 7955.

(B) After-acquired property or property to be grown or acquired, of a similar nature to that owned and mortgaged at the time, may be included in the mortgage: Wy.

NOTE. — <sup>a</sup> But it must be of at least the value of \$250.

§ 4543. **Sale by Mortgagor.** The mortgagor may not sell (or pledge: N.H., Vt., Minn., Col.; or conceal or carry away: Me., Ct., Ind., Ill., Mich., Wis., Io., Minn., Neb., Md., Ky., Ark., Tex., Col.,<sup>a</sup> Wash., Dak., Ida., Mon., Uta., N.M., Ariz.; or remove: Me., Ct., N.J., O., Ind., Ill., Mich., Wis., Minn., Neb., Md., Del., Ark., Tex., Col.,<sup>a</sup> Wash., Dak., Ida., Mon., Wy.,<sup>c</sup> Uta., N.M.; or otherwise dispose of: Mich., Io., Minn., Neb., Md., N.C., Ky., Tenn., Mo., Ark., Tex., Col.,<sup>a</sup> Wash., Dak., Ida., Mon., Uta., Ga.) such property without the consent of the mortgagee: N.H. 137,13; Me.<sup>a</sup> 126,4; Vt.<sup>a</sup> 1972; Ct.<sup>a</sup> 1877,53; N.J.<sup>a</sup> 1885,44,13; O.<sup>a</sup> 6849; Ind.<sup>a</sup> 1954; Ill.<sup>a</sup> 95,7; Mich.<sup>a</sup> 9187; Wis.<sup>a</sup> 4467; Io.<sup>d</sup> 3895; Minn.<sup>a,b</sup> 39,14; 1883,23; Neb.<sup>c</sup> 1,12,9; Md.<sup>a</sup> 1884,202; Del.<sup>a</sup> V. 15,477,4; N.C.<sup>a</sup> 1089; Ky.<sup>a</sup> 1874, Feb. 23; Tenn.<sup>c</sup> 5847; Mo.<sup>a</sup> 1341; Ark.<sup>c</sup> 1693; Tex.<sup>c</sup> Crim. C. 797; 1879,12,1,6; Col.<sup>c</sup> 170-1; Wash.<sup>a</sup> 1999; Dak.<sup>c</sup> P. C. 579; Ida.<sup>d</sup> 1880-1, p. 307,1; Mon.<sup>a</sup> *ib.* 13; Wy.<sup>c</sup> 1882,11,20; Uta.<sup>a</sup> *ib.* 11; Ga.<sup>a,b,e</sup> 4600; 1883, p. 111; N.M.<sup>a</sup> 1598; Ariz.<sup>a</sup> 1885,27; S.C.<sup>a</sup> 2515; Ala.<sup>a</sup> 4354; Fla.<sup>a</sup> 56,47; 68,13-4.

Such consent must be written on the margin of the record: N.H., Vt. It must be written simply: Ct., Minn., Neb.,<sup>c</sup> Mo., Ida., N.M., Fla.

Such sale or removal is a breach of the condition of the mortgage, and the mortgagee may thereupon take possession or sell: Tex. 1879,127,6; Cal. 7966; Dak. Civ. C. 1752. See also in Part V., for other states.

He cannot execute a subsequent mortgage unless the fact of the previous mortgage is set out in the instrument: N.H. 137,14; Vt.<sup>a</sup> 1973-4. No one can remove such property mortgaged from the state without the consent of the mortgagor and mortgagee: Vt. 1971.

So, every chattel mortgage (except of vessels or rolling-stock, in New Jersey) vests in the mortgagee the right to possession of the chattels so far as may be necessary for the purpose of preventing their removal out of the county and recovering them if so removed: N.J. 1882,179, 1 and 3; 1885,244,1 and 3.

If the mortgagor sell the property to a third person without giving him notice of the mortgage (1) he shall forfeit and pay to the purchaser twice the value of the property: Ill. 95,6; Col. 168; Mon. *ib.* 12. (2) He is subjected to fine and imprisonment: Ct. 1877,53,2. See also in Part V.

NOTES. — <sup>a</sup> Such sale, etc., is a misdemeanor; <sup>b</sup> unless fraudulent intent be disproved. <sup>c</sup> It is a felony. <sup>d</sup> It is larceny. <sup>e</sup> This provision applies also to the vendees under conditional sales.

§ 4544. **Assignment.** Mortgages of personalty may be assigned in the same manner as mortgages of realty: Md. 44,53; so, probably, in all states.

§ 4545. **Illegal Consideration.** In one state, no conveyance or mortgage made to secure the payment of any debt or the performance of any contract or agreement, is deemed void as against any purchaser for value of the property mortgaged because the consideration of such debt, etc., is forbidden by law, if such purchaser at the time of purchase did not have notice of such unlawful consideration: N.C. 1549.

#### § 4546. **Special Cases of Chattel Mortgages by Tenants.**

**Crops.** The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as it remains upon the land of the mortgagor: Cal. V. 3,7972.

§ 4547. **Proof of Fraud.** In Wisconsin, whenever it shall appear upon the trial of any action against a sheriff, coroner, constable, or other officer for the recovery of the possession of personal property or the value thereof, that the defendant obtained the possession of such property by virtue of an execution or attachment against the property of a person not a party to such action, from whom the plaintiff claims to have derived his right by a mortgage, and that such property was taken by the officer from the possession of the defendant in such execution or attachment, or from premises occupied or controlled by him, and it shall be alleged in the answer that such mortgage was fraudulent as to the creditors of the mortgagor, then the burden of proof shall be upon the plaintiff to show that such mortgage was given in good faith and to secure an actual indebtedness, and the amount thereof: Wis. 2319. For other states, see in Part IV.

### Art. 455. **Conditional Sales.**

§ 4550. **General Principles.** In one state, the law in personal property is the same as in realty; see § 1891: Ga. 1969.

§ 4551. **Right to Redeem.** In one state, the vendee may redeem, on paying unpaid price, interest, and charges, at any time within fifteen days after condition broken: Mass. 192,13. Within two years after breach: S. C. 2347.

§ 4552. **Statute of Frauds.** See Art. 414. In two states, no agreement that personal property bargained and delivered to another (for which a note is given: Me.) shall remain the property of the vendor until the note is paid, is valid, (1) unless made and signed as a part of the note: Me. 111,5; (2) unless in writing, and a copy be furnished to the vendee: Mass. 1884,313.

§ 4553. **Record.** (A) In many states, all conditional sales must (to be valid as against third persons) be recorded (1) like mortgages of personal property in all respects<sup>a</sup> (§§ 4530–2): N.Y. 1884,315,1–2; Io. 1922; Mo. 2505; Col. 169; S. C. 2022; 1882,20.

Record is made in the town where the vendee resides, if in the State: N.H. 1885,30; Vt. 1992; Neb. 1,32,26; N.C. 1275; otherwise where the vendor resides: N.H., Vt., Neb.

So, in others, (2) all agreements that goods sold and delivered shall remain the property of the vendor until (a) the price or a note is paid: Me.<sup>b</sup> 111,5; N.Y.; O. 1885, p. 238; Wis. 2317; W.Va. 96,3; Mo. 2507; Tex.<sup>a</sup> 1885,78; Ga. 1955a; (β) or any other condition satisfied: Io., W.Va., Mo. (3) So, all leases where the title is to depend upon any condition: Io., Neb., Mo.

Such record must be made within thirty days of the sale: Vt.; within ten days: N.H.

The effect of record will not extend beyond (1) one year from the time for performance, unless it is renewed: Wis.; (2) five years, unless renewed: Neb.

(B) But in other states, the conditional sale seems to be good; only a note or other evidence of indebtedness given by the vendee therefor is void as against his creditors and subsequent purchasers or mortgagees unless such note or contract be recorded with the town clerk where the vendee resides: Minn. 39,15-6; 1883,38,2; 1885,76.

Such record ceases to be notice after one year from the time the note, etc., became due: N.Y. *ib.* 3; Minn. 39,17.

This section does not, however, apply to household goods, pianos, etc., if the contract of sale be executed in duplicate and one duplicate shall be delivered to the purchaser: N.Y. 1885,488.

An affidavit of good faith must be appended to such sale, signed by both parties, and recorded therewith: N.H. 1885,30,2.

NOTES. — <sup>a</sup> Such agreements are held to create chattel mortgages. <sup>b</sup> If the note is for more than \$30.

§ 4554. **Foreclosure, etc.** Whenever personal property is sold or delivered on a conditional sale or lease, or agreement that it shall remain the property of the vendor until payment is made or other condition performed, it is, in two states, made unlawful for the vendor or lessor to take possession or seize the property without refunding the sums actually paid by the lessee, less a reasonable compensation for use, in no case exceeding twenty-five per cent (in Ohio, fifty per cent) of such sums paid, and for actual breakage or damage: O. 1885, p. 239,2; Mo. 2508.

All personal property to which title is held by the vendor as above is subject to redemption, after breach, like a chattel mortgage (§ 4429), unless otherwise stipulated in the notes: Me. 91,7.

It may be retaken, and sold by the vendor thirty days after condition broken: Vt. 1884, 93,5; N.Y. 1885,488.

§ 4555. **Removal.** No personal property sold conditionally upon which there is reserved a lien duly recorded shall be removed from the State without the consent of the vendor or his assignee: Vt. 1884,93,1. See also § 4543, and in Part V.

## Art. 456. Sales.

§ 4560. **General Principles.** Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property: Cal. 6721; Dak. Civ. C. 981.

The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer: Cal. 6722; Dak. Civ. C. 982.

In all cases, where no special provision is made under the present title, the contract of sale is subjected to the general rules established under the title: *Of Contracts*: La. 2433.

The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself: La. 2439.

Three circumstances concur to the perfection of the contract, to wit: the thing sold the price, and the consent: Ga. 2629; La.

§ 4561. **Agreements for Sale.** An agreement for sale is either: —

1. An agreement to sell;
2. An agreement to buy; or,
3. A mutual agreement to sell and buy.

An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.

An agreement to buy is a contract by which one engages to accept from another and pay a price for the title to a certain thing.

An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor: Cal. 6726-9; Dak. Civ. C. 983-6.



Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not : Cal. 6730 ; Dak. Civ. C. 987.

An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property : Cal. 6731 ; Dak. Civ. C. 988.

An agreement on the part of a seller of real property to give the usual covenants binds him to insert in the grant covenants of "seisin," "quiet enjoyment," "further assurance," "general warranty," and "against incumbrances : " Cal. 6733 ; Dak. Civ. C. 989.

The covenants above mentioned must be in substance as follows : "The party of the first part covenants with the party of the second part, that the former is now seized in fee-simple of the property granted ; that the latter shall enjoy the same without any lawful disturbance ; that the same is free from all incumbrances ; that the party of the first part, and all persons acquiring any interest in the same through or for him, will, on demand, execute and deliver to the party of the second part, at the expense of the latter, any further assurance of the same that may be reasonably required ; and that the party of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same : " Cal. 6734 ; Dak. Civ. C. 990.

#### § 4562. Who May Sell. See also in Art. 650.

He who is already the owner of a thing cannot validly purchase it. If he buys it through error, thinking it the property of another, the act is null, and the price must be restored to him.

The sales of immovable property made by parents to their children may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one fourth of the real value of the immovable sold, at the time of the sale : La. 2443-4.

All persons may buy and sell, except those interdicted by law : La. 2445.

§ 4563. What May be Sold. A bare contingency or possibility cannot be the subject of sale, unless there exists a present right in the person selling to a future benefit ; so a contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfil his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation on chances, is contrary to the policy of the law, and can be enforced by neither party : Ga. 2638. Compare §§ 1420, 4132, 4770.

The seller can convey no greater title than he has himself. There is no "market overt" in Georgia : Ga. 2639. For negotiable paper, see Art. 473. When the sale is of goods to be manufactured and delivered at a future time, the question of risk will depend upon the fact, to be ascertained in each case, whether the parties stipulate for a particular article in course of construction, or an article filling the specification of the contract. In the former case, the title passes to the vendee before delivery ; in the latter, not : Ga. 2645.

**Louisiana Law.** Any effects of commerce may be sold when there exists no particular law to prohibit the traffic thereof.

Not only corporeal objects — such as movables and immovables, live-stock and produce — may be sold, but also incorporeal things, — such as a debt, an inheritance, a servitude, or any other rights.

A sale is sometimes made of a thing to come, — as of what shall accrue from an estate, of animals yet unborn, or such like other things, although not yet existing.

It also happens sometimes that an uncertain hope is sold, — as the fisher sells a haul of his net before he throws it ; and although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught.

The sale of a thing belonging to another person is null ; it may give rise to damages when the buyer knew not that the thing belonged to another person.

The thing claimed as the property of the claimant cannot be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as a sale of another's property, and does not prevent him from being put in possession by virtue of such judgment.

The succession of a living person cannot be sold.

If, at the moment of the sale, the thing sold is totally destroyed, the sale is null ; if there is only a part of the thing destroyed, the purchaser has the choice either to abandon the sale or to retain the preserved part, by having the price thereof determined by appraisement : La. 2448-2455.

§ 4564. **Form of the Contract.** For the Statute of Frauds, see Art. 414.

The verbal sale of all movable effects, whatever may be their value, is valid, but its testimonial proof must be made agreeably with what is directed in the title: *Of Contracts*: La. 2441.

The sale of any immovable made under private signature shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered according to law, and the actual delivery of the thing sold took place.

But this defect of registering shall not be pleaded between the parties who shall have contracted in such act, their heirs or assigns, who are as effectually bound by a sale made under private signature, as if it were by an authentic act: La. 2442.

§ 4565. **How the Contract of Sale is to be Perfected.** The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered nor the price paid.

The sale may be made purely and simply or under a condition either suspensive or resolutive. The object of the sale may also be two or more alternative things.

In all these cases its effects are regulated by the principles laid down in the title: *Of Contracts*.

When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller until they be weighed, counted, or measured; but the buyer may require either the delivery of them or damages, if there be any, in case of non-execution of the contract.

If, on the contrary, the goods, produce, or other objects have been sold in a lump, the sale is perfect, though these objects may not have been weighed, counted, or measured.

Things of which the buyer reserves to himself the view and trial, although the price be agreed on, are not sold until the buyer be satisfied with the trial, which is a kind of suspensive condition of the sale.

The sale of a thing includes that of its accessories and of whatever has been destined for its constant use, unless there be a reservation to the contrary.

A promise to sell amounts to a sale when there exists a reciprocal consent of both parties as to the thing and the price thereof; but to have its effect, either between the contracting parties or with regard to other persons, the promise to sell must be vested with the same formalities as are above prescribed in §§ 4560, 1560 concerning sales, in all cases where the law directs that the sale be committed to writing.

But if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise: to wit, he who has given the earnest, by forfeiting it; and he who has received it, by returning the double.

The price of the sale must be certain, — that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange.

It ought to be serious, — that is to say, there should have been a serious and true agreement that it should be paid.

It ought not to be out of all proportion with the value of the thing; for instance, the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

The price, however, may be left to the arbitration of a third person; but if such person cannot, or be unwilling to make the estimation, there exists no sale.

The expenses of the act or other incidental costs of sale are chargeable to the buyer, unless some agreement be made to the contrary: La. 2456-2466.

§ 4566. **Rights and Duties of the Seller.** After personal property has been sold, and until the delivery is completed, the seller has the rights and obligations of a depositary for hire, except that he must keep the property, without charge, until the buyer has had a reasonable opportunity to remove it.

If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller after payment is due, the seller may rescind the sale, or may enforce his lien for the price, in the manner prescribed by the title on liens: Cal. 6748-9; Dak. Civ.

C. 995-6. One who sells personal property must bring it to his own door; but further transportation is at the buyer's risk.

Whether it was in his possession at the time of sale or not, he must put it into a condition fit for delivery, and deliver it to the buyer within a reasonable time after demand, unless he has a lien thereon. Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if it is not then in existence, it is deliverable at the place where it is produced: Cal. 6753-5; Dak. Civ. C. 997-9.

When either party to a contract of sale has an option as to the time, place, or manner of delivery, he must give the other party reasonable notice of his choice; and if he does not give such notice within a reasonable time, his right of option is waived.

If a seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. If he follows such directions, or if, in the absence of special directions, he uses ordinary care in forwarding the thing, it is at the risk of the buyer.

The delivery of a thing sold can be offered or demanded only within reasonable hours of the day: Cal. 6756-8; Dak. Civ. C. 1000-1002.

The seller is bound to explain himself clearly respecting the extent of his obligations; any obscure or ambiguous clause is construed against him.

The seller is bound to two principal obligations, — that of delivering and that of warranting the thing which he sells.

The warranty respecting the seller has two objects: the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices: La. 2474-6.

**§ 4567. Title Passed.** The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not: Cal. 6140; Dak. Civ. C. 636.

Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto in the manner prescribed in Art. 417: Cal. 6141; Dak. Civ. C. 637. Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind the transfer made by him: Cal. 6142; Dak. Civ. C. 638.

**Special Cases.** Cotton, corn, rice, or other products sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer, or the ownership given up until the same shall be fully paid for, although it may have been delivered into the possession of the buyer: Ga. 1593. Failing to pay, or to pay a draft, for such cotton is made a criminal offence. See in Part V.

**Delivery.** Generally, the delivery of the goods is essential to the perfection of a sale. The intention of the parties to a contract may dispense therewith; delivery need not be actual; constructive delivery may be inferred from a variety of facts. Until delivery is made or dispensed with, the goods are at the risk of the seller: Ga. 2644.

**Louisiana Law.** The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer.

The tradition or delivery of movable effects takes place either by their real tradition or by the delivery of the keys of the buildings in which they are kept; or even by the bare consent of the parties, if the things cannot be transported at the time of sale, or if the purchaser had them already in his possession under another title.

The law considers the tradition or delivery of immovables as always accompanying the public act which transfers the property. Every obstacle which the seller afterwards interposes to prevent the taking of corporal possession by the buyer is considered as a trespass.

In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct or retains possession by a precarious title, there is reason to presume that the sale is simulated; and with respect to third persons, the parties must produce proof that they are acting in good faith and establish the reality of the sale.

The tradition of incorporeal rights is to be made either by the delivery of the titles and of the act of transfer or by the use made by the purchaser with the consent of the seller.



When the object sold is out of the vendor's possession he must redeem it at his cost, and deliver it to the buyer, unless it be differently agreed between the parties, or unless it evidently appears from the contract that the buyer himself has undertaken to reclaim it.

The costs of delivery are chargeable to the seller, and those of removing are to be supported by the buyer if there has been no stipulation made to the contrary.

The delivery must be made on the place where the thing which is the object of the sale was at the time of such sale if not otherwise agreed upon.

If the seller fails to make the delivery at the time agreed on between the parties, the buyer will be at liberty to demand either a cancelling of the sale or to be put into possession, if the delay is occasioned only by the deed of the seller.

In all cases the seller is liable to damages if there result any detriment to the buyer occasioned by the non-delivery at the time agreed on.

The seller is not bound to make a delivery of the thing if the buyer does not pay the price and the seller has not granted him any term for the payment.

Neither shall he be obliged to the delivery, even if he has granted a term for the payment, if since the sale the buyer is become a bankrupt or is in a state of insolvency, so that the seller would be in imminent danger of losing the price of the same, unless the buyer should give him security to pay at the time agreed on.

The thing must be delivered in the same state in which it was at the time of the sale; that is to say, without any change occasioned by the act or fault of the seller. From the day of sale all the profits belong to the purchaser.

The obligation of delivering the thing includes the accessories and dependencies without which it would be of no value or service, and likewise everything that has been designed to its perpetual use.

The seller is bound to deliver the full extent of the premises as specified in the contract, under the modifications hereafter expressed.

If the sale of an immovable has been made with indication of the extent of the premises at the rate of so much per measure, the seller is obliged to deliver to the buyer, if he requires it, the quantity mentioned in the contract, and if he cannot conveniently do it, or if the buyer does not require it, the seller is obliged to suffer a diminution proportionate to the price.

If, on the other hand, there exists an extent of more than what is specified in the contract, the buyer has a right either to give the supplement of the price or to recede from the contract, should the overplus be upwards of a twentieth part of the extent which is declared.

In all other cases, whether the sale be of a certain and limited body or of distinct and separate objects, whether it first set forth the measure or the designation of the object followed by its measure, the expression of the measure gives no room to any supplement of price in favor of the seller for the overplus of the measure, neither can the purchaser claim a diminution of the price on a deficiency of the measure, unless the real measure comes short of that expressed in the contract by one-twentieth part, regard being had to the totality of the objects sold; provided there be no stipulation to the contrary.

There can be neither increase nor diminution of price on account of disagreement in measure when the object is designated by the adjoining tenements and sold from boundary to boundary.

In the case where there is room for an augmentation of price for the surplus of the measure, the buyer has the option to give the supplement or to recede from the contract.

In all cases where the buyer has a right to recede from the contract the seller is bound to make him restitution not only of the price, if already received, but also of the expenses occasioned by the contract.

The action for supplement of the price on the part of the seller and that for diminution of the price or for the cancelling of the contract on the part of the buyer, must be brought within one year from the day of the contract, otherwise it is barred.

If two pieces of ground have been sold by one and the same contract, with the expression of the measure for each, and there be found a less quantity in one, and a larger one in the other, the deficiency of the one is supplied by the overplus of the other, as far as it goes; and the action, either in supplement or in abatement of the price, takes place only according to the rules above established: La. 2477-2499.

**§ 4568. At whose Risk the Thing is after the Sale is Completed.** As soon as the contract of sale is completed, the thing sold is at the risk of the buyer, but with the following modifications: —

Until the thing sold is delivered to the buyer the seller is obliged to guard it as a faithful administrator; and if, through want of this care, the thing is destroyed, or its value diminished, the seller is responsible for the loss.

The seller is released from this degree of care when the buyer delays obtaining the possession; but he is still liable for any injury which the thing sold may sustain through gross neglect on his part.

If it is the seller who delays to deliver the thing, and it be destroyed, even by a fortuitous event, it is he who sustains the loss, unless it appear certain that the fortuitous event would equally have occasioned the destruction of the thing in the buyer's possession after delivery.

A sale made with a suspensive condition does not transfer the property to the buyer until the fulfilment of the condition.

If the thing be destroyed before this happens the loss is sustained by the seller.

If the thing be only deteriorated when the condition is accomplished the buyer has the choice either to take it in the state in which it is, or to dissolve the contract.

If it has undergone any improvement without the agency of the seller, the buyer has the advantage of this improvement without having to pay any increase of price.

In alternative sales, whether the choice be left to the seller or be expressly granted to the buyer, the first of the two things which perishes after the contract is a loss to the seller, and he must give up that which remains. But if that which remains also perish, it is the buyer's loss, and he must pay the price of it.

In the case specified in the above article, when the choice is reserved to the buyer, he may recede from the contract if one of the things has perished, provided he has not delayed to be put in possession: La. 2467-2473.

**§ 4569. Warranty.** See also Art. 145, the provisions of which apply, in Louisiana, to personal property also.

If the purchaser of land loses part of it from defect of title, he may claim either a rescission of the entire contract or a reduction of the price according to the relative value of the land so lost: Ga. 2643.

If there is no express covenant of warranty, the purchaser must exercise caution in detecting defects; the seller, however, in all cases (unless expressly or from the nature of the transaction excepted), warrants (1) that he has a valid right and title to sell; (2) that the article sold is merchantable, and reasonably suited to the use intended; (3) that he knows of no latent defects undisclosed: Ga. 2651.

Covenants of warranty should be so construed as to require and encourage the utmost good faith in all contracting parties: Ga. 2653.

A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future.

Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.

One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unincumbered title thereto.

One who sells or agrees to sell goods by sample thereby warrants the bulk to be equal to the sample.

One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.

One who agrees to sell merchandise not then in existence, thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so, at the place of delivery, as can be secured by reasonable care.

One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose.

One who sells or agrees to sell merchandise inaccessible to the examination of the buyer thereby warrants that it is sound and merchantable.

One who sells or agrees to sell any article to which there is affixed or attached a trade-mark thereby warrants that mark to be genuine and lawfully used.

One who sells or agrees to sell any article to which there is affixed or attached a statement or mark to express the quantity or quality thereof, or the place where it was, in whole or in part, produced, manufactured, or prepared, thereby warrants the truth thereof.

One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.

One who makes a business of selling provisions for domestic use warrants by a sale thereof, to one who buys for actual consumption, that they are sound and wholesome.

One who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers.

Upon a judicial sale, the only warranty implied is that the seller does not know that the sale will not pass a good title to the property.

A general warranty does not extend to defects inconsistent therewith of which the buyer was then aware, or which were then easily discernible by him without the exercise of peculiar skill; but it extends to all other defects: Cal. 6763-6778; Dak. Civ. C. 1003-1018.

**§ 4570. Of the Warranty in Case of Eviction from the Thing Sold.** (See also Arts. 145, 150.) Eviction is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claims of a third person: La. 2500.

If the buyer be evicted from a part only of the thing sold, and it be of such consequence relatively to the whole, that the buyer would not have purchased it, without the part from which he is evicted, he may have the sale cancelled.

Not only eviction from part of the thing sold, but eviction from that which proceeds from it, is included in the warranty.

But if the thing sold be succession rights, the eviction which the buyer might suffer from any particular thing found among the property of the succession does not give rise to the warranty, because in this case the thing sold is only the succession right, which includes only such things as belong really to the succession.

If in case of eviction from a part of the thing, the sale is not cancelled, the value of the part from which he is evicted is to be reimbursed to the buyer according to its estimation, proportionably to the total price of sale.

If the inheritance sold be incumbered with non-apparent servitudes, without any declaration having been made thereof, if the servitudes be of such importance that there is cause to presume that the buyer would not have contracted if he had been aware of the incumbrance, he may claim the cancelling of the contract, should he not prefer to have an indemnification.

Other questions arising from a claim for damages resulting from the non-execution of the contract of sale shall be decided by the general rules established under the title: *Of Contracts*: La. 2511-6.

**§ 4571. Breach of Warranty.** A breach of warranty, express or implied, does not annul the sale if executed, but gives the purchaser a right to damages. It may be pleaded in abatement of the purchase-money. If the sale be executory, it is a good reason for the purchaser to refuse to accept possession of the goods: Ga. 2652. Any vice or defect in the thing sold which renders it either absolutely useless or its use so inconvenient and imperfect that it is reasonable to suppose that the purchaser would not have contracted had he knowledge of its existence, is such a latent defect as good faith requires the seller to disclose: Ga. 2654. Patent defects are not covered by a general express warranty, unless intended to be so covered. In proof of this intention parol evidence is admissible: Ga. 2655.

**Redhibition** is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice.

Apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices.

The buyer cannot institute the redhibitory action on account of the latent defects which the seller has declared to him before or at the time of the sale. Testimonial proof of this declaration may be received.



With regard to inanimate things, the latent defects which give rise to the redhibitory action are in general all such as are comprised in the definition above expressed.

The latent defects of animals are divided into two classes, — vices of body and vices of character.

The vices of body are distinguished into absolute and relative.

Absolute vices are those of which the bare existence gives rise to the redhibitory action.

Relative vices are those which give rise to it only in proportion to the degree in which they disable the object sold.

The absolute vices of horses and mules are short wind, glanders, and founder.

The other vices of body in animals are included in the above definition.

The vices of character which give rise to the redhibition of animals are comprised in the definition above given.

The declaration made in good faith by the seller that the thing sold has some quality which it is found not to have, gives rise to a redhibition, if this quality was the principal motive for making the purchase.

The buyer who institutes the redhibitory action must prove that the vice existed before the sale was made to him. If the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale.

The seller who knew not the vices of the thing is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits which the purchaser has drawn from it be sufficient to satisfy those expenses.

If the thing affected with the vices has perished through the badness of its quality, the seller must sustain the loss.

If it has perished by a fortuitous event before the purchaser has instituted his redhibitory action, the loss must be borne by him.

But if it has perished, even by a fortuitous event, since the commencement of the suit, it is for the seller to bear the loss.

The redhibitory action must be instituted within a year at the farthest, commencing from the date of the sale.

This limitation does not apply where the seller had knowledge of the vice and neglected to declare it to the purchaser.

Nor where the seller, not being domiciliated in the State, shall have absented himself before the expiration of the year following the sale; in which case the prescription remains suspended during his absence.

The redhibition of animals can only be sued for within two months immediately following the sale.

The redhibitory action may be commenced after the loss of the object sold, if that loss was not occasioned by the fault of the purchaser.

Redhibition does not take place in the cases of the sales made under a seizure by order of a court of justice.

The redhibitory action is not divisible among the heirs of the purchaser, — that is to say, they must all concur in it, and no one of them can bring it for his part only.

The redhibitory action may be brought against the heirs of the vendor collectively or against one of them at the choice of the purchaser.

The redhibitory vice of one of several things sold together gives rise to the redhibition of all, if the things were matched, — as a pair of horses or a yoke of oxen : La. 2520-2540.

**Of the Vices of the Thing sold which occasion a Reduction of the Price.** Whether the defect in the thing sold be such as to render it useless and altogether unsuited to its purpose, or whether it be such as merely to diminish the value, the buyer may limit his demand to the reduction of the price.

The buyer may also content himself with resorting to this action when the quality which the thing sold has been declared to possess and which it is found to want, is not of such importance as to induce him to demand a redhibition.

The purchaser who has contented himself with demanding a reduction of the price cannot afterwards maintain the redhibitory action.

But in a redhibitory suit the judge may decree merely a reduction of the price.

The action for a reduction of price is subject to the same rules and to the same limitations as the redhibitory action : La. 2541-4.

**Of the Vices of the Things sold which the Seller has concealed from the Buyer.**

The seller who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses is answerable to the buyer in damages.

In this case the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice.

This discovery is not to be presumed; it must be proved by the seller.

A declaration made by the seller that the thing sold possesses some quality which he knows it does not possess comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject under the title: *Of Contracts*.

It may, according to circumstances, give rise to the redhibition or to a reduction of the price, and to damages in favor of the buyer.

The renunciation of warranty made by the buyer is not obligatory where there has been fraud on the part of the seller: La. 2545-8.

**§ 4572. Rights and Obligations of the Buyer.** A buyer must pay the price of the thing sold on its delivery, and must take it away within a reasonable time after the seller offers to deliver it.

On an agreement for sale with warranty, the buyer has a right to inspect the thing sold at a reasonable time before accepting it, and may rescind the contract if the seller refuses to permit him to do so.

The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition: Cal. 6784-6; Dak. Civ. C. 1019-1021.

**Civil Law.** The obligations of the buyer are: —

1. To pay the price of sale.
2. To receive delivery of the thing, and to remove it if it be an object which requires removal, and to indemnify the seller for what he has expended in preserving it for him.

The price ought to be paid on the day and at the place mentioned in the sale.

If no stipulations have been made on that point at the time of the sale, the buyer must pay at the time and at the place where the delivery is to be made.

On failure of the buyer to pay the price, the seller may compel him to do it by offering to deliver the thing to him, if that has not been already done.

If, after the contract and before the seller has been required to deliver the thing, it ceases to be susceptible of delivery without his fault, the buyer is still bound to pay him the price.

The buyer owes interest on the price of the sale until the payment of the capital in the three following cases: —

1. If it has been so agreed at the time of the sale.
2. If the thing sold produces fruits or any other income.
3. From the date of the sale when the price is then due.

When the seller has granted to the buyer a term for the payment, the interest begins to run from the end of that term.

The purchaser who neglects to obtain delivery of the thing sold after having been put in default is answerable to the vendor for the damage which he may sustain on that account, and for the reimbursement of the expense which may have been incurred for the preservation of the thing.

If, on account of delay in the payment of the price, the seller is obliged to retain or to resume the thing sold, and its value is diminished, the buyer is bound to make good this diminution to the amount of the price which had been agreed upon: La. 2565.

**§ 4573. Vendor's Lien.** One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price: Cal. 8049; Dak. Civ. C. 1804.

(For record of conditional sales, see § 4553.) Special liens are given to vendors of cotton, as against merchants or factors: Tenn. 2761.

**Louisiana Law.** He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.

So that although the vendor may have taken a note, bond, or other acknowledgment from the buyer, he still enjoys the privilege.

Any person who may sell the agricultural products of the United States in the city of New Orleans, shall be entitled to a special lien and privilege thereon to secure the payment of the purchase-money, for and during the space of five days only, after the day of delivery; within which time the vendor shall be entitled to seize the same in whatsoever hands or place they may be found, and his claim for the purchase-money shall have preference over all others. If the vendor gives a written order for the delivery of any such products and shall say therein that they are to be delivered without vendor's privilege, then no lien shall attach thereto.

But if he allows the things to be sold, confusedly with a mass of other things belonging to the purchaser, without making his claim, he shall lose the privilege, because it will not be possible in such a case to ascertain what price they brought.

If the sale was not made on credit, the seller may even claim back the things in kind, which were thus sold, as long as they are in possession of the purchaser, and prevent the resale of them; provided the claim for restitution be made within eight days of the delivery at farthest, and that the identity of the objects be established.

When the things reclaimed consist in merchandise, which is sold in bales, packages, or cases, the claim shall not be admitted if they have been untied, unpacked, or taken out of the cases and mixed with other things of the same nature belonging to the purchaser, so that their identity can no longer be established.

But if the things sold are of such a nature as to be easily recognized, as household furniture, even although the papers or cloths which covered them at the time of delivery be removed, the claim for restitution shall be allowed: La. 3227-3231.

If the buyer is disquieted in his possession, or has just reason to fear that he shall be disquieted by an action of mortgage, or by any other claim, he may suspend the payment of the price until the seller has restored him to quiet possession or caused the disturbance to cease, unless the seller prefer to give security.

There is an exception to this rule, when the buyer has been informed, before the sale, of the danger of eviction.

In the case mentioned in the preceding article, the seller who cannot receive the price from being unable to give security, may compel the buyer to deposit the price, subject to the order of the court, to await the decision of the suit.

The purchaser may also require the deposit, to relieve himself from the payment of interest.

If the purchaser has paid before the disturbance of his possession, he can neither demand a restitution of the price, nor security during the suit.

If the buyer does not pay the price, the seller may sue for the dissolution of the sale: La. 2549-2561.

In matters of sale of movable effects, the dissolution of the sale shall take place of right, as demanded, without its being in the power of the judge to grant any delay except that fixed by law: La. 2564.

**§ 4574. Consideration.** A valuable consideration is essential to a sale; it must be either definite, or an agreement made by which it can be made certain; if its ascertainment becomes impossible, there is no sale: Ga. 2646. Inadequacy of price is no ground for rescission of a contract of sale, unless it is so gross as, combined with other circumstances, to amount to a fraud: Ga. 2647.

**§ 4575. Payment.** Unless credit is specifically agreed upon, or is the custom of the trade, the purchase-money is due immediately; and the seller may demand payment before delivering the goods: Ga. 2648.

**§ 4576. Stoppage in Transitu.** If the goods are delivered before the price is paid, the seller cannot retake because of failure to pay; but until actual receipt by the purchaser, the seller may at any time arrest them on the way and retain them until the price is paid. If credit has been agreed to be given, but the insolvency of the purchaser is made known to the seller, he may still exercise this right: Ga. 2649. A *bona-fide* assignee of the bill of lading of goods for a valuable consideration and without notice that the same were unpaid for and the



purchaser insolvent, will be protected in his title against the seller's right of stoppage *in transitu*: Ga. 2650.

A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him after parting with the property, stop it while on its transit to the buyer or consignee, and resume possession thereof.

A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so.

The transit of property is at an end when it comes into the possession of the consignee, or into that of his agent, unless such agent is employed merely to forward the property to the consignee.

Stoppage in transit can be effected only by notice to the carrier or depositary of the property, or by taking actual possession thereof.

Stoppage in transit does not, of itself, rescind a sale, but is a means of enforcing the lien of the seller: Cal. 8076-8080; Dak. Civ. C. 1815-9.

§ 4577. **Entire and Divisible Contracts.** The contract of sale may be entire or divisible; if entire, a failure in part voids the whole; if divisible, the voidance is only in proportion and to the extent of the failure. The intention of the parties determines which it is: Ga. 2641. In a sale of lands, if the purchase is *per acre*, a deficiency in the number of acres may be apportioned in the price; if the sale is by the tract or entire body, otherwise. If the quantity is specified as "more or less," this qualification will cover any deficiency not so gross as to justify the suspicion of wilful deception or mistake amounting to fraud; in this event, the deficiency is apportionable; the purchaser may demand a rescission or an apportionment according to relative value: Ga. 2642.

§ 4578. **Void Sales. Sales under Mistake.** Mistake of law, if not brought about by the other party, is no ground for annulling the contract of sale; mistake of a material fact may in some cases justify a rescission; mere ignorance of a fact will not: Ga. 2636.

**Sales under Duress.** Fraud or duress, by which the consent of a party has been obtained to a contract of sale, voids the sale: Ga. 2633. Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will: Ga. 2637.

§ 4579. **The Bill of Sale.** In Maryland, a bill of sale is sufficient if it contain the names of the parties, the consideration, a description of the property conveyed, be signed by the vendor, and dated: Md. 44,46.

It must also be sealed: Md.; it may be acknowledged: Md. 44,47-8.

§ 4580. **Record.** (For conditional sales, see § 4553.) The sale, if not accompanied by delivery, is invalid, except as between the parties (in Iowa, Washington, not valid as against creditors and innocent purchasers) unless recorded in the same way as chattel mortgages (Art. 453): Io. 1923; Md. 44,45 and 49; Wash. 2327.

The time of record is presumably the same when not specified; but in Washington Territory, a bill of sale must so be recorded within ten days after the sale, etc.

In two states, all deeds, bills of sale, or instruments affecting personal property may be recorded, as above, but such record is not generally obligatory: Tex. 4341; Ga. 2710. And such permissive record is not constructive notice to any one (and hence not valid as against third parties, possession being retained): Ga.

**An Affidavit** of good faith must be made and appended as in § 4534: Md. 44,54.

§ 4581. **Barter.** Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.

The provisions of the Statute of Frauds apply to all exchanges in which the value of the thing to be given by either party is two hundred dollars or more.

The provisions of the title on sale apply to exchanges (so, Ga. 2656). Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.

On an exchange of money, each party thereby warrants the genuineness of the money given by him : Cal. 6804-7 ; Dak. Civ. C. 1029-1032.

§ 4582. **Auctions.** (See also § 4142.) **Louisiana Law.** The sale by auction is that which takes place when the thing is offered publicly to be sold to whomever will give the highest price.

This sale is either voluntary or forced, — voluntary when the owner himself offers his property for sale in this manner ; forced, when the law prescribes this mode of sale for certain property, such as that of minors.

The sale by auction as it is made by officers of justice, is treated of separately under the chapter on *Judicial Sales* (see in Part IV.).

The sale by auction, whether made at the will of the seller or by direction of the law, is subjected to the rules hereafter mentioned.

It cannot be made directly by the seller himself, but must be made through the ministry of a public officer appointed for that purpose.

This officer, after having received in writing from the seller the conditions of the sale, must proclaim them in a loud and audible voice, and afterwards propose that a bid shall be made for the property thus offered.

When the highest price offered has been cried long enough to make it probable that no higher will be offered, he who has made the offer is publicly declared to be the purchaser, and the thing sold is adjudicated to him.

This adjudication is the completion of the sale ; the purchaser becomes the owner of the article adjudged, and the contract is from that time subjected to the same rules which govern the ordinary contract of sale.

If the adjudication be made on condition that the price shall be paid in cash, the auctioneer may require the price immediately before delivering possession of the thing sold.

If the object adjudged is an immovable for which the law requires that the act of sale shall be passed in writing, the purchaser may retain the price, and the seller the possession, of the thing until the act be passed.

This act ought to be passed within twenty-four hours after the adjudication if one of the parties require it ; he who occasions a further delay is responsible to the other in damages.

In all cases of sale by auction, whether of movables or immovables, if the person to whom adjudication is made does not pay the price at the time required agreeably to the two preceding paragraphs, the seller at the end of ten days, and after the customary notices, may again expose to public sale the thing sold, as if the first adjudication had never been made ; and if at the second crying the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to the vendor for the deficiency and for all the expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudged, the first purchaser has no claim for the excess.

At this second crying the first purchaser cannot be allowed to bid, either directly or through the intervention of another person.

When a thing is exposed to public sale with notice that the buyer shall give indorsed notes for the price, he is bound, immediately after the sale, if required, to acquaint the auctioneer or the seller with the name of the person whom he offers for indorser, and if this indorser does not suit the seller, or in his absence the auctioneer, the adjudication is considered as not having been made.

The refusal by the seller to receive the indorser whom the purchaser offers renders him responsible in damages to the latter, if it be proved that the indorser proposed is good and solvent.

The adjudication can only be made to a bidder present or properly represented. The person who bids in the name of another, without sufficient authority to bind him, is considered as having bought on his own account, and is answerable for all the consequences of the adjudication : La. 2601-2615.

A sale by auction is a sale by public outcry to the highest bidder on the spot.

A sale by auction is complete when the auctioneer publicly announces, by the fall of his hammer, or in any other customary manner, that the thing is sold.

Until the announcement mentioned in the last section has been made any bidder may withdraw his bid, if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.

When a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit.

If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and upon such a sale bids by the seller or any agent for him are void.

The employment by a seller of any person to bid at a sale by auction without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer which entitles him to rescind his purchase.

When property is sold by auction, an entry made by the auctioneer in his sale-book at the time of the sale, specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer, binds both the parties in the same manner as if made by themselves: Cal. 6792-8; Dak. Civ. C. 1022-8.

#### § 4583. Of the Assignment or Transfer of Credits and other Incorporeal Rights.

In the transfer of credits, rights, or claims to a third person, the delivery takes place between the transferor and the transferee by the giving of the title.

The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place.

The transferee may nevertheless become possessed by the acceptance of the transfer by the debtor in an authentic act.

If, previous to notice having been given of the transfer to the debtor, either by the transferor or by the transferee, the debtor should have made payment to the transferor, the debtor is discharged of the debt.

The sale or transfer of a credit includes everything which is an accessory to the same, — as suretyship, privileges, and mortgages.

He who sells a credit or an incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned in the deed.

The seller does not warrant the solvency of the debtor unless he has agreed so to do.

When the solvency of a debtor is warranted by contract, such warrant extends only to the actual solvency of the debtor and not to his future solvency, unless the same be expressly submitted to by the transferor.

If it be proved that the assignor who has not warranted the solvency of the debtor knew, or had strong reasons to suspect, that the debtor was insolvent at the time of the assignment, the contract may be rescinded, and the assignor compelled to restore the price.

When a man sells his right to a succession without particularly specifying the objects of which it consists, he only warrants his right as an heir.

In case he who sells his right to a succession has already received any of the fruits of any property belonging to the same, and if any credit due to that succession has been paid to him, he shall be bound to repay the same to the purchaser unless the same has been excepted by the contract.

He against whom a litigious right has been transferred may get himself released by paying to the transferee the real price of the transfer, together with the interest from its date. A right is said to be *litigious* whenever there exists a suit and contestation on the same.

The above provisions do not apply, —

1. When the transfer has been made either to a co-heir or to the co-proprietor of the right.
2. When such right has been transferred to a creditor as a payment for a debt due to him.
3. When the transfer has been made to the possessor of the estate subject to the litigious right: La. 2642-2654.

§ 4584. Of the Giving in Payment. The giving in payment is an act by which a debtor gives a thing to the creditor, who is willing to receive it in payment of a sum which is due.

That giving in payment differs from the ordinary contract of sale in this, that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving in payment is made only by delivery.

From this distinction result consequences which are different in relation to the risk of the thing sold, which risk, in this species of contract, never falls upon the creditor before delivery unless he has delayed beyond a reasonable time to obtain the thing.



This difference gives rise to another in the effect of these contracts in cases of the insolvency of the debtor. He may, although insolvent, lawfully sell for the price which is paid to him, but the law forbids to give in payment to one creditor to the prejudice of the others any other thing than the sum of money due.

Except with these differences, the giving in payment is subjected to all the rules which govern the ordinary contract of sale : La. 2655-9.

**Exchange** is a contract by which the parties to the contract give to one another one thing for another, whatever it be except money ; for in that case it would be a sale. An exchange takes place by the bare consent of the parties.

If one of the exchangers, after having received the thing given to him in exchange, learns that the other exchanger is not the proprietor of that thing, he cannot be compelled to deliver that which he had promised to give in exchange ; he is only bound to return the thing which he has received.

The exchanger who is evicted by a judgment of the thing he has received in exchange has his choice either to sue for damages or for the thing he gave in exchange.

The rescission of the contract on account of lesion is not allowed in contracts of exchange, except in the following cases :—

The rescission on account of lesion, beyond moiety, takes place when one party gives immovable property to the other in exchange for movable property ; in that case, the person having given the immovable estate may obtain a rescission if the movables which he has received are not worth more than the one-half of the value of the real estate.

But he who has given movable property in exchange for immovable estate cannot obtain a rescission of the contract, even in case the things given by him were worth twice as much as the immovable estate.

The rescission on account of lesion beyond moiety may take place on a contract of exchange if a balance has been paid in money or immovable property, and if the balance paid exceeds by more than one half the total value of the immovable property given in exchange by the person to whom the balance has been paid ; in that case it is only the person who has paid such balance who may demand the rescission of the contract on account of lesion.

All the other provisions relative to the contract of sale apply to the contract of exchange.

And in this last contract each of the parties is individually considered both as vendor and vendee : La. 2660-7.

**§ 4585. Dissolution and Rescission.** Besides the causes of nullity or dissolution of the sale already mentioned in this title, and those which are common to all agreements, the contract of sale may be cancelled by the use of the power of redemption, and by the effect of lesion beyond moiety : La. 2566.

**§ 4586. Of the Power or Right of Redemption.** This right is an agreement or pacton by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it. The right of redemption cannot be reserved for a time exceeding ten years ; and if any greater term has been so stipulated, it shall be reduced to ten years.

If the right has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold. The delay runs against any person, not excepting minors, who cannot be relieved against it.

A person having sold a thing with the power of redemption may exercise the right against a second purchaser, even in case such right should not have been mentioned in the second sale.

The person having purchased an estate under a condition of redemption is entitled to all the rights possessed by the vendor ; he may prescribe against the true owner, as well as against those having claims or mortgages on the thing sold.

He may oppose the plea of discussion to the creditors of his vendor.

The fruits are his until the vendor exercises his right of redemption.

He becomes absolute owner of the natural augmentations which the thing receives by accession, and is not bound to restore them.

But if these augmentations are of such a nature that they cannot be separated from the thing sold without injury to it, the person exercising the right of redemption may insist that they shall be yielded to him for a fair price.

With regard to the augmentations which the purchaser under a condition of redemption

may have produced at his own expense, he has a right to an indemnity for them, as is hereafter stated, or to take them away if the removal can be effected in such a way that the thing sold shall be placed in its original condition.

The thing sold shall be restored to the seller who exercises the right of redemption in the state in which it is at the moment. If it has been deteriorated without the fault of the buyer, the loss must be borne by the seller; nor can he in this case claim any reduction of the price to be reimbursed. If it has been deteriorated by the fault or neglect of the buyer, though this be but slight, he must make good the loss to the seller.

If the purchaser of an undivided portion of an estate sold with the power of redemption has become the purchaser of the whole at an auction ordered in a judicial proceeding against him, he may oblige the vendor to redeem the whole if the latter wishes to avail himself of the redemption.

If several persons have jointly sold by a single contract a joint estate, each one of them can individually exercise the right of redemption for that share only which belonged to him.

The same principle governs when a person, having sold an estate, leaves several co-heirs; each of these co-heirs can only exercise the right of redemption for the portion of the estate which falls to his share.

But in the cases provided for in the two preceding paragraphs, the purchaser may require, if he deem it proper, that all the co-vendors and co-heirs may be made parties to the suit for the purpose that they may agree together on the redemption of the whole estate; and in case the co-vendors or co-heirs should not agree, the purchaser shall be hence dismissed.

If an estate belonging to several persons has not been sold by them jointly, and if each co-proprietor has only sold individually his share of that estate, they may separately exercise the right of redemption on the respective portions which belonged to each of them; and in that case the purchaser cannot compel him who thus exercises the right of redemption to redeem the whole estate.

If the purchaser has left several heirs, the right of redemption can only be exercised against them individually, for the portion belonging to each of them respectively, whether the estate has already been divided between them or not. But if a partition has already taken place by which the thing subject to redemption has fallen to the share of only one of the co-heirs, the action of redemption may be brought against this heir for the whole estate.

The creditors of the vendor cannot make use of the right of redemption which such vendor may have reserved to himself.

When a vendor exercises the right of redemption he becomes entitled to all the fruits not yet gathered from the day in which he has either reimbursed or consigned the money paid by the purchaser, unless the contrary has been stipulated.

The vendor who exercises the right of redemption is bound to reimburse to the purchaser not only the purchase-money, but also the expenses resulting from necessary repairs, those which have attended the sale, and the price of the improvements which have increased the value of the estate up to that increased value.

When a vendor recovers the possession of his inheritance by virtue of the power of redemption, he recovers it free from any mortgages or incumbrances created by the purchaser, provided such possession be recovered within the ten years as above provided. If after the expiration of these ten years the vendor recover his estate with the consent of the purchaser, the estate remains liable for every mortgage and incumbrance laid upon it by the purchaser: La. 2567-2588.

**§ 4587. Rescission of Sales for Lesion.** If the vendor has been aggrieved for more than half the value of an immovable estate by him sold, he has the right to demand the rescission of the sale, even in case he had expressly abandoned the right of claiming such rescission, and declared that he gave to the purchaser the surplus of the thing's value.

To ascertain whether there is a lesion beyond moiety the immovable must be estimated according to the state in which it was and the value which it had at the time of the sale.

If it should appear that the immovable estate had been sold for less than one half of its just value, the purchaser may either restore the thing and take back the price which he has paid or make up the just price and keep the thing.

Should the purchaser prefer to keep the thing by making up the just price, he must pay the interest of the additional price from the day when the rescission was demanded. If he chooses rather to restore the thing and to receive the purchase-money, he shall be liable to restore the

fruits of the estate from the day of the demand, but the interest of his money shall also be paid to him from the same time.

The rescission for lesion beyond moiety cannot take place in favor of the purchaser.

Rescission for lesion beyond moiety is not granted against sales of movables and produce, nor when rights to a succession have been sold to a stranger, nor in matter of transfer of credits, nor against sales of immovable property made by virtue of any decree or process of a court of justice.

Actions for rescission of sales on account of lesion beyond moiety must be commenced within four years. These four years with respect to minors begin only from the day they become of age. With respect to persons of full age, they begin from the day of the sale.

This delay runs with and is not suspended by that granted for redemption.

The seller who demands the rescission on account of lesion beyond moiety must resume the possession of the thing in the state in which it is.

The buyer in this case is not bound for the injury sustained through his fault before the demand. He is only bound to make reimbursement for such injuries as he has turned to his own profit.

The buyer is entitled to repayment for ameliorations which he has effected, although they be merely for pleasure and convenience.

He may remain in possession of the thing sold until the seller has restored the price which he paid, together with his expenses.

The provisions contained in the preceding section relative to the case where several coproprietors have sold a thing, either jointly or separately, and to that where the vendor or the buyer has left several heirs, must likewise be applied to the exercise of the action of rescission for lesion beyond moiety: La. 2589-2600.

## Art. 459. Fraudulent Sales.

§ 4590. **What is Fraud.** Fraud may exist from misrepresentation by either party made with intent to deceive or which does deceive the other; and in the latter case it voids the sale, though the party was not aware that his statement was false. It may be by acts as well as words, and by any artifices designed to mislead. A misrepresentation not acted on is not ground for annulling the contract: Ga. 2634. Compare Art. 419.

Concealment of material facts may in itself amount to a fraud (1) when direct inquiry is made and the truth evaded; (2) when from any reason one party has a right to expect full communication of the facts from the other; (3) where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party and yet keeps silence; (4) where the concealment is of intrinsic qualities of the article which the other party by the exercise of ordinary prudence and caution could not discover: Ga. 2635.

Mistake of law, if not brought about by the other party, is no ground for annulling a contract of sale; mistake of a material fact may in some cases justify a rescission; mere ignorance will not: Ga. 2636.

A title obtained by fraud, though voidable in the vendee, will be protected in a *bona-fide* purchaser without notice: Ga. 2640.

§ 4591. **Frauds upon Creditors.** (See *Insolvency*, Part IV.) Every sale made with intent to defraud creditors of the vendor or prior or subsequent purchasers, if such intention is known to the vendee, is void as against such creditors, etc.: Ga. 2631. Compare § 4503.

Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor, or other person, of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor: Cal. 8439; Dak. Civ. C. 2023.

A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation: Cal. 8441; Dak. Civ. C. 2025.

(A) The Stat. 13 Eliz. C. 5, is substantially or in terms re-enacted in most of the states (every gift, grant, alienation, bargain, and conveyance of lands, tenements, and hereditaments, or of any lease, rent, common, or other profit or charge out of



the same, or of goods or chattels, by writing or otherwise, or bond given, suit commenced, or judgment or execution suffered, devised, or contrived of malice, fraud, covin, collusion, or guile, to delay or defraud creditors, purchasers, and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, etc., as against such creditors and others, are void and of no effect, any feigned consideration to the contrary notwithstanding): Vt. 4155; R.I. 173,1; N.Y. 2,7,3,1; N.J. *Frauds*, 12; Pa. App. *Fraudulent Conveyances*, 1-2; O. 4196; Ind. 4920; Ill. 59,4; Mich. 6203; Wis. 2320; Kan. 43,2; Va. 114,1; W.Va. 96,1; N.C. 1545; Ky. 44,1,1; Tenn. 2424; Mo. 2497; Ark. 3374; Tex. 2465; Ore. 6,51; Nev. 297; Col. 1526; Ida. 1874-5, p. 609,18; Mon. G. L. 172; Uta. 1017; S.C. 1786; Ala. 2124; Miss. 1293; Fla. 30,1; Ariz. 2133.

But nothing herein contained applies to conveyances, etc., made upon good consideration to persons acting in good faith without knowledge of fraud (13 Eliz. C. 5, § 5): N.Y. *ib.* 5; Pa. *ib.* 3; Ill. 59,5 and 8; Va.; W.Va.; N.C. 4; Ky.; Tex.; S.C. 1789; Fla. See also § 4598.

So, in several others, in effect: (B) fraudulent and deceitful deeds, conveyances, and alienations of land, or of an estate or interest therein (or, in Connecticut and Nebraska, of goods or chattels), and charges upon lands or upon the rents and profits thereof, or suits, bonds, or judgments procured, made, or suffered, with intent to avoid a right, debt, or duty of any person, shall, as against such person, his heirs or assigns, be void: Vt. 1955; Ct. 18,3,1; Minn. 41,18; Neb. 1,32,17.

So, in Georgia, (C) every conveyance of real or personal estate, in writing or otherwise, and every bond, suit, judgment, or execution or contract of any description had or made with intention to delay or defraud creditors, and such intention known to the party taking it, is void as against creditors; but a *bona-fide* transaction on a valuable consideration, without notice or grounds for reasonable suspicion, is valid: Ga. 1952.

**Penalties.** By the statute of Elizabeth (13 Eliz. C. 5, § 2), all parties to such fraudulent conveyances forfeit the whole value of goods conveyed, and one year's value of the land, half to the state, half to the party aggrieved, and are further liable to one half year's imprisonment. This is re-enacted in two states: Ct. 18,3,2; S.C. 1788. For other states, see Part V.

§ 4592. **Of Land, to Defraud Purchasers.** (A) In some states, the Stat. 27 Eliz. C. 4, § 2, is re-enacted (whereby every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use, in or out of any lands, tenements, or hereditaments [or goods and chattels: N.C., Tenn.], made to defraud and deceive purchasers of such lands, etc., or of an interest therein, is void, as against such purchasers for valuable or good consideration, any pretence or feigned consideration to the contrary notwithstanding): N.J. *Frauds*, 13; N.C. 1546; Tenn. 2424; S.C. 1787; Miss. 1293; Fla. 30,2. (B) So, in most others, in effect; and every conveyance of any estate or interest in lands or the rents and profits thereof, or charge on land or the rents and profits, made with intention to defraud prior or subsequent purchasers for value of such lands, etc., as against such purchasers, shall be void: N.Y. 2,7,1,1; O. 4196; Ind. 4915; Mich. 6174; Wis. 2297; Minn. 41,1; Kan. 43,2; Neb. 1,32,1; Cal. 6227; Ore. 6,40; Nev. 278; Col. 1510; Dak. Civ. C. 676; Ida. 1874-5, p. 606, § 1; Mon. G. L. 155; Uta. 1012; Ariz. 2114.

But no such conveyance or charge is deemed fraudulent as against a subsequent purchaser with actual or legal notice at the time of such purchase: N.Y. *ib.* 2; Ind. 4916; Mich. 6175; Wis. 2298; Minn. 41,2; Neb. 1,32,2; N.C.; Mo. 2498; Ark. 3375; Cal. 6228; Ore. 6,41; Nev. 279; Col. 1511; Dak. Civ. C. 677; Ida. *ib.* 2; Mon. G. L. 156; Ariz. 2115. Unless, in all but Nebraska, the grantee, or person to be benefited by such conveyance, was privy to the fraud.

If the person claiming under the conveyance alleged fraudulent take possession, that is notice : N.C. A statute of Missouri provides that any conveyance of land made by a citizen of the State to a citizen of any other state without a valuable *bona-fide* consideration, and made for the purpose of giving jurisdiction to the United States courts and thereby harassing the occupant of the land, shall be inoperative, except as to the transferee and his heirs, in whom such conveyance shall vest an absolute irreclaimable fee-simple title, which notwithstanding any release or reconveyance by the transferee may be asserted by his heirs after his death as against the grantor or his heirs or assigns : Mo. 2506.

§ 4593. **Revocable Conveyances.** (Compare also § 4594.) (A) In three states, the Stat. 27 Eliz. C. 4, § 5, is re-enacted in terms (whereby any person making a conveyance, etc., of land, etc., with a clause of revocation, determination, or alteration at his pleasure of such conveyance, etc., after such conveyance making another conveyance to a purchaser for value or good consideration, the first conveyance, as against such purchaser, is void : N.J. *Frauds*, 14 ; S.C. 1790 ; Fla. 30,3. *Provided*, nevertheless, that no lawful mortgage made in good faith upon good consideration and without fraud shall be thus impeached) : N.J., S.C.

(B) So, in many states, in effect : every conveyance or charge of or upon any estate or interest in lands, containing any provision for the revocation, determination, or alteration of such estate or interest or any part thereof, at the will of the grantor, is void as against subsequent purchasers from such grantor for a valuable consideration of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined, or altered by such grantor by virtue of the power reserved or expressed in such prior conveyance or charge : N.Y. 2,7,1,3 ; Ind. 4917 ; Mich. 6176 ; Wis. 2299 ; Minn. 41,3 ; Cal. 6229 ; Ore. 6,42 ; Nev. 280 ; Col. 1512 ; Dak. Civ. C. 678 ; Ida. 1874-5, p. 607,3 ; Mon. G. L. 157 ; Ariz. 2116.

(C) When a power to revoke a conveyance of lands or the rents and profits thereof, and to re-convey the same, is given to any other person than the grantor in such conveyance, and such person thereafter convey the same lands, rents, or profits to a purchaser for a valuable consideration, such subsequent conveyance is valid as if the power of revocation were recited therein and the intent to revoke the former conveyance expressly declared (see also § 1656) : N.Y. *ib.* 4 ; Ind. 4918 ; Mich. 6177 ; Wis. 2300 ; Minn. 41,4 ; Cal. : Ore. 6,43 ; Nev. 281 ; Col. 1513 ; Dak. ; Ida. *ib.* 4 ; Mon. G. L. 158 ; Ariz. 2117.

(D) If a conveyance to a purchaser be made as above by the grantor or other person with power to revoke, before such person is entitled to execute such power, it is nevertheless valid from the time the power vests in such person, as if then made : N.Y. *ib.* 5 ; Ind. 4919 ; Mich. 6178 ; Wis. 2301 ; Minn. 41,5 ; Cal. 6230 ; Ore. 6,44 ; Nev. 282 ; Col. 1514 ; Dak. Civ. C. 679 ; Ida. *ib.* 5 ; Mon. G. L. 159 ; Ariz. 2118.

§ 4594. **Conveyances in Trust for the Grantor.** (See also in Part IV., *Insolvency*.) All deeds of gift, transfers, assignments, or other conveyances, verbal or written, of goods, chattels, or things in action, made in trust for or for the use of the person making the same, are void as against the creditors existing or subsequent of such person : N.Y. 2,7,2,1 ; N.J. *Frauds*, 11 ; O. 4195 ; Ind. 4921 ; Mich. 6184 ; Wis. 2306 ; Minn. 41,14 ; Kan.<sup>a</sup> 43,1 ; Neb. 1,32,7 ; Mo. 2496 ; Ark. 3373 ; Ore. 6,45 ; Nev. 288 ; Col. 1520 ; Wash. 2324 ; Ida. 1874-5, p. 608,11 ; Mon. G. L. 165 ; Uta. 1013 ; S.C. 1957 ; Ala. 2120 ; Ariz. 2124.

NOTE. — <sup>a</sup> In Kansas, it seems, they are absolutely void.

§ 4595. **Conveyance in Trust for Creditors.** A deed of trust, mortgage, or other security made to secure any pre-existing debt, whether absolute or conditional, due or not due, is fraudulent and void as to the creditors of the grantor when any creditor provided for thereby is required to make any release or do any other act impairing his existing rights, before participating in or receiving the securities therein provided for him: Ala. 2125. See in Part IV., *Insolvency*.

Every assignment or transfer by a debtor insolvent at the time of real or personal property to any person in trust for or for the benefit of creditors, wherein any trust or benefit is reserved to the assignor or any person for him, is fraudulent and void as against creditors: Ga. 1952.

§ 4596. **Assignments.** (See Part IV., *Insolvency*.) Every general assignment made by a debtor by which a preference or priority of payment is given to one or more creditors over the remaining creditors of the grantor, shall be and inure to the benefit of all the creditors equally: Tenn. 2425; Ala. 2126; 1883,118.

So, in Kentucky, every sale, mortgage, or assignment made, and every judgment suffered, by a debtor, in contemplation of insolvency and with the design to prefer one creditor to the exclusion in whole or part of others, operates as an assignment of all the property of the debtor and inures to the benefit of all his creditors equally: Ky. 44,2,1.

But this does not apply to a mortgage in good faith made to secure any debt created at the same time with the mortgage and duly recorded within thirty days: Ky., Ala.

§ 4597. **Fraudulent Conveyances of Personalty.** Every gift or conveyance of goods and chattels on consideration not deemed valuable in law is, in a few, taken to be fraudulent unless it be by will duly proved, or deed in writing duly acknowledged or proved, and recorded like a deed of realty; unless possession shall really and *bona fide* remain with the donee (cf. §§ 4501,4580): Ill. 59,6; Tenn. 2430; Mo. 2499.

[In Nebraska, fraudulent sale or removal of goods made with intent to cheat or delay creditors is made an offence punishable as larceny: Neb. 1883,46,1; see generally in Part V.]

And even though recorded, deeds of gift or loans of personal property are void against creditors and purchasers of the donor or borrower if made with intent to defraud: Mo. 2501.

§ 4598. **General Provisions.** Every conveyance, charge, instrument, or proceeding declared by this article to be void as against creditors or purchasers is, in many states, equally void as against the heirs, successors, personal representatives, and assignees of such creditors and purchasers: N.Y. 2,7,3,3; N.J. *Frauds*, 12-13; Ind. 4922; Mich. 6205; Wis. 2322; Minn. 41,19; Neb. 1,32,19; Ore. 6,53; Nev. 299; Col. 1528; Ida. *ib.* 19; Mon. G. L. 173; Uta. 1018; Ariz. 2135.

The question of fraudulent intent in all cases arising under this article is, in most states, deemed a question of fact, not of law; but no conveyance or charge can be adjudged fraudulent as against creditors and purchasers, solely on the ground that it was without valuable consideration: N.Y. 2,7,3,4; Ind. 4924; Mich. 6206; Wis. 2323; Minn. 41,20; Neb. 1,32,20; Cal. 8442; Ore. 6,54; Nev. 300; Col. 529; Dak. Civ. C. 2026; Ida. *ib.* 20; Mon. G. L. 174; Ariz. 2136.

Nothing in this or the preceding article is, in most states, to be construed in any manner to affect or impair the title of a purchaser for value without notice of the fraudulent intent of his immediate grantor or of the fraud rendering void his title: N.Y. 2,7,1,10; 2,7,3,5; N.J. *Frauds*, 15; Ind. 4923; Mich. 6207; Wis. 2324; Minn. 41,21; Neb. 1,32,21; N.C. 1548; Mo. 2502; Ark. 3379; Tex. 2465; Ore. 6,55; Nev. 301; Col. 1530; Dak. Civ. C. 680; Ida. *ib.* 21; Mon. G. L. 175; S.C. 1789; Ariz. 2137.

Nor does this article extend to *bona-fide* conveyances for value of real and personal property: Ill. 59,8; Mo.; Ark.; Fla. 30,2.



§ 4599. **Sales in Fraud of Creditors.** In Delaware, no sale, whether with or without bill of sale, of any goods or chattels, is good in law except as against the vendor, or shall change the property in such goods, unless a valuable consideration be paid or in good faith secured, and unless the goods sold are actually delivered into the vendee's possession as soon as may be after the sale; and if such goods so sold afterwards come into and continue in the vendor's possession, they are liable to the demands of all his creditors: Del. 63,4.

So, in many states, every conveyance or sale made by a vendor of goods and chattels in his possession or under his control, unless accompanied by immediate delivery and followed by actual and continued change of possession, is presumed fraudulent and void as against creditors of the vendor or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the person claiming under such sale or assignment, that it was made in good faith and without any intent to defraud such creditors or purchasers: N.Y.<sup>a</sup> 2,7,2,5; Ind. 4911; Mich.<sup>a</sup> 6190; Wis.<sup>a</sup> 2310; Minn.<sup>a</sup> 39,1; 41,15; Kan. 43,3; Neb.<sup>a</sup> 1,32,11; Mo. 2502 and 2505.

But in several, it is conclusive evidence of fraud as against such creditors, etc., in all cases: Cal. 8440; Nev. 292; Col. 1523; Dak. Civ. C. 2024; Ida. 1874-5, p. 609,15; Mon. G. L. 169; Uta. 1016; La. 2247; Ariz. 2128.

The word *creditors* here includes all persons who may be creditors of such vendor or assignor at any time while such goods were in his possession or under his control: N.Y. 2,7,2,6; Ind. 4912; Mich. 6191; Wis. 2311; Minn. 41,16; Neb. 1,32,12; Nev. 293; Col. 1524; Ida. *ib.* 16; Mon. G. L. 170; Uta.; Ariz. 2129.

These last two clauses do not apply to contracts of bottomry or respondentia, nor to assignments or hypothecation of vessels or goods at sea or beyond the State; *provided* (except in California, Dakota) the assignee or mortgagee shall take possession of such ship, vessels, or goods as soon as may be after their arrival within the state: N.Y. 2,7,2,7; Mich. 6194; Wis. 2312; Minn. 41,17; Neb. *ib.* 13; Mo. 2504; Cal.; Dak.

Sales or exchanges of movable property are void against *bona-fide* purchasers and creditors unless possession is given before such *bona-fide* purchaser or creditor acquires his right by possession. What a delivery of possession is depends on the nature of the property; it may be constructive or actual; the delivery of the key of a store in which it is contained, or an order accepted by the person in whose custody it is held, if at the order of the vendor, is good evidence of delivery: La. 2247.

NOTE. — <sup>a</sup> Applies also to mortgages unrecorded.

§ 4600. **Public Officers.** In New Jersey, all conveyances by officers holding, or who have held, public offices, and who have embezzled public money, whether on valuable consideration or not, are void as against the state, county, or town, etc., injured, except as against a *bona-fide* purchaser, mortgagee, or judgment creditor for value, and without notice of the embezzlement: N.J. *Frauds*, 16; see in Part III.

§ 4601. **Record.** No conveyance required by the provisions of this article, or of Articles 453 and 456, to be recorded is valid until filed for record, except between the parties and their representatives, nor even then, if shown to be made with an intent to defraud prior creditors or purchasers, as against such creditors, etc.: Ark. 3378.

§ 4602. **Definitions.** (See also §§ 1300,1301,1471,1551-1553.) The word *lands*, as used in this article, is specially provided, in several states, to include *lands, tenements, and hereditaments*: N.Y. 2,7,3,6; Wis. 2325; Neb. 1,32,22; Nev. 302; Col. 1531; Ida. *ib.* 22; Mon. G. L. 176; Ariz. 2138. And all possessory rights for mining or other purposes: Nev., Ida., Mon.

And the words *estate and interest in lands*, to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands as above defined: N.Y., Wis., Neb., Nev., Col., Ida., Mon., Ariz.

And the term *conveyance*, to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered : N.Y. 2,7,3,7 ; Mich. 6208 ; Wis. 2326 ; Minn. 41,22 ; Neb. 1,32,23 ; Nev. 303 ; Col. 1532 ; Ida. *ib.* 23 ; Mon. G. L. 177 ; Ariz. 2139.

## Art. 462. Liens.

§ 4620. **Definition.** A lien is defined to be a charge imposed upon specific property by which it is made security for the performance of an act : Cal. 11180 ; Uta. C. Civ. P. 1056 ; N.M. 1519.

A lien is a charge imposed upon specific property by which it is made security for the performance of an act. (But this does not include a charge imposed by a transfer in trust : Cal. V. 3, Amt.)

Liens are either general or special.

A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property.

A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto.

Where the holder of a special lien is compelled to satisfy a prior lien for his own protection he may enforce payment of the amount so paid by him as a part of the claim for which his own lien exists.

Contracts of mortgage, pledge, bottomry, or respondentia are subject to all the provisions of this chapter : Cal. 7872-7 ; Dak. Civ. C. 1697-1701.

See in Part IV., Division I., for other Louisiana provisions ; and in Part IV., Division II., for privileges when the debtor is insolvent.

§ 4621. **Creation of Liens.** A lien is created, —

1. By contract of the parties ; or,
2. By operation of law.

No lien arises by mere operation of law until the time at which the act to be secured thereby ought to be performed.

An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest.

A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence : Cal. 7781-4 ; Dak. Civ. C. 1702-5.

§ 4622. **Effect of Liens.** Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien.

All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void. (Except in a case of pledge : Dak.)

The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security.

The existence of a lien upon property does not of itself entitle the person in whose favor it exists to a lien upon the same property for the performance of any other obligation than that which the lien originally secured.

One who holds property by virtue of a lien thereon is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower, under sections 4333 and 4334 : Cal. 7888-7892 ; Dak. Civ. C. 1706-1710.

§ 4623. **Priority.** Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia : Cal. 7897 ; Dak. Civ. C. 1711.

§ 4624. **Of Resort to Different Funds.** Where one has a lien upon several things, and other persons have subordinate liens upon, or interests in, some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself or of injustice to other persons, must resort to the property in the following order on the demand of any party interested:—

1. To the things upon which he has an exclusive lien;
2. To the things which are subject to the fewest subordinate liens;
3. In like manner inversely to the number of subordinate liens upon the same thing; and,
4. When several things are within one of the foregoing classes, and subject to the same number of liens, resort must be had,—
  - (1) To the things which have not been transferred since the prior lien was created;
  - (2) To the things which have been so transferred without a valuable consideration; and,
  - (3) To the things which have been so transferred for a valuable consideration in the inverse order of the transfer: Cal. 7899; Dak. Civ. C. 1713.

§ 4625. **Redemption from Lien.** Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed.

One who has a lien inferior to another upon the same property has a right,—

1. To redeem the property in the same manner as its owner might from the superior lien; and,
2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby.

Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay: Cal. 7903-5; Dak. Civ. C. 1714-6.

§ 4626. **Extinction of Liens.** A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

The sale of any property on which there is a lien in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien thereon.

A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.

The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible.

The voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons subsequently acquiring a title to the property, or a lien thereon, in good faith and for a good consideration: Cal. 7909-7913; Dak. Civ. C. 1717-1721.

§ 4627. **List of Liens.** The code of Georgia enumerates liens recognized by the laws as follows: (1) liens in favor of the state or municipal corporations for taxes (see Part III.); (2) liens of creditors by judgment or decree (see Part IV.); (3) laborers' liens (see § 4610 and in Part III.); (4) mechanics' liens on real property (see Art. 196) (so in two others: Cal. 8059; Dak. Civ. C. 1814). So, in Vermont, there is an employees' lien for wages: Vt. 1991; and see in Part III.; and mechanics' liens on personal property (see § 4638): Ga.; and liens in favor of contractors, material-men, machinists, and manufacturers of machinery (see Art. 196): Ga.; (5) liens in favor of proprietors of saw-mills, planing-mills, and on the products (§ 1961); (6) liens in favor of landlords (Art. 203, and § 1954); (7) innkeepers' liens (§ 4393) (so, in N.H. 139,1; Dak. Civ. C. 1812); so, of boarding-house keepers (§ 4393): Dak.; so, of livery-stable keepers (§ 4612): Ga.; so, of pastors of cattle or horses or keepers of other animals (§ 4642): N.H. 139,2; (8) so, of mortgagees (Art. 453); (9) of pawnees (Art. 452); (10) of depositaries (Art. 432); (11) of bailees (§ 4305); (12) carriers' liens (Art. 434); (13) liens of factors (Art. 438); (14) liens of acceptors (Art. 472); (15) liens of attorneys-at-law (see in Part III.) (so, in two others: Ind. 5276; Dak.); (16) liens on crops or farming-utensils for advances (§ 1954). (17) In many, liens on ships or boats



for labor or material (§ 4643); (18) the vendor's lien (§§ 1950,4573); so, in California and Dakota.

For other states, where no special list of liens is provided, see the respective kinds of liens as above indicated.

**§ 4628. Rank.** Liens generally rank according to their priority: Ga. 1995. (For special provisions, see the various liens in detail.)

No chattel mortgage takes precedence of a lien: Wy. p. 464, § 13.

These liens are not valid against purchasers without special notice of the lien: Wy. *ib.* § 16.

They have precedence of attachments and incumbrances made after the lien attached: Me. 90,42; see generally in Part IV., Div. II.

**§ 4629. Remedy.** A person having a lien is generally entitled to retain possession of the property until his lien is satisfied: Wis. 3347; Kan. 58,10; Ark.<sup>a</sup> 4464; Ore. 1878, p. 102,1-2.

If he give up possession to the owner, he loses the lien: Kan.; Ga. 1938.

He may, in Georgia, have execution against the property, after demand on the owner or his agent and refusal to pay, if the owner can be found: Ga. 1991.

So, his remedy is by attachment and sale: Vt. 1994.

In others, his remedy is by petition to court for sale: Mass. 192,24; Me. 91,47-8; Wis.; Mo. 3197 and 3199; Ark.<sup>b</sup> 4486; Dak. C. Civ. P. 674; Wy. <sup>a, c, d</sup> p. 463, § 4; Fla. 143,11.

He may sell after ten, twenty, or thirty days' notice to the owner, without order of court: Ill. 141,3; Kan. 58,6; Ark.<sup>a</sup> 4465-7; Ga. 1992-3; N.M.<sup>c, f</sup> 1543-4; 1546. He may sell after notice to the owner, if the debt remain unpaid for three months (the value of the goods not being over \$100; otherwise, an order of court is necessary, in Wisconsin): Wis.<sup>d, e</sup> 3347; Ore. 1878, p. 102, § 3.

If the debt be unpaid thirty days after due, he may sell upon petition to a justice of the peace: Col. 2121.

NOTES. — <sup>a</sup> Applies to liens mentioned under § 4642 only. <sup>b</sup> Applies to liens for service by stud-horses, etc. (§ 4642). <sup>c</sup> Applies to artisans' liens only (§ 4641). <sup>d</sup> Applies to carriers' liens (§ 4353). <sup>e</sup> Applies to innkeepers' and stable-keepers' liens (§§ 4393,4642). <sup>f</sup> Applies to landlords' liens (§ 2034).

**§ 4630. Limitation.** A lien must, in Georgia, be enforced within one year after the debt becomes due: Ga. 1991.

**§ 4631. Assignment.** In Georgia, all liens are assignable in writing: Ga. 1996.

## Art. 464. Special Liens.

**§ 4640. Laborers.** (See also *Railroads, Labor, etc.*, in Part III.) (A) Laborers have a general lien upon the property of their employers, liable to levy and sale for their labor, superior to all other liens except liens for taxes, landlords' special liens on crops, and such other liens as are declared by law superior to them: Ga. 1974. (B) They have also a special lien on the products of their labor (superior to all liens except for taxes and landlords' special liens on crops: Ga.): Ark. 4427; Ga. 1975.

Liens of laborers arise upon completion of their contract of labor, but do not exist against *bona-fide* purchasers without notice; as between themselves, they rank according to date of the completion of contract: Ga. 1976. Laborers at steam-mills have all the liens in this section provided: Ga. 1984.

(C) And there is a special lien in favor of laborers (1) on lime, limework, and slate: Me. 91,27.

(2) Contractors, laborers (or, in a few, material-men) have a lien on logs and lumber or wood cut: N.H. 139,13 and 16; 1879,57,25; Me. 91,38; 1885,280; Vt. 1988; Mich. 8412; Wis. 3329 and 3341; 1885,469; Minn. 32,36 and 63; 1885,86; Ore. 1882,

p. 53, § 1; Nev. 1879,45; Wash. 1941; Ida. 1874-5, p. 615,11; Fla. 143,39; Ariz. 1885,93,20.

(3) Miners have a lien upon all the real and personal property of mines: Mich. 8408; (4) brickmakers have a lien on the bricks: Me. 91,23.

§ 4641. **Artisans.** Any mechanic or artisan making, altering, or repairing any article of personal property at the request of the owner or legal possessor has a lien on such property for his reasonable charges: Mass. 192,24; N.J. 1885,15; Ind. 5304; Mich. 8399,8400; Wis. 3343; Minn. 90,16; Kan. 58,1; Va. 1880,191; N.C. 1783; Tenn. 2763; Ark. 4425; Tex. 3184-5; Cal. 8051, Amt. 8052; Ore. 1874, p. 111, § 17; 1878, p. 102, § 1; Col. 2120; Dak. Civ. C. 1806,1814; Ida. 1874-5, p. 617,15; Wy. 77,1, p. 462, § 3; Ga. 1981; Ala. 3462; 1885,26; Miss. 1383; Fla. 143,10; 1885,3611; N.M. 1536; Ariz. 1885,93,19; D.C. 711; S.C. 1667.

Such a lien is lost by the surrender of the property: Kan. 58,10; Tex.; Ga.; N.M.

**Enforcement.** (See also § 4629.) He may hold possession of the property until paid: Mich. 8400; Minn.; Kan.; Va.; N.C.; Tex.; Cal.; Ore.; Dak.; Ida.; Ga.; Miss.; Ariz.; D.C.

And may sell at the expiration of a certain period: Mass.; Ind.; Minn.; Kan.; N.C.; Tenn.; Tex. 3136; Cal.; Ore.; Dak.; Ida.; Fla.; Ariz.

Giving notice to the owner: Mass., Kan., Tex. And notice of the sale: Ind. 5305; Minn.; N.C.; Tenn.; Tex.; Cal.; Ore.; Dak.; Ida.; Fla.; Ariz.

But in others, it can only be enforced by petition or suit in court: Mass.; Mich. 8402; Ark. 4426; Wy. 77,2; Ala. 3464; Miss; S. C.

§ 4642. **Graziers' Liens.** In most states, ranchmen, stable-keepers, agistors, or keepers, in a pasture or elsewhere, of horses, cattle, and other domestic animals, have a lien thereon for their charges for pasturing and board: N.H. 139,2; Mass. 192,32; Me. 91,41; Vt. 1884,91; Ct. 1875,77; N.Y. 1872,498; N.J. *Inns*, 72; O. 3212; Ind. 5292; Ill. 82,50; Mich. 8399; Wis. 3344; Io. 1880,25; Minn. 90,17; 1885,81; Kan. 58,2; Neb. 1,4,28; Ky. 1874, Feb. 7; Tenn. 2756,2760; Mo. 3196; Cal. 8051, Amt.; Ore. 1878, p. 102, § 2; Nev. 144; Col. 2118; Dak. C. Civ. P. 672; Mon. G. L. 848; Wy. p. 462, § 1.

So, of livery-stable keepers specially: Pa. *Inns*, 16; Wis.; Io.; Minn.; Del. V. 17, 620,1; Va. 1879,84,2; Ala. 3494; Fla. 1885,3618; N.M. 1542.

So, in many, the owner of a stud-horse or jackass to which mares or jennets are turned has a lien for his charges on the colts or issue: O. 1884, p. 43; Neb. 1883,2,1; N.C. 1797; Ky. 1876, Feb. 11; Tenn. 2757-8; Ark. 4468; Dak. Civ. C. 1814*k*; Ga. 1883, p. 131; Ala. 3496; Miss. 1394; S. C. 2349.

So, in some, of bulls: Neb.; N.C. 1885,72; Dak.; Ga.; Ala. 1883,85; Miss; S. C.

**Stable-Keepers** and any persons have a lien upon horses, carriages, and harnesses kept by them for their proper charges: N.H.; Mass.; N.J.; Ill. 82,49; Wis. 3344; Del.; Va.; Ky. 1871, Jan. 31; Ark. 4463; Tex. 3183; Cal. 8051, Amt.; Ore.; Nev.; Col.; Dak.; Mon.; Wy.; Ga. 1986; N.M.

A livery-stable keeper is a depositary for hire, liable like an innkeeper: Ga. 2124.

§ 4643. **Liens on Ships.** In most states, any person (A) doing labor or furnishing materials, whether by express or implied contract, for the construction or repair of any sea, river, or canal ship, boat, or vessel, has a lien upon such ship, tackle, and furniture: N.H. 139,9; Mass. 192,14; Me. 91,8; Vt. 1981; Ct. 18,7,18; N.Y. 1862,482,1; N.J. *Liens*, 1; 1884,169; Pa.<sup>a</sup> *Attachment of Vessels*, 1 and 3-6; O. 5880; Ind. 5277-8; Ill. 12,1; Mich. 8236; Wis.<sup>b</sup> 3348; Io. 3432; Minn. 83,1; Md. 67,6,44; Del. V. 16,145,5; Va.<sup>c</sup> 148,5; 1877,44; N.C. 1781; Ky. 1880, May 5, § 1; Tenn. 2751; Mo. 4225; Ark. 395; Tex. 3180;

Cal. 10813; Ore. 1876, p. 9, § 17; Wash. 1939; Mon.<sup>c</sup> C. Civ. P. 204-5; S.C. 2389; Ala. 3465; Miss. 1395; Fla. 143,18; Ariz. 2755.

So, in many, any person so furnishing (B) stores, supplies, or ship-chandlers' goods: Mass.; N.Y.; N.J.; Pa. *ib.* 3; O.; Ind.; Ill.; Mich.; Wis.;<sup>b</sup> Io.; Minn.; Md.; Del.; Va.; Ky.; Tenn.; Mo.; Cal.; Ore.; Wash.; Mon.; S.C.; Ala.; Miss.; Fla.; Ariz.

(C) So, for wharfage or dock charges: N.Y.; N.J.; O.; Ill.; Mich.; Wis.;<sup>b</sup> Minn.; Va.; Tenn. 2753; Mo.; Cal.; Ore.; Wash.; Ariz.; or anchorage: Ill., Mich., Wis.,<sup>b</sup> Minn., Mo., Cal., Ore., Wash., Ariz.; owners of dry docks or marine railways: Me., Ill., Mich.

(D) In others, for pilotage: N.Y., Va.

(E) So, a ship or person has a lien on another vessel doing damage (1) by collision: N.Y. 1862,482,33; N.J. *Liens*, 40; Ala. 3327. So, (2) for all damages for injuries done to person or property by the vessel, whether the person or property is aboard the vessel or not, when the same occurred through negligence or misconduct of the owner, agent, or employee; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Va.; Ky. *ib.* 2; Mo.; Cal.; Ore.; Wash.; Mon.; Ariz. *Except* an injury received by one member of the crew from another: Ill. So, (3) for "any torts of the vessel:" Ark. 396.

(F) For towage: N.Y., N.J., Ill., Mich., Wis.,<sup>b</sup> Ore.

(G) For labor on the vessel when sunk or disabled: Ill., Mich.

(H) For debts due the ship's husband or agent by the owner for disbursements on account of the vessel: Ill.

(I) For damages on any contract of freight or transportation of passengers made by the owner or agent in the State: O., Ind., Ill., Mich., Wis., Io., Minn., Va., Mo., Cal., Ore., Wash., Mon., Ariz.

(J) In many, seamen, masters, or other employees employed on the ship have the lien for wages due them: Ind.; Ill.; Mich.; Minn.; Ky.; Tenn.; Mo.<sup>f</sup> 4267; Ark.<sup>e</sup> 398; Cal.<sup>d,e</sup> 8056; Ore.; Wash.; Dak.<sup>d,e</sup> Civ. C. 1810; Mon.;<sup>e</sup> Ga. 1982; Ala.; Miss.; Ariz.

But in Wisconsin, it is specially provided that "no person employed as master, or otherwise, on board the vessel, to collect or receive freights or passage-money" has the lien.

The master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages: Cal. 8055; Dak. Civ. C. 1809.

(K) There is a lien on account of any indebtedness for insurance, fire or marine, effected upon such ship or tackle: N.Y., O., Mich., Wis.<sup>b</sup>

(L) In others, on account of indebtedness on bottomry: Mich.; for salvage: Mich., Va.; lighterage: Mich.

There are, in several states, special provisions for the lien on inland river craft.

It takes preference of any other debt due from the owners of the ship: Pa. All such liens are deemed simultaneous, and paid *pro rata*: Me. 91,22. This lien takes precedence of all other liens upon the vessel except (1) mariners' wages: N.H. 139,10; Mass.; Me.; Ct.; N.Y.; N.J.; Ind. 5279; Ill. 12,26; Ky.; Ark.; Mon.;<sup>e</sup> S.C.; Ariz.; (2) mortgages or bills of sale duly executed and recorded before the lien accrued: Md. 67,48.

The order of liens is as follows: (1) salvage; (2) seamen's wages; (3) all other liens duly filed: Mich. 8267; (1) seamen's wages; (2) liens for labor in repairing the vessel, or materials or supplies furnished; (3) wharfage or anchorage; (4) for non-performance of freight or transportation contracts; (5) damages for injuries: Mo. 4226. So, in Oregon, but the last two classes rank together.

The classes (J), (B), (A), (C), (I), (E), rank in order: Cal., Wash. (1) Mariners' wages; (2) such liens as result from contracts made within the territory; (3) all other cases: Mon. C. Civ. P. 206.



In a few, this lien on ships is governed by the same law as mechanics' liens on houses: Del. ; N.C. ; Fla. 143,7.

NOTES. — <sup>a</sup> Only carpenters, blacksmiths, mast-makers, vendors of copper sheathing, iron manufacturers, steam-engine and boiler makers, boat-builders, block-makers, rope-makers, sail-makers, riggers, joiners, carvers, plumbers, painters, ship-chandlers, coppersmiths, brass-founders, coopers, vendors of sail-cloth, and lumber-merchants, have the lien. <sup>b</sup> For these debts the owners of the vessel are personally liable, besides any liability that may exist against the master or agent: Wis. 3350. <sup>c</sup> In states so noted, the process is termed *attachment*, not a lien; but the effect is the same. <sup>d</sup> This lien attaches also to the freightage. <sup>e</sup> It is superior to all other liens. <sup>f</sup> But not for more than two months' wages.

§ 4644. **Louisiana Law of the Privilege on Ships and Merchandise.** The following debts are privileged on the price of ships and other vessels, in the order in which they are placed: (1) Legal and other charges incurred to obtain the sale of a ship or other vessel, and the distribution of the price. (2) Debts for pilotage, towage, wharfage, and anchorage. (3) The expenses of keeping the vessel from the time of her entrance into port until sale, including the wages of persons employed to watch her. (4) The rent of stores in which the rigging and apparel are deposited. (5) The maintenance of the ship and her tackle and apparatus, since her return into port from her last voyage. (6) The wages of the captain and crew employed on the last voyage. (7) Sums lent to the captain for the necessities of the ship during the last voyage, and reimbursement of the price of merchandise sold by him for the same purpose. (8) Sums due to sellers, to those who have furnished materials, and to workmen employed in the construction, if the vessel has never made a voyage; and those due to creditors for supplies, labor, repairing, victuals, armament, and equipment, previous to the departure of the ship, if she has already made a voyage. (9) Money lent on bottomry for refitting, victualing, arming, and equipping the vessel before her departure. (10) The premiums due for insurance made on the vessel, tackle, and apparel, and on the armament and equipment of the ship. (11) The amount of damage due to freighters for the failure in delivering goods which they have shipped, or for the reimbursement of damage sustained by the goods through the fault of the captain or crew. (12) Where any loss or damage has been caused to the person or property of any individual by any carelessness, neglect, or want of skill in the direction or management of any steamboat, barge, flatboat, water craft, or raft, the party injured shall have a privilege to rank after the privileges above specified. The term of prescription of privileges against ships, steamboats, and other vessels shall be six months: La. 3237.

The creditors, named in each number of the preceding paragraph, except number twelve, come in together, and must all suffer a ratable diminution, if the fund be insufficient.

Creditors having privileges on ships or other vessels may pursue the vessel in the possession of any person who has obtained it by virtue of a sale; in this case, however, a distinction must be made between a forced and a voluntary sale.

When the sale was a forced one, the right of the purchaser to the property becomes irrevocable; he owes only the price of adjudication, and over it the creditors exercise their privilege, in the order above prescribed.

When the sale is voluntary on the part of the owner, a distinction is to be made, whether the vessel was in port or on a voyage.

When a sale has been made, the vessel being in port, the creditors of the vendor, who enjoy the privilege for some cause anterior to the act of sale, may demand payment and enforce their rights over the ship, until a voyage has been made in the name and at the risk of the purchaser, without any claim interposed by them.

But when the ship has made a voyage in the name and at the risk of the purchaser, without any claim on the part of the privileged creditors of the vendor, these privileges are lost and extinct against the ship, if she was in port at the time of sale.

On the other hand, if the ship was on a voyage at the time of sale, the privilege of the creditor against the purchaser shall only become extinct after the ship shall have returned to the port of departure, and the creditors of the vendor shall have allowed her to depart on another voyage for the account and risk of the purchaser, and shall have made no claim.

A ship is considered to have made a voyage when her departure from one port and arrival at another shall have taken place, or when, without having arrived at another, more than sixty days have elapsed between the departure and return to the same port; or when the ship, hav-

ing departed on a long voyage, has been out more than sixty days without any claim on the part of persons pretending a privilege.

The captain has a privilege for the freight during fifteen days after the delivery of the merchandise, if it has not passed into third hands. He may even keep the goods, unless the shipper or consignee shall give him security for the payment of the freight.

Every consignee or commission agent who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of these advances, or for any balance due him (La. D. 2887) with interest and charges on the value of the goods, if they are at his disposal in his stores, or in a public warehouse, or if before their arrival, he can show, by a bill of lading or letter of advice, that they have been despatched to him.

This privilege extends to the unpaid price of the goods which the consignee or agent shall have thus received and sold. It is preferred to any attachment made after the goods or invoice, etc., are received (La. D. 2887).

Every consignee, commission agent, or factor shall have a privilege, preferred to any attaching creditor, on the goods consigned to him for any balance due him, whether specially advanced on such goods or not; provided they have been received by him, or an invoice or bill of lading has been received by him previous to the attachment; *provided*, that the privilege established by this paragraph shall not have a preference over a privilege pre-existing on the goods aforesaid in behalf of a resident creditor of this State.

In the event of the failure of the consignee or commission agent, the consignor has not only a right to reclaim the goods sent by him, and which remain unsold in the hands of the consignee or agent, if he can prove their identity, but he has also a privilege on the price of such as have been sold, if the price has not been paid by the purchaser, or passed into account current between him and the bankrupt: La. 3238-3248.

§ 4645. **Duration.** This lien (if duly enforced, as below) continues (1) until satisfied: Mass. 192,14; (2) only until the departure of the vessel: Pa. *ib.* 2; (3) it continues twelve months: N.Y. 1862,482,2; 1885,273; (4) eight months: Vt. 1981; (5) six months: Ala. 3466; Miss. 1396; (6) three months: Wis. 3351; Tenn.; S.C. 2390; 1884,451; (7) thirty days: Fla. 143,18; (8) nine months: N.J. *Liens*, 1; Ill.<sup>a</sup> 12,3; Mo.<sup>b</sup> 4268; (9) for two years after filing statement as below: Md. 67,6,47; (10) five years: Ill.; or (11) until thirty days after the vessel's return, if it be absent at the end of the time so above limited: N.Y.

But generally it will dissolve unless a sworn statement be filed with the court, county, city, or town clerk, or (in New Hampshire and Maine) an attachment be brought within (1) four days after launching: N.H. 139,9; Me.; Del.; or after the ship's departure: Mass. 192,15; (2) four days after completion of vessel: N.H.; (3) twelve days after departure of the ship: N.Y.; (4) six months after commencement of work: Md. 67,6,45; (5) ten days after end of work: Ct. *ib.* 19; (6) one year after the claim accrues: Minn. 83,23; Ky. *ib.* 8; Cal. 10313; Ore. 32,33; Mon. C. Civ. P. 207.

The lien for collision (§ 4643, D) must be enforced by action within ten days thereafter: N.Y.; twenty days: N.J. Liens on vessels on the great lakes cease at the expiration of six months after the January 1st following, or ten days after the vessel's return to the port where the lien was contracted: N.Y. 1863,422; 1885,216.

The receiving the note of the owner or master of the vessel for the claim does not forfeit the lien, unless expressly received in payment therefor and so specified therein: Wis. 3349.

NOTES. — <sup>a</sup> As against other creditors or subsequent incumbrancers; but it may be enforced against the vessel any time within five years. <sup>b</sup> But liens for wages must be enforced within thirty days after due.

§ 4646. **Enforcement.** (A) This lien on ships is enforced by petition in court: Mass. 192,17; Ct.; Io. 3433; Ore. 32,19-20.

(B) By attachment: N.H. 139,10; Me. 91,8; Vt. 1981; N.Y. *ib.* 6; N.J. *Liens*, 4; Pa. *ib.* 11; O. 5884; Ind. 5280; Ill. 12,6; Mich. 8238; Wis. 3351,3354; Minn. 83,4; Del. V. 16,145,5; Va. 148,5; Ky. *ib.* 4; Tenn. 4297; Mo. 4227,4234; Ark. 399; Cal. 10817; Uta. C. Civ. P. 210; S.C. 2392; Ala. 3329; Miss. 2415; Fla. 143,19; Ariz. 2759.

(C) By *scire facias*: Md. 67,6,49.

(D) By admiralty suit *in rem*: Wash. 1940.

§ 4647. **Release of Lien.** The owner or his agent may generally release the vessel from the lien by giving bond conditioned to pay all the judgments rendered on claims so filed or enforced: N.Y. *ib.* 11; N.J. *ib.* 12; Pa. *ib.* 14; O. 5887; Ind. 5283; Ill. 12,15; Mich. 8248; Wis. 3356; Io. 3438; Minn. 83,7; Del. V. 16,145,5; Va. 148,9; Ky. *ib.* 6; Tenn. 4298; Mo. 4238; Cal. 10822; Ore. 32,25; Uta. C. Civ. P. 215; Ala. 3331; Ariz. 2761.

§ 4648. **Sale.** If the vessel is not released from the lien under § 4492, upon judgment for the claimant the court issues an order of sale of the vessel, etc.: Mass. 192,18; Me. 91,20; N.Y. *ib.* 15; N.J. *ib.* 21; Pa. *ib.* 19; O. 5890; Ill. 12,22; Mich. 8263; Wis. 3353,4242; Minn. 83,8; Del. V. 16,145,7; Va. 148,23; Tenn. 4303; Mo. 4253; Cal. 10824; Ore. 32,27; Uta. C. Civ. P. 216-7; S.C. 2396; Ala. 3338; Ariz. 2766.

And the proceeds, after paying costs, are distributed among the claimants, giving priority as specified in § 4488: Mass. 192,21; Me. 91,21; N.J. *ib.* 24; Pa.; Ill. 12,26; Mich. 8269; Md. 67,53; Del.; Tenn.; Mo. 4247; Cal.; Ore. 32,31; S.C.; Ariz.

If the proceeds of the sale (§ 4493) are insufficient to satisfy all the liens (1) those having liens for labor receive a percentage one third greater than those having liens for materials, stores, etc.: Mass. 192,21; S.C. 2396. (2) The sub-contractors are paid in full, before the original contractor: Ct. 18,7,21. (3) Except as to mariners' wages, the liens are satisfied according to their priority: N.Y. *ib.* 19. (4) Except as above, the distribution is *pro rata*: N.J. *ib.* 36; Pa. *ib.* 19; Tenn. 4305.

§ 4649. **Further Liability.** The owners are generally liable for the balance in a civil action, if the proceeds do not satisfy the debt: O. 5891; Wis. 3350. So, probably, in other states.

§ 4650. **Lien on Freight.** A similar lien is, in Illinois, provided in favor of such vessel upon goods shipped in it, for freight, demurrage, and advanced charges; and it is enforced in the same way: Ill. 12,2.

§ 4651. **Producers' Liens.** Farmers, etc., furnishing grain or fruit for canning or preserving have a lien on such preserved article until it is shipped: Me. 91,40.

In many states, cotton raisers, planters, farmers, etc., have liens on their produce in the hands of the agent or factor.

## Art. 466. Civil Law of Privileges.

§ 4660. **General Provisions.** Whoever has bound himself personally is obliged to fulfil his engagements out of all his property, movable and immovable, present and future.

The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference.

Lawful causes of preference are privilege and mortgages.

Privilege can be claimed only for those debts to which it is expressly granted in the code: La. 3182-5.

§ 4661. **Of the Several Kinds of Privileges.** *Privilege* is a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages.

Among creditors who are privileged the preference is settled by the different nature of their privileges.

The creditors who are in the same rank of privileges are paid in concurrence, that is, on an equal footing.

Privileges may exist either on movables or immovables, or on both at once: La. 3186-9.



§ 4662. **Of Privileges on Movables.** Privileges are either general or special on certain movables : La. 3190.

§ 4663. **Of General Privileges on Movables.** The debts which are privileged on all the movables in general are those hereafter enumerated, and are paid in the following order : —

1. Funeral charges.
2. Law charges.
3. Charges of whatever nature occasioned by the last sickness, concurrently among those to whom they are due.
4. The wages of servants for the year past, and so much as is due for the current year.
5. Supplies of provisions made to the debtor or his family during the last six months, by retail dealers, such as bakers, butchers, grocers ; and during the last year by keepers of boarding-houses and taverns.
6. The salaries of clerks, secretaries, and other persons of that kind.
7. Dotal rights due to wives by their husbands : La. 3191.

§ 4664. **Servants** or domestics are those who receive wages, and stay in the house of the person paying and employing them for his service or that of his family ; such are valets, footmen, cooks, butlers, and others who reside in the house.

Domestics or servants must make a demand of their wages within a year from the time when they left service ; but their privilege is only for the year past, and so much as is due for the present year.

As to the wages of preceding years which may be due, the wages may be recovered, if there is any balanced account, note, or obligation of the debtor ; but they enjoy no privilege. They form an ordinary debt, for which domestics or servants come in by contribution with other ordinary creditors : La. 3205-7.

§ 4665. **Of Supplies of Provisions.** Such supplies of provisions as confer a privilege are those which are made by retail dealers, — that is, persons keeping an open shop, and selling by small portions provisions and liquors.

Retail dealers who have furnished such supplies ought to demand their money within a year from the time of the first supply ; but they have a privilege only for the last six months, and for the rest they are placed on the footing of ordinary creditors.

Dealers by wholesale in provisions and liquors do not enjoy any privilege on the property of their debtor further than what they have acquired by mortgage or by a judgment duly recorded.

It is not keepers of taverns and hotels alone who are comprehended in the term *masters of boarding-houses*, and who enjoy a privilege for their supplies, but all persons who make a business of receiving persons at board for a fixed price.

Teachers and preceptors who receive into their houses young persons to be brought up, led, and instructed, enjoy the same privilege which is given to keepers of boarding-houses.

The privilege of keepers of boarding-houses, taverns, and other persons comprised in this class extends to the last year due, and so much as has expired of the current year : La. 3203-3213.

§ 4666. **Of the Privilege of Clerks and that of Wives for their Dower.** Although clerks, secretaries, and other agents of that sort cannot be included under the denomination of servants, yet a privilege is granted them for their salaries for the last year elapsed, and so much as has elapsed of the current year. This privilege, however, cannot be enforced until after that of the furnishers of provisions : La. 3214.

The privilege granted to wives on the movable effects of their husbands exists for the dotal property only, and can only be enforced on such effects as were in the husband's possession at the dissolution of the marriage or co-partnership : La. 3215.

§ 4667. **Of the Privileges on Particular Movables.** The privileges enumerated in the preceding section extend to all the movables of the debtor, without distinction.

There are some which act only on particular movables and no other ; and it is of these last that we shall treat in this and the following sections.

The debts which are privileged on certain movables are the following : —

1. The appointments or salaries of the overseer for the current year on the crops of the year and the proceeds thereof; debts due for necessary supplies furnished to any farm or plantation, not including articles furnished and which were sold to laborers, and debts due for money actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses for any farm or plantation, on the crops of the year and the proceeds thereof.

2. The debt of a workman or artisan for the price of his labor on the movable which he has repaired or made, if the thing continues still in his possession, or that of the person for whom they were repaired.

3. The rents of immovables and the wages of laborers employed in working the same on the crops of the year and on the furniture which is found in the house let or on the farm, and on everything which serves to the working of the farm.

4. The debt on the pledge which is in the creditor's possession.

5. That of a depositor on the price of the sale of the thing by him deposited.

6. The debt due for money laid out in preserving the thing.

7. The price due on movable effects, if they are yet in the possession of the purchaser.

8. The things which have been furnished by an innkeeper on the property of the traveller which has been carried to his inn.

9. The carrier's charges and the accessory expenses on the thing carried, including necessary charges and expenses paid by carriers, — such as taxes, storage, and privileged claims required to be paid before moving the thing; and in case the thing carried be lost or destroyed without the fault of the carrier, this privilege for money paid by the carrier shall attach to insurance effected on the thing for the benefit of the owner, provided written notice of the amount so paid by the carrier and for whose account, with a description of the property lost or destroyed, be given to the insurer or his agent within thirty days after the loss, or if it be impracticable to give the notice in that time, it shall be sufficient to give the notice at any time before the money is paid over.

The privilege hereinbefore granted to the overseer, the laborers, the furnishers of supplies, and the party advancing money necessary to carry on any farm or plantation, shall be concurrent, and shall not be devested by any prior mortgage, whether conventional, legal, or judicial, or by any seizure and sale of the land while the crop is on it.

The privileges granted by this paragraph, on the growing crop in favor of the classes of persons mentioned shall be concurrent, except the privilege in favor of the laborer, which shall be ranked as the first privilege on the crop: La. 3218; D. 2873-5.

## **Art. 467. Bottomry and Respondentia.**

§ 4670. **Bottomry, what.** Bottomry is a contract by which a ship or its freightage is hypothecated as security for a loan, which is to be repaid only in case the ship survives a particular risk, voyage, or period.

The owner of a ship may hypothecate it or its freightage upon bottomry for any lawful purpose and at any time and place.

The master of a ship may hypothecate it upon bottomry only for the purpose of procuring repairs or supplies which are necessary for accomplishing the objects of the voyage or for securing the safety of the ship.

The master of a ship can hypothecate it upon bottomry only when he cannot otherwise relieve the necessities of the ship and is unable to reach adequate funds of the owner, or to obtain any upon the personal credit of the owner, and when previous communication with him is precluded by the urgent necessity of the case.

The master of a ship may hypothecate freightage upon bottomry under the same circumstances as those which authorize an hypothecation of the ship by him.

Upon a contract of bottomry the parties may lawfully stipulate for a rate of interest higher than that allowed by the law upon other contracts. But a competent court may reduce the rate stipulated when it appears unjustifiable and exorbitant.

A lender upon a contract of bottomry made by the master of a ship, as such, may enforce the contract, though the circumstances necessary to authorize the master to hypothecate the ship did not in fact exist, if, after due diligence and inquiry, the lender had reasonable grounds to believe, and did in good faith believe, in the existence of such circumstances.

A stipulation in a contract of bottomry imposing any liability for the loan independent of the maritime risks is void.

In case of a total loss of the thing hypothecated, from a risk to which the loan was subject, the lender upon bottomry can recover nothing; in case of a partial loss, he can recover only to the extent of the net value to the owner of the part saved.

Unless it is otherwise expressly agreed, a bottomry loan becomes due immediately upon the termination of the risk, although a term of credit is specified in the contract.

A bottomry lien is independent of possession, and is lost by omission to enforce it within a reasonable time. A bottomry lien, if made out of a real or apparent necessity, in good faith, is preferred to every other lien or claim upon the same thing, excepting only a lien for seamen's wages, a subsequent lien of material-men for supplies or repairs indispensable to the safety of the ship, and a subsequent lien for salvage.

Of two or more bottomry liens on the same subject the latter in date has preference, if created out of necessity: Cal. 8017-8029; Dak. Civ. C. 1783-1795.

§ 4671. **Respondentia.** Respondentia is a contract by which a cargo, or some part thereof, is hypothecated as security for a loan, the repayment of which is dependent on maritime risks.

The owner of cargo may hypothecate it upon respondentia, at any time and place, and for any lawful purpose.

The master of a ship may hypothecate its cargo upon respondentia only in a case in which he would be authorized to hypothecate the ship and freightage, but is unable to borrow sufficient money thereon for repairs or supplies which are necessary for the successful accomplishment of the voyage; and he cannot do so, even in such case, if there is no reasonable prospect of benefiting the cargo thereby.

The provisions of § 4640 apply equally to loans on respondentia.

The owner of a ship is bound to repay to the owner of its cargo all which the latter is compelled to pay, under a contract of respondentia made by the master, in order to discharge its lien: Cal. 8036-8040; Dak. Civ. C. 1796-1800.

## CHAPTER V. — NEGOTIABLE PAPER.

### Art. 470. General Principles.

§ 4700. **Definitions:** A **Bill of Exchange**, by the code of Georgia, is an order by one person, called the drawer or maker, to another, called the drawee or acceptor, to pay money to another (who may be the drawer himself), called the payee, or his order, or to the bearer; if the payee or a bearer transfers the bill by indorsement, he then becomes the indorser. If the drawer or drawee resides out of the State, it is called a foreign bill of exchange: Ga. 2773.

The term includes all drafts and orders drawn by one person on another for the payment of a sum of money specified therein: Ark. 471.

One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an indorser, and his act is called indorsement: Cal. 8108; Dak. Civ. C. 1836; Uta. 1882, 41, 16.

A bill of exchange is an instrument negotiable in form, by which one who is called the drawer requests another, called the drawee, to pay a specified sum of money: Cal. 8171; Dak. Civ. C. 1882; Uta. 1882, 41, 59.

Every instrument which is made payable at a day subsequent to its date, and is otherwise in the form of a check, shall be deemed a bill of exchange: W. Va. 1882, 77.

A bill of exchange may give the name of any person in addition to the drawee, to be resorted to in case of need.

A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set.

An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it.



Presentment, acceptance, or payment of a single part in a set of a bill of exchange is sufficient for the whole : Cal. 8172-5 ; Dak. Civ. C. 1883-6 ; Uta. *ib.* 60-63.

A bill or check may be made payable in bank-notes, or currency, or other funds, and be negotiable as if drawn for money : Ky. 22,11.

All bills drawn and payable within the State are inland bills ; those drawn in the State and payable elsewhere, are foreign bills : Cal. 8224 ; Dak. Civ. C. 1914 ; Ala. 2118.

**Checks.** A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand, without interest.

A check is subject to all the provisions of this code concerning bills of exchange, except that, —

1. The drawer and indorsers are exonerated by delay in presentment only to the extent of the injury which they suffer thereby ;

2. An indorsee of a bond, bank-note, check, or certificate of deposit, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period : Cal. 8254-5 ; Dak. Civ. C. 193-4 ; Uta. 1882,141,110-2.

A bank-note remains negotiable, even after it has been paid by the maker : Cal. 8261 ; Dak. Civ. C. 1935 ; Uta.

**A Promissory Note** is a written promise made by one or more to pay another or order or bearer, at a specified time, a specific amount of money or other articles of value : Ga. 2774.

A promissory note is an instrument, negotiable in form, whereby the signer promises to pay a specified sum of money.

An instrument in the form of a bill of exchange, but drawn upon and accepted by the drawer himself, is to be deemed a promissory note.

A bill of exchange, if accepted with the consent of the owner by a person other than the drawee or an acceptor for honor, becomes in effect the promissory note of such person, and all prior parties thereto are exonerated.

The general law of negotiable paper and §§ 4716 and 4713 of this book apply to promissory notes : Cal. 8244-7 ; Dak. Civ. C. 1928-1931 ; Uta. *ib.* 106-9.

If a note be made by more than one, it may be a joint promise or joint and several ; in which case each is bound for the whole separately, at the option of the holder : Ga. 2774.

The sum of money must not be expressed in figures only, or other evidence must be given to prove the amount : La. D. 319 ; Civ. C. 2243.

If the payment is in articles other than money, and is not punctually made, the holder may recover the value of such articles at the time the note was due, at the place where it was payable, if a specific place is mentioned ; otherwise, at the place where it was made, with lawful interest thereon : Ga.

Every promise in writing whereby any person or corporation promises or agrees to pay a sum of money, or acknowledges the same to be due, shall be deemed a promissory note ; and the sum due to the payee and his assigns : Miss. 1123.

When any person or corporation shall, by order in writing duly signed, direct the payment of a sum of money by any other person, the sum therein specified shall be due by virtue thereof to the person in whose favor it is drawn, and may be put in suit against the drawer thereof or against the drawee, if accepted, and the amount recovered, with interest and costs : Miss. 1126.

A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article.

A negotiable instrument must be made payable in money only, and without any condition not certain of fulfilment.

The person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made.

A negotiable instrument may give to the payee an option between the payment of the sum specified therein and the performance of another act ; but as to the latter, the instrument is not within the provisions of this title.

A negotiable instrument may be with or without date, and with or without designation of the time or place of payment.

A negotiable instrument may contain a pledge of collateral security with authority to dispose thereof.

A negotiable instrument must not contain any other contract than such as is specified in this article.

Any date may be inserted by the maker of a negotiable instrument, whether past, present, or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date.

There are six classes of negotiable instruments, namely: —

1. Bills of exchange.
2. Promissory notes.
3. Bank notes.
4. Checks.
5. Bonds.
6. Certificates of deposit: Cal. 8087-8095; Dak. Civ. C. 1821-9; Uta. 1882,41, Art. 1.

§ 4701. **Negotiability of Notes.** There is much confusion in the several states in the use of the word negotiable. Its proper technical meaning is *assignable so as to pass a title free of the equities existing between previous parties*; but in the statutes of many states it would seem to mean *assignable so as to give the assignee a right of action in his own name*, as in § 4032. In most states, the substance of the Eng. Stat. 3 and 4 Anne, Chap. 9, § 1, is, in effect, re-enacted, whereby all notes in writing, made and signed by any person or corporation or his agent duly authorized, by which such person, etc., promises to pay any other person or corporation, his or their order or bearer, any sum of money<sup>a</sup> mentioned therein, shall be taken to be due and payable accordingly, and shall be indorsable over, in the same manner as inland bills of exchange, according to the custom of merchants: R.I. 142,6; Ct. 18,1,1; N.Y. 2,4,2,1-3; N.J. *Promissory Notes*, 1; Pa. *Bills*, 1; *Promissory Notes*, 2; O. 3171; Ind.<sup>a</sup> 5501 (but see below); Ill.<sup>a</sup> 98,3-4; Mich. 1577-8; Wis. 1675,1677; Io. 2082; Kan. 14,1; Neb. 1,41,1; N.C. 41; Tenn. 2713; Mo.<sup>b</sup> 547; Cal. 8101,8124; Ore. 48,1-2; Nev. 9-11; Col. 103; Wash. 2295-7; Dak. Civ. C. 1832,1853; Ida. 1874-5, p. 652,1-3; Mon. G. L. 99; Uta. *ib.* 12 and 31; S.C. 1290; Miss.<sup>a</sup> 1124; N.M. 1725; Ariz. 3464-6; 1919.

So, in many, of all foreign bills of exchange: Kan.; Neb.; Va.; W.Va.; Ky. 22,10, etc.; Mon.; Ala. So, in several, all bills, drafts, or orders: Pa.; N.C.; Tenn. 2714,2716; Ala. 2095. So, in one, all certificates of deposit: Wis. So, in a few, all checks on a bank: Va. 1879, Ex. 117; W.Va. 12,7; 1882,77; Ky.; Ala. 2094. On a savings bank or broker: Va., W.Va., Ala., N.M. So, in many, all bonds: Ill., Kan., Neb., Tenn., Col. So, in a few, due-bills: Ill., Tenn., Col., N.M.

So, in several, of notes payable at a bank (or any place certain: Ala.); and such notes, only, are indorsable over according to the ordinary law of bills and notes; see note<sup>c</sup>, and in § 4702: Ind. 5506; Va.; W.Va.; Ky. 22,21; Ala.

Warehouse receipts are made negotiable in all respects like promissory notes under this article: Wis. 1676; and see § 4372.

All notes, bills, bonds, whether drawn for value received or payable to order or not, sealed or unsealed, are negotiable like promissory notes: Tenn. 2714. See also § 4031. So, of all other writings for the payment of money or other thing (see § 4031): Miss.; and, in Illinois, of all other instruments in writing.

In South Carolina, a negotiable note or bill for less than \$1 is void, and not to be passed or received under penalty: S.C. 1301. See, for other states, in Part III., *Banking*.

NOTES. — <sup>a</sup> In several, a note may be for the payment of articles other than money: Ind., Ill., Col., Ida., Ga., Miss., N.M. See § 4700. <sup>b</sup> So, only when the note is expressed to be for value received. <sup>c</sup> *Quære*, however, whether the courts would enforce this extraordinary law literally.

§ 4702. **Action by Indorsee.** (For citations, see also § 4701.) And the payee or indorsee, or the holder without indorsement, of a note payable to bearer, may maintain a suit on the same in his own name, in the same manner as on such inland bills against the maker or indorser (Eng. Stat. 3 and 4 Anne, C. 9, § 1):

Vt. 2002-3; R.I. 142,7; N.Y. *ib.* 4; N.J.; Pa.; O. 3172; Ind.<sup>a, b</sup> 5502; Ill.<sup>a, b</sup> 98,5 and 8; Mich. 1579; Wis. 1678; Io. 2083; Neb. 1,41,2; N.C.; Tenn. 2715; Mo. 548; Tex. 265; Ore. 48,3; Nev. 12; Col. 104-5; Wash. 2298; Ida. *ib.* 4; S.C.; Ga. 2775; Miss.;<sup>b</sup> N.M.; Ariz. 3467.

But in two states, there is a provision expressly to the contrary, making notes (*i. e.*, *not* bills of exchange) liable to defences existing against the assignor before notice of assignment to the maker, as in the case of ordinary choses in action: Ind. 5503, 5505; Miss. 1124; see note <sup>c</sup>, § 4701. Except notes payable at a bank: Ind. 5506. The same law perhaps exists in states where only notes, etc., payable at a bank are declared negotiable; see under § 4701, above.

NOTES. — <sup>a</sup> Applies also to instruments not bills or notes. <sup>b</sup> But see below in this article.

§ 4703. **Limitations.** No order drawn upon or accepted by the treasurer of any county, city, town, or other municipality, whether drawn by any officer thereof or any other person, and no obligation or instrument made by any such corporation or officer thereof, unless expressly authorized by law to be made negotiable, shall be so deemed, in whatever form it be made or drawn: Wis. 1675. No bond, note, or bill, drawn payable to any person or persons alone, and not to any order, bearer, or assigns, is made negotiable by this article: Kan. 14,1; Neb. 1,41,1.

A maker may restrain the negotiability of a note by expressing such intention in the body of the instrument: Ga. 2775.

§ 4704. **Lost Bills.** If a bill is lost before maturity, the drawer must give another bill of the same tenor to the person entitled, who must give sufficient security for indemnity, if demanded, to the drawer: N.J. *ib.* 6; Miss. 1130. See, for other states, in Part IV. for suits on lost bills.

§ 4705. **Notes Payable to the Order of the Maker**, if negotiated by him, have, in many states, the same effect, and are of the same validity against the maker and all persons having knowledge of the facts, as if drawn to bearer: N.Y. 2,4,2,5; Mich. 1580; Wis. 1679; Minn. 23,16; Ky. 22,13; Mo.<sup>a</sup> 549; Cal. 8102; Ore. 48,4; Nev. 13; Wash. 2299; Dak. Civ. C. 1833; Ida. *ib.* 5; Uta. *ib.* 13; Ariz. 3468.

So, in most of these, of notes made payable to a fictitious person: N.Y., Mich., Wis., Minn., Mo., Cal., Ore., Nev., Wash., Dak., Ida., Ariz.

If payable to the order of a person obviously fictitious, it is deemed in fact payable to bearer: Cal. 8103; Dak. Civ. C. 1834; Uta. *ib.* 14.

All bonds, bills, or notes payable to bearer or a fictitious person are construed as payable to the person from whom the consideration moved: Ala. 2098.

NOTE. — <sup>a</sup> See § 4702, note <sup>b</sup>.

§ 4706. **Want of Consideration** (see also §§ 4034, 4123, 4739) is, in a few states, a defence to the note or bill as between the original parties: Ill. 98,9; Tex.<sup>a</sup> 272; Col.<sup>a</sup> 110; or as against an indorsee receiving it after maturity: Ill., Tex.,<sup>a</sup> Col.;<sup>a</sup> or as against an indorsee with notice at the time of transfer: Tex.<sup>a</sup>

So, failure of consideration, respectively: Ill., Tex.,<sup>a</sup> Col.;<sup>a</sup> or partial failure: Vt. 911.

Where a total want of consideration would be a defence, the defendant may prove a partial failure in reduction of damages: N.H. 220,13; Ill.; Tex.;<sup>a</sup> Col.<sup>a</sup> See also § 4123.

NOTE. — <sup>a</sup> Non-negotiable or not; see § 4741, note <sup>a</sup>.

§ 4707. **Patent Rights.** The laws of several states provide that when any note or bill (or other obligation: Ind.) is given in consideration of the sale of a patent or a patent right, the words "given for patent right" should be legibly written on its face



above the signature ; and such note, in the hands of any holder or purchaser, is subject to the same defences as if in the hands of the original owner : *Vt.* 2008 ; *Ct.* 1877,148 ; *N.Y.* 1877,65,1 ; *Pa. Promissory Notes*, 3 ; *O.* 3178 ; *Ind.* 6055 ; *Minn.* 124,116 ; *Neb.* 1,66,4 ; *Tenn.* 2481.

But this does not apply to a note given solely for the use or purchase price of a patented article : *N.Y. ib.* 3.

§ 4708. **Forged Bills.** Generally, no party to a forged bill or note, his name being forged, is liable thereon, and the purchaser for value has no remedy against them ; but he may, in Pennsylvania, recover back the consideration paid with interest from any party or person previously holding or negotiating the same : *Pa. Bills*, 10 ; *Promissory Notes*, 8.

§ 4709. **Usury and Fraud.** Usury is not available as a defence against any assignee or holder of a bond, bill, note, or other negotiable instrument, who received it *bona fide*, before maturity, for a valuable consideration, without notice thereof : *Pa. Interest*, 2 ; *O.* 3183 ; *Mich.* 1596 ; *Minn.* 1879,66,3 ; *Md.* 36,2. But the maker may nevertheless recover the usurious interest paid by him from the original holder : *Minn.*

**Fraud** in obtaining the execution of the instrument is a defence as against any person, even a *bona-fide* indorsee : *Ill.* 98,10 ; *Minn.* 1883,114,1 ; unless the person was guilty of negligence in signing such instrument : *Minn.* So also, except as against an indorsee who received it before maturity : *Col.*<sup>a</sup> 111.

If the consideration was wholly or partly money won at play or gaming (§ 4132) the note, etc., is void (1) as against all persons but purchasers for value without notice : *Mass.* 99,5. (2) It is void as against all persons, even including assignees or indorsees without notice : *Ark.*<sup>a</sup> 3407 ; *N.M.*<sup>a</sup> 2294.

If the holder of a negotiable note has been notified in writing by the maker that said note was obtained by conspiracy or fraud, he must sue within one year after such notice, or six months after the note became due ; and this applies to indorsees after maturity as if they were the holders to whom the notice was given : *Ct.* 1878,36.

NOTE. — <sup>a</sup> Applies also to non-negotiable contracts, judgments, etc. The same would be law in many states. See § 4032.

## Art. 471. Of the Indorsement.

§ 4710. **General Principles.** One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument if there is sufficient space thereon for that purpose.

When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereof may be made upon a paper annexed thereto.

An indorsement may be general or special.

A general indorsement is one by which no indorsee is named.

A special indorsement specifies the indorsee.

A negotiable instrument bearing a general indorsement cannot be afterwards specially indorsed ; but any lawful holder may turn a general indorsement into a special one by writing above it a direction for payment to a particular person.

A special indorsement may, by express words for that purpose, but not otherwise, be so made as to render the instrument not negotiable : *Cal.* 8109-8115 ; *Dak. Civ. C.* 1837-1843 *Uta. ib.* 17-23.

§ 4711. **Warranty by the Indorser.** By the laws of Georgia, every transferrer of a negotiable instrument, whether by indorsement or delivery, warrants, (1) unless otherwise agreed by the parties, that he is the lawful holder and has a

right to sell, that the instrument is genuine, and that he has no knowledge of any fact which proves the instrument to be worthless, either by insolvency of the maker, payment, or otherwise : Ga. 2778.

Every indorser of a negotiable instrument (unless his indorsement is qualified : Cal., Uta.) warrants to every subsequent holder thereof who is not liable thereon to him, —

1. That it is in all respects what it purports to be.
2. That he has a good title to it.
3. That the signatures of all prior parties are binding upon them.
4. That if the instrument is dishonored, the indorser will, upon notice thereof, duly given to him, or without notice, where it is excused by law, pay the same with interest, unless otherwise exonerated : Cal. 8116 ; Dak. Civ. C. 1844 ; Uta. *ib.* 24.

§ 4712. **Indorsement in Blank.** Generally, an indorsement in blank is a good indorsement ; and in Maryland, it is not necessary for the holder to fill in his name before obtaining judgment : Md. 35,8. An indorser in blank on a promissory note is entitled to notice of non-payment like other indorsers. Blank indorsements of negotiable paper may always be explained between the parties themselves or those taking with notice of dishonor or of the actual facts of such indorsements : Ga. 3808.

**An Indorsee in Due Course** is one who in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer : Cal. 8123 ; Dak. Civ. C. 1852 ; Uta. *ib.* 30.

§ 4713. **Anomalous Indorsement.** Every person becoming a party to a promissory note payable on time by a signature in blank on the back, is entitled to notice like an indorser : Mass. 77,15. So, in Iowa ; but notice is sufficient if given within reasonable time, and the guarantor is chargeable without notice if the holder show affirmatively that the guarantor has received no detriment from the want of notice : Io.<sup>a</sup> 2090.

In Iowa, the blank indorsement of an instrument for the payment of money (property or labor) by a person not a payee, indorsee, or assignee thereof, (1) is deemed a guaranty of the performance of the contract : Io.<sup>a</sup> 2089. (2) It effects a contract of ordinary indorsement as between the indorser and the payee or subsequent holders : Ct. 1884,83 ; Ky.<sup>b</sup> 22,14.

**Guaranty.** The laws of Michigan provide that the guaranty of the payment or collection of any promissory note shall be negotiable, and pass to the holder of the note, whether indorsed thereon or written or printed upon a separate paper ; and the assignment, indorsement, or transfer of any promissory note, the payment or collection of which shall have been guaranteed, shall operate as, and be an assignment of, all guaranties of any such note, and the holder of such note may maintain an action upon any and all such guaranties in his own name, subject to all the equities existing between the guarantor and the person to whom such guaranty was made : Mich. 1590.

A guarantor by anomalous indorsement is also liable to the action of an indorsee, assignee, or payee, if due diligence has been used in prosecuting as against the maker : Io. 2091.

NOTES. — <sup>a</sup> Applies also to non-negotiable instruments. <sup>b</sup> Unless a different purpose be expressed in the indorsement, or the note can legally be placed on the footing of a bill of exchange.

§ 4714. **Indorsement after Maturity** makes the indorsee liable to any defence by the maker which he might have set up as against the payee (or any intermediate holder) : O. 3173 ; Ill. 98,11 ; Kan. 14,2 ; Neb. 1,41,4 ; Tex. 265 ; Col.<sup>a</sup> 108. “ Before notice of the assignment ” given the defendant : Tex.

And in such case any set-off may be allowed which would have been allowed as against any such assignor after maturity : Ill. 98,12. So, in Texas, any “ discount.”

**Past-Due Paper.** So, in Georgia, a person receiving a note or bill after it is due, is charged with notice of its dishonor, and takes it subject to all the equities existing between the original parties thereto : Ga. 2786.

And if there are several notes constituting one transaction, but due at different times, the fact that one is overdue and unpaid shall be notice to the purchaser of all to put him on his guard as to each: Ga.

NOTE. — <sup>a</sup> Applies also to non-negotiable instruments, as in § 4706.

**§ 4715. Payment.** No maker of such bill, note, or negotiable instrument, or other person liable thereon, can, in Colorado, allege payment to the payee, made after notice of assignment, as a defence against the assignee: Ill. 98,6; Col.<sup>a</sup> 106; see § 4744.

But if the bill or note was indorsed before due, the defendant may give in evidence and set-off as against the indorsee any payment made before indorsement of which the indorsee had notice at the time: O. 3174; Kan. 14,3; Neb. 1,41,5; Col.<sup>a</sup> 109.

The obligation of a party to a negotiable instrument is extinguished, —

1. In like manner with that of parties to contracts in general; or,
2. By payment of the amount due upon the instrument, at or after its maturity, in good faith and in the ordinary course of business, to any person having actual possession thereof, and entitled by its terms to payment: Cal. 8164; Dak. Civ. C. 1880; Uta. *ib.* 58.

If, after its extinction, a negotiable instrument comes into the possession of an indorsee in due course, the obligation thereof revives in his favor: Dak. Civ. C. 1881.

NOTE. — <sup>a</sup> See § 4741, same note.

## Art. 472. Acceptance, Payment, and Protest.

**§ 4720. Form of Acceptance.** (A) The statute of Anne, § 5, as amended by 1 & 2 Geo. IV. C. 78, § 2, is re-enacted in many states; and no acceptance of any inland bill of exchange is sufficient to charge any person unless written upon the bill: Cal. 8193-4; Dak. Civ. C. 1895-6; Uta. *ib.* 72-3; S.C. 1293.

(B) So, in many others; except that an acceptance written on a paper other than the bill will only bind the acceptor as against a person to whom it was shown, and who on the faith thereof gave value for the bill: N.Y. 2,4,2,6-7; Kan. 14, 8-9; Mo. 533,534; Ark. 459,460; Cal. 8196; Nev. 14-15; Wash. 2302-3; Dak. Civ. C. 1898; Ida. *ib.* 1874-5, p. 653, §§ 6,7; Uta. *ib.* 75; Ariz. 3469,3470. (C) But in a few, it is sufficient if the acceptance be in writing: Me. 32,10; Pa. *Bills*, 2; Mich. 1583; Wis. 1681; Minn. 24,13; Ore. 48,7; Ala. 2101; Miss. 1133. And by the statute of Anne, if a person refuse to accept the bill by underwriting on the bill or as above respectively, the payee may cause the bill to be protested (as in the case of foreign bills); this is re-enacted in several (and see § 4728): Kan. 14,11; S.C. 1292; Miss.; Ariz. 3471. So, in many states, every holder of a bill presenting it for acceptance may require the acceptance to be written on the bill; a refusal so to do is equivalent to a refusal to accept, and the bill may be protested accordingly: N.Y. *ib.* 9; Mo. 536; Ark. 462; Cal.; Nev. 17; Wash. 2305; Dak.; Ida. *ib.* 9; Uta.; Ala. 2103; Miss.; Ariz. 3472.

The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance, —

1. An acceptance written upon any part of the bill or upon a separate paper;
2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or town in which if the acceptance was unqualified it would be payable; or,
3. A refusal by the drawee to return the bill to the holder after presentment, in which case the bill is payable immediately, without regard to its terms: Cal. 8195; Dak. Civ. C. 1897; Uta. *ib.* 74.



§ 4721. **Promise to Accept.** In most states, an unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, so gave value for the bill : N.Y. *ib.* 8 ; Kan. 14,10 ; Mo. 535 ; Ark. 461 ; Cal. 8197 ; Nev. 16 ; Wash. 2304 ; Dak. Civ. C. 1899 ; Ida. *ib.* 8 ; Uta. *ib.* 76 ; Ala. 2102.

The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder, and before the holder has, with the consent of the acceptor, transferred his title to another person who has given value for it upon the faith of such acceptance.

The acceptance of a bill of exchange admits the signature of the drawer, but does not admit the signature of any indorser to be genuine : Cal. 8198-9 ; Dak. Civ. C. 1900-1901 ; Uta. *ib.* 77-8.

**Conditional Acceptance.** An acceptance of a bill or order may, in Georgia, be conditioned, or payable out of a certain fund : Ga. 2779. In all cases (*i. e.*, whether the acceptance be conditional or of the ordinary kind) the acceptor has a lien on the funds or property of the drawer in his hands for the payment of the acceptance in his behalf : Ga. 2779.

But nothing herein is, in many states, to prevent any person to whom a promise to accept the bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill, from suing and recovering damages from the party so refusing to accept : N.Y. *ib.* 10 ; Kan. 14,12 ; Mo. 537 ; Ark. 463 ; Nev. 18 ; Wash. 2306 ; Ida. *ib.* 10 ; Ala. 2104 ; Ariz. 3473.

§ 4722. **Time of Acceptance.** And in many, every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or shall refuse within twenty-four hours after such delivery, or such other period as the holder may allow, to return the bill, accepted or non-accepted, to the holder, shall be deemed to have accepted the same : N.Y. *ib.* 11 ; Kan. 14,13 ; Mo. 538 ; Ark. 464 ; Nev. 19 ; Wash. 2307 ; Ida. *ib.* 11 ; Ala. 2105 ; Ariz. 3474.

But in two, the drawee at the first presentation has until 2 P. M. of the following business day to decide ; but the acceptance, whenever made, dates from the day of presentation : Mass. 77,17 ; R.I. 142,5.

§ 4723. **Presentment and Demand.** In two states, the Stat. 1 & 2 Geo. IV. C. 78, § 1, is in effect re-enacted ; and if a person accept a bill payable at the house of a banker or other place, without further expression in the acceptance, the presentment of the bill for payment may be made either at such place or as it might have been if no place had been specified in the acceptance ; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed a qualified acceptance : Va. 141,1 ; W.Va. 12,1.

But in the case of bills, whether the acceptance be general or qualified (§ 4513), it is not necessary, as against the acceptor, nor, in the case of a note, as against the maker, to aver or prove presentment for payment at the time or place specified in the note, bill, or acceptance : Va. 141,1 ; W.Va. ; Cal. 8130 ; Dak. Civ. C. 1855 ; Uta. *ib.* 33.

The maker or acceptor may, (1) however, set up as a matter of defence any loss sustained by him by reason of the failure to make such presentment : Va., W.Va.

(2) If the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part : Cal., Dak., Uta.

**Presentment for Acceptance.** At any time before a bill of exchange is payable the holder may present it to the drawee for acceptance, and if acceptance is refused the bill is dishonored.

Presentment for acceptance must be made in the following manner, as nearly as by reasonable diligence it is practicable : —

1. The bill must be presented by the holder or his agent ;
2. It must be presented on a business day, and within reasonable hours ;

3. It must be presented to the drawee, or, if he be absent from his place of residence or business, to some person having charge thereof or employed therein; and,

4. The drawee on such presentment may postpone his acceptance or refusal until the next day. If the drawee have no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for acceptance is excused, and the bill may be protested for non-acceptance.

Presentment for acceptance to one of several joint drawees and refusal by him dispenses with presentment to the others.

A bill of exchange which specifies a drawee in case of need must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

When a bill of exchange is payable at a specified time after sight the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice with ordinary diligence to forward it for acceptance, unless presentment is excused: Cal. 8185-9; Dak. Civ. C. 1890-4; Uta. *ib.* 67-71.

In order to hold indorsers, the holder of a bill or note must cause it to be presented at the place where by its terms it is payable, or, if no place be specified, then to the person himself: Mon. G. L. 104.

**Presentment for Payment.** If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment, it must be presented at the same place for payment when presentment for payment is necessary.

A bill of exchange accepted payable at a particular place must be presented at that place for payment when presentment for payment is necessary, and need not be presented elsewhere.

If a bill of exchange payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused.

Mere delay in presenting a bill of exchange payable with interest, at sight or on demand, does not exonerate any party thereto: Cal. 8211-4; Dak. Civ. C. 1907-1910; Uta. *ib.* 84-7.

Presentment of a negotiable instrument for payment, when necessary, must be made as follows as nearly as by reasonable diligence it is practicable:—

1. The instrument must be presented by the holder;

2. The instrument must be presented to the principal debtor, if he can be found at the place where presentment should be made; and if not, then it must be presented to some other person having charge thereof, or employed therein, if one can be found there;

3. An instrument which specifies a place for its payment must be presented there; and if the place specified includes more than one house, then at the place of residence or business of the principal debtor, if it can be found therein;

4. An instrument which does not specify a place for its payment must be presented at the place of residence or business of the principal debtor, or wherever he may be found, at the option of the presenter; and,

5. The instrument must be presented upon the day of its maturity, or, if it be payable on demand, it may be presented upon any day. It must be presented within reasonable hours; and, if it be payable at a banking house, within the usual banking hours of the vicinity; but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day;

6. If the principal debtor have no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for payment is excused: Cal. 8131; Dak. Civ. C. 1856; Uta. *ib.* 34.

**Excuse of Presentment and Notice.** The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it.

Delay in the presentment of a bill of exchange for acceptance is excused when caused by circumstances over which the holder has no control.

Presentment of a bill of exchange for acceptance or payment and notice of its dishonor are excused as to the drawer, if he forbids the drawee to accept or the acceptor to pay the bill, or if at the time of drawing he had no reason to believe that the drawee would accept or pay the same: Cal. 8218-8220; Dak. Civ. C. 1911-3; Uta. *ib.* 88-90.

In two states, the Eng. Stat. 2 & 3 Will. IV., C. 98, is re-enacted; and if a bill wherein the drawer has expressed that it is to be payable in any place other than that by him mentioned therein to be the residence of the drawee, shall not, on presentment thereof for ac-

ceptance, be accepted, such bill may without further presentment to the drawee be protested for non-payment in the place in which it shall have been by the drawer expressed to be payable, unless the amount thereof be paid to the holder on the day in which the bill would have become payable had it been duly accepted: Va. 141,2; W.Va. 12,2.

A bill of exchange is payable, —

1. At the place where by its terms it is made payable; or,
2. If it specify no place of payment, then at the place to which it is addressed; or,
3. If it be not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found. If the drawee has no place of business, or if his place of business or residence [cannot] with reasonable diligence be ascertained, presentment for payment is excused, and the bill may be protested for non-payment: Cal. 8176; Dak. Civ. C. 1887; Uta. *ib.* 64.

The plaintiff in an action on a promissory note cannot recover unless he prove a demand made upon the maker prior to the commencement of the suit; and he cannot so recover upon a note payable at a place certain unless he prove a demand so made at such place: Me. 32,10.

A demand made at any time during the days of grace is, in Iowa, sufficient to charge the indorser: Io. 2093. So, a demand on the third day of grace: Neb. 1,41,3.

A negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker, or wherever he may be found: Cal. 8100; Dak. Civ. C. 1831; Uta. *ib.* 11.

§ 4724. **Foreign Bills.** In a foreign bill, the presentment for payment made or to be made out of the State at an office or house referred to only in the margin of the bill or below the drawee's name does not charge the indorsers unless such office was at the date of the bill the actual place of business or residence of the drawee, or it is so expressed in the reference, or it appear by the certificate of protest that upon diligent inquiry the place of business or residence of the drawee could not be found: Pa. *Bills*, 6.

Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest.

Protest must be made by a notary public, if with reasonable diligence one can be obtained, and if not, then by any reputable person in the presence of two witnesses.

Protest must be made by an instrument in writing, giving a literal copy of the bill of exchange, with all that is written thereon, or annexing the original, stating the presentment and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and, finally, protesting against all the parties to be charged.

A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance, and a protest for non-payment in the city or town in which it is presented for payment.

A protest must be noted on the day of presentment or on the next business day; but it may be written out at any time thereafter.

The want of a protest of a foreign bill of exchange or delay in making the same is excused in like cases with the want or delay of presentment.

Notice of protest must be given in the same manner as notice of dishonor, except that it may be given by the notary who makes the protest.

If a foreign bill of exchange on its face waives protest, notice of dishonor may be given to any party thereto, in like manner as of an inland bill; except that if any indorser of such a bill expressly requires protest to be made by a direction written on the bill at or before his indorsement, protest must be made and notice thereof given to him and to all subsequent indorsers.

One who pays a foreign bill of exchange for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement: Cal. 8225-8233; Dak. Civ. C. 1915-1923; Uta. *ib.* 91-100.

§ 4725. **Apparent Maturity.** The apparent maturity of a negotiable instrument payable at a particular time is the day on which by its terms it becomes due, or, when that is a holiday, the next business day.

A bill of exchange payable at a certain time after sight, which is not accepted within ten days after its date, in addition to the time which would suffice with ordinary diligence, to for-



ward it for acceptance, is presumed to have been dishonored: Cal. 8132-8133; Dak. Civ. C. 1853; Uta. *ib.* 36.

The apparent maturity of a bill of exchange payable at sight or on demand is,

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, ten days after its date, in addition to the time which would suffice with ordinary diligence to forward it for acceptance.

The apparent maturity of a promissory note payable at sight or on demand is, -

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, six months after its date.

Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned in the last section: Cal. 8134-6; Dak. Civ. C. 1859-1861; Uta. *ib.* 37-9.

§ 4726. **Days of Grace.** (A) By the statute of Anne (see § 4720) three days' grace are allowed, after negotiable paper is due, before it may be protested for non-payment. The same is law, as to all bills and notes payable at a future day certain in most of the states: N.H. 220,8; Mass. 77,9; Me. 32,9; Vt. 2009; Pa. *Bills*, 3; O. 3175; Ind. 5514; Ill. 98,15; Mich. 1581; Wis. 1680; Io. 2092; Minn. 23,17; Kan. 14,4; Neb. 1,41,3; Del. 63,2; N.C. 43; Ark.<sup>a</sup> 472; Tex. 276; Ore. 48,5; Nev. 8; Col. 114; Wash. 2300; Dak. Civ. C. 1889; Ida. 1874-5, p. 655,20; Mon. G. L. 100; Ala. 2096; La. D. 331; Ariz. 3483. So, probably, also in the other states.

And in several, it is specified that bills at sight are entitled to the days of grace: Mass.; Me.; N.J. *ib.* 3; O.; Ind.; Mich.; Wis.; Io.; Minn.; N.C.; Ore.; Wash.; Dak.; S.C. 1297.

In Georgia, the code specifies that the last day of grace is the day of maturity: Ga. 2783b.

But (B) bills, drafts, or orders drawn payable (1) at sight are, in many states, deemed due and payable on presentation without days of grace: Vt.; R.I. 142,4; Ct. 18,1,3; N.Y. 1857,416,1; Pa. *ib.* 4; Ill.; Kan.; Del.; W.Va. 1882,77; Tenn. 2722; Mo. 550; Nev.; Col.; Ida.; Mon.; Ga. 2784; La. D. 332; N.M. 1729; Ariz.

So, of bills, etc., drawn without any time specified: Minn., Del. So, in others, of checks or bills appearing on their face to have been drawn upon any bank or banker, whether payable at sight, at a day certain, or at any number of days after sight: N.Y. 1857,416,2; N.J. *ib.* 4; Pa.; O.; Del. V. 17,143. So, in one, except when payable at sight: Mich. 1587.

So, in several, of any checks drawn on a bank: Mass. 77,10; Vt.; Ct.; O.; Kan.; Col.; Dak. Civ. C. 1934; Mon. So, of all non-negotiable instruments: Ala. So, of contracts payable in any other way than in money: Vt., Ala.

(2) So, in many states, there is no grace upon notes payable on demand: N.H.; Mass.; Me.; Vt.; Ct.; Ill.; Mich. 1582; Wis.; Io. 1876,81; Minn. 23,18; N.C.; Mo.; Ore. 48,6; Ga. 2791; La.; N.M.

But in two, it is specified that bills or notes payable on demand are entitled to grace after presentment: N.J., Dak. So, of notes payable at no fixed time: N.J.

But an express stipulation may always be made to the contrary of the above provisions: N.H., Mass., Ct., Mich., Wis., Minn., N.C., Dak.

(C) Days of grace are abolished in all cases, in three states: Cal. 8181; Uta. *ib.* 66; N.M.

In Georgia, days of grace are always allowed in cases where notice is necessary (§ 4728): Ga. 2781.

NOTE. — <sup>a</sup> "According to the rules of the law-merchant."

§ 4727. **Holidays.** (See also § 4134.) Appended is a table of the days in which a note or bill need not be paid, presented for acceptance, or protested. A note or bill falling due and payable (*i. e.*, after grace, if allowed) on these days or on Sunday is generally payable, or presentable for acceptance, (A) on the day be-

fore: N.H. 220,9; Mass. 77,8; 1882,49; Me.<sup>a</sup> 32,9; Vt.<sup>a</sup> 2010-2; R.I. 142,8 and 9; Ct. 18,1,4; 1875,21; N.Y. 1875,27,1; 1881,30; N.J. *Promissory Notes*, 14; *Holidays*, 1; Pa. *Bills*, 5; *Holidays*, 1 and 5, *Promissory Notes*, 5-7; O. 3176-7, Amt. Vol. 3; 1884, p. 104; Ind. 5517; Ill. 98,17; Mich. 1591; Wis. 1684,2577; Io. 2094; Minn. 2410; Kan. 14,5; Neb. 1,41,8; 1885,56; Md. 35,10,11; 1880,426; 1882,23; Del. V. 11, C. 195; 1875,192; Va. 141,3; W.Va. 12,3; 1882,77; N.C. 3784; Ky. 51,1-2; Tenn. 2723; Mo. 551; Ark. 465; Tex. 2835; Nev. 8 and 28; Col. 115 and 1630; Wash. 2301; Ida. *ib.* 20; Mon. G. L. 101; Uta. 1882, 30,2; 1882,41,35; Ga. 2783; Ala.<sup>a</sup> 2097; 1883,117; Miss. 1132; Fla. 90,4; D.C. 993; U.S. 1881,2; 1879,38.

If the day before be Sunday or a holiday, it is payable, in most states, on the previous Saturday or other secular day: N.H., Mass., R.I., Ct., N.Y., Pa., Ill., Wis., Io., Kan., Md., Va., W.Va., Ky., Tenn., Mo., Miss., Fla.

But in several, on the Tuesday following: Me.; N.J. *Holidays*, 2; N.C.; Uta.; Ga.; Ala.; La. D. 1114.

So, in several, notice may be given on the first business day following such holiday: N.H. *ib.* 10; Mass.; N.J. *ib.* 15; Pa.; Minn.; Md.; Va. 141,4; W.Va. 12,4; 1882,77; Ark. In one state, on the Wednesday following: N.J. Nothing in this provision, however, renders invalid a presentation notice or demand (1) on any such holiday other than Sunday: Pa. *ib.* 3; Mich.; (2) "as heretofore, at the option of the holder:" Del.

(B) In other states, a bill or note falling due on such holiday is payable on the secular day following: Vt.<sup>b</sup> 2011; Va. 1880,103,1; Cal. 8132; Ore. 1885, p. 50; Dak. Civ. C. 1857; La.; N.M. 1730; Ariz. 3483; 1885,19.

January 1: Me., Vt., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Tenn., Mo., Ark., Tex., Nev., Col., Ida., Ga., Ala., Miss., Fla., La., N.M., Ariz., D.C.

January 8: La.

February 22: N.H.; Mass.; Me.: R.I.; Ct.; N.Y.; N.J.; Pa.; O.; Ill.; Mich.; Wis.; Minn.; Neb.; Md.; Del.; Va.; W.Va.; N.C.; Ky.; Mo.; Tex.; Nev.; Col.; Ga.; Ala.; Fla.; La.; Ariz. 1881,98; D.C.

"Mardi gras:" La.

Good Friday: Pa., Minn., Md., La.

March 2: Tex.

March 4, in New Orleans: La.

April 21: Tex.

April 22: Neb.

April 26 (Decoration Day): Ga.

Any day appointed by the Governor for a Fast: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Io., Kan., Neb., Md., Del., Va., Ky., Tenn., Tex., Col., Mon., Ga., Fla., N.M., Ariz., D.C.

May 10: N.C.

May 20: N.C.

May 30: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa.,<sup>c</sup> O., Ill., Mich., Io., Neb., Col.

July 4: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Nev., Col., Wash., Ida., Mon., Ga., Ala., Miss., Fla., La., N.M., Ariz., D.C.

Any general election day: N.Y., N.J., Pa.,<sup>c</sup> Wis., Md., Mo., Tex., Fla., Ariz.

Any day appointed by the Governor for Thanksgiving: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Del., Va., N.C., Ky., Tenn., Mo., Tex., Nev., Col., Mon., S.C., Ga., Ala., Fla., N.M., Ariz., D.C.

Christmas Day: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich.,

Wis., Io., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Nev., Col., Wash., Ida., Mon., Ga., Ala., Miss., Fla., La., N.M., Ariz., D.C.

If such holiday fall on a Sunday, the Monday following is, in most states, deemed a holiday as before, and the bill or note due on such holiday must be presented the Saturday preceding : N.H. ; Mass. ; R.I. ; <sup>d</sup> Ct. 1885,21,2 ; N.Y. *ib.* 2 ; Pa. *ib.* 2 ; O. ; Ill. ; Mich. ; Wis. ; Minn. ; Neb. ; Md. 35,11 ; 1882,23 ; Del. V. 16,446 ; V. 17,551 ; W.Va. ; N.C. ; Ky. ; Mo. ; Tex. 2837 ; Col. ; Ga. 2783*a* ; Fla. 90,5 ; D.C.

But in others, on the Tuesday following, as before : Me.,<sup>e</sup> N.J., Va., Uta., Ala., Ariz. So, of bills falling due on the Monday : Va. *ib.* 2 ; N.C. If it fall on a Saturday, the bills due on the Sunday following are payable, in a few states, on the Monday following : N.C. 3785 ; Ga. ; Ala. If it fall on a Monday, in several, bills due on such day are payable on the Tuesday following : Neb. ; N.C. 3786 ; Ga.

Any such holiday falling as one of the days of grace is, however, counted as one of them : Nev., Ida., Ariz. But in two states, otherwise ; and it is excluded : Dak. Civ. C. 1889 ; La.

**Holidays for Other Purposes.**<sup>f</sup> In a few states, the same principle is extended to all contracts which are to be performed on such Sundays or holidays ; and they are to be performed (1) on the day previous, etc., as above : N.H., Mass. ; (2) on the day succeeding : Dak. Civ. C. 2118. See also § 1023.

Civil process cannot generally be served on holidays enumerated in § 4727 ; see in Part IV.

NOTES. — <sup>a</sup> When subject to grace. <sup>b</sup> When not subject to grace. <sup>c</sup> This seems to follow from § 4137, though not specially enacted as to bills and notes. <sup>d</sup> But if the 30th of May fall on Sunday, the day preceding is deemed a holiday, and the bill is payable on the Friday previous. <sup>e</sup> If Christmas day fall on Sunday, the Monday following is not a holiday in these states. <sup>f</sup> See 39 and 40 Geo. III. C. 42 ; 7 and 8 Geo. IV. C. 15.

**§ 4728. Protest for Non-acceptance.** By the statute of Anne, if a bill is not accepted according to § 4720, no drawer is liable for any damage or costs on a bill of over £20, unless protest be made and the same be sent, or otherwise notice thereof be given, within fourteen days after protest, to the party from whom such bill was received, or left in writing at the place of his usual abode. This is re-enacted, \$100 being substituted for £20, in one state : S.C. 1293-4. So, in two others, but there is no money limit : N.C. 42 ; Tenn. 2718.

So, in several, all bills of exchange drawn in the State upon a person in the State over \$8 are subject to the same law as foreign bills of exchange as to protest for non-acceptance or non-payment : N.J. *Promissory Notes*, 2 ; S.C. 1292 ; Miss. 1128 (§20). And it is probable that the law-merchant regarding protest exists in all other states.

So, notice of non-acceptance or non-payment or both of said instruments shall be required according to the rules and principles of the commercial law : Io. 2092.

The notary is required to give notice (§ 4731) to the maker and each and every indorser, immediately after protest : Dak. Pol. C. 17,4. The holder of the bill or note *may* (see § 4725) fix the liability of the parties by giving due protest and notice according to the principles of the law-merchant : Ark. 472 ; Tex. 273.

A negotiable instrument is dishonored when it is either not paid or not accepted, according to its tenor, on presentment for that purpose, or without presentment where that is excused.

A notice of the dishonor of a negotiable instrument may be given, —

1. By a holder thereof ; or,
2. By any party to the instrument who might be compelled to pay it to the holder, and who would, upon taking it up, have a right to reimbursement from the party to whom the notice is given.

A notice of dishonor may be given in any form which describes the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored.



A notice of dishonor may be given, —

1. By delivering it to the party to be charged personally at any place ; or,
2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him ; or,
3. By properly folding the notice, directing it to the party to be charged at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.

In case of the death of a party to whom notice of dishonor should otherwise be given, the notice must be given to one of his personal representatives, or, if there are none, then to any member of his family who resided with him at his death ; or, if there is none, then it must be mailed to his last place of residence, as prescribed by subdivision 3 above.

A notice of dishonor sent to a party after his death, but in ignorance thereof, and in good faith, is valid.

Notice of dishonor, when given by the holder of an instrument or his agent otherwise than by mail must be given on the day of dishonor, or on the next business day thereafter.

When notice of dishonor is given by mail, it must be deposited in the post-office in time for the first mail which closes after noon of the first business day succeeding the dishonor, and which leaves the place where the instrument was dishonored for the place to which the notice should be sent.

When the holder of a negotiable instrument at the time of its dishonor is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser ; and his principal may give notice to any other party to be charged as if he were himself an indorser. And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal.

Every party to a negotiable instrument receiving notice of its dishonor has the like time thereafter to give similar notice to prior parties as the original holder had after its dishonor. But this additional time is available only to the particular party entitled thereto.

A notice of the dishonor of a negotiable instrument, if valid in favor of the party giving it, inures to the benefit of all other parties thereto whose right to give the like notice has not then been lost : Cal. 8141-8151 ; Dak. Civ. C. 1863-1873 ; Uta. *ib.* 41-51.

**Excuse of Presentment and Notice.** Notice of dishonor is excused, —

1. When the party by whom it should be given cannot with reasonable diligence ascertain either the place of residence or business of the party to be charged ; or,
2. When there is no post-office communication between the town of the party by whom the notice should be given and the town in which the place of residence or business of the party to be charged is situated ; or,
3. When the party to be charged is the same person who dishonors the instrument ; or,
4. When the notice is waived by the party entitled thereto.

Presentment and notice are excused as to any party to a negotiable instrument who informs the holder within ten days before its maturity that it will be dishonored.

If, before or after the maturity of an instrument, an indorser has received full security for the amount thereof, or the maker has assigned all his estate to him as such security, presentment and notice to him are excused.

Delay in presentment or in giving notice of dishonor is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence.

A waiver of presentment waives notice of dishonor also, unless the contrary is expressly stipulated ; but a waiver of notice does not waive presentment.

A waiver of protest on any negotiable instrument other than a foreign bill of exchange waives presentment and notice : Cal. 8155-8160 ; Dak. Civ. C. 1874-9 ; Uta. *ib.* 52-7.

A check, bill, or draft appearing on its face to be drawn upon any bank, banker, or broker, need not be protested for non-acceptance, nor notice given to the drawer, etc. : O. 3175 ; Mich. 1587.

**Protest for Non-payment.** By the statute of Anne, though a bill be not paid before the expiration of three days after it is due, no drawer shall be liable unless protest be made and sent or notice given as in § 4730. This is re-enacted in one state : S.C. 1293-4.

Bills drawn out of the State upon persons in the State are liable to protest : Md. 35,3.

Protest may be made either of non-acceptance or of non-payment, and will charge the drawer: S.C.; Miss. 1129.

A party to a negotiable instrument may require, as a condition concurrent to its payment by him, —

1. That the instrument be surrendered to him unless it is lost or destroyed, or the holder has other claims upon it; or,

2. If the holder has a right to retain the instrument, and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying, be written thereon; or,

3. If the instrument is lost or destroyed, then that the holder give to him a bond, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon: Cal. 8137; Dak. Civ. C. 1862; Uta. *ib.* 40.

§ 4729. **Form of Protest.** Generally, the protest of a bill or note (as in the case of a foreign bill, in Vermont, Virginia; whether foreign or inland, in Maryland, Missouri; by a notary duly certified under the hand and seal of the notary: N.H.; Mass.; Vt.; N.J. *Promissory Notes*, 9; Io.; Neb.; Md. 35,3; N.C.; Ark.; Tex.; Cal.; Ga.; La.; or, in New Jersey, North Carolina, Louisiana, for want thereof by a justice of the peace, or, in Maryland, North Carolina, a clerk of a court of record) is *prima facie* evidence (1) in most states, of the facts therein stated: N.H. 17,3; Mass. 77,22; Me. 32,4; Ct. 19,11,16; N.J. *Evidence*, 20; *Promissory Notes*, 12; Pa. *Evidence*, 70; *Notaries*, 13, 14; O. 120; Ind. 460; Ill. 99,14; Mich. 632; Io. 3668; Minn. 26,7-8; Neb. 1,61,6; Va. 141,8; Tenn. 4536,2470; Mo. 2320; Ark. 2831,4770; Tex. 274; Cal. 795; Ore. 40,6; Nev. 337,340; Ida. 1874-5, p. 818,12; Mon. G. L. 912,923; Wy. 88,6; Ga. 3829; La. D. 326 and 329; N.M. 1731; Ariz. 2194; D.C. 988; (2) in many states, of such non-acceptance or non-payment and of presentment at the time and in the manner stated in the protest: Vt. 2006; Pa.; Wis. 176; Kan. 14,18; Neb. 2,349; Md. 35,6; Va. 1879, Ex. 117; W.Va. 12,7; N.C. 49; Ky. 22,12; 79,5-6; Mo. 552; Tex.; Cal.; Ala. 1336; Miss. 1636; (3) of notice to the drawer and indorsers: N.H.; Mass.; Me.; Vt.; Pa. *ib.* 71; Wis.; Kan. 1883,118,1; Neb.; Md. *ib.* 7; Va.; W.Va. 12,8; 1882,20,7; N.C.; Ky.; Tenn. 2471; Mo.; Ark. 2832; Tex.; Cal.; Ore.; Col. 2464; Dak. Pol. C. 17,6; Uta. 259; S.C.<sup>a</sup> 1296; Ala.; La. D. 325.

**Protest of Foreign Bills** payable in a foreign state or country may be made according to the laws thereof, and if so made will be valid: N.Y. 1865,309,1; Md. 35,4.

NOTE. — <sup>a</sup> The protest is such sufficient evidence of notice only where the notary is dead, or resides out of the district in which suit is brought.

§ 4730. **Manner of Notice.** It is, in a few states, declared to be sufficient notice of non-acceptance or non-payment of a bill or note if it be directed by mail to the city or town where the person to be charged resided at the time of drawing, making, or indorsing the note or bill, unless such person has added to his signature on the instrument the post-office to which he wishes the notice addressed: Ct. 18,1,6; N.Y. 1835, 141,1; Nev. 26; Ida. *ib.* 18; Mon. G. L. 104; Ala. 2111; Ariz. 3481.

And when the city or town where the bill is payable or presentable is the one in which the person sought to be charged resides (or, in Massachusetts, New York, New Jersey, Michigan, Iowa, has a place of business; or, in New York, New Jersey, the one indicated as such under his signature in the instrument; or, in New York, New Jersey, Michigan, the one where he is reputed or believed to reside; or, in Massachusetts, when for any other reason a notice given to the party in such city or town would be sufficient), notice may be served by mailing it in the post-office of such town, properly directed and addressed to such person at such town: Mass. 77,16; Vt. 2007; N.Y. 1857,416,3; N.J. *Promissory Notes*, 16; O.<sup>a</sup> 3176, Amt.; Mich. 1586; Io. 2095; Va. 1877,37; Ala.<sup>a</sup> 1879,143.

But it must further be sufficiently directed to his residence or place of business in such town for the usual course of the mail and delivery by carriers therein: Mass.

And it must be directed to the post-office nearest his residence: Vt., Io.

And it may be deposited in the post-office nearest the place where payable: Vt.; La. D. 327.

A waiver of demand and notice by an indorser is not valid unless in writing and signed by him: Me. 32,10; Tex. 268.

Notice may be given either personally or by post: Col. 2465; Dak. Pol. C. 17,5; Uta. 258; Ga. 2781.

It must be personal if the party reside within one mile of the town or in the town where protest is made: Col., Uta.

And when a note or bill is not made payable at any place, notices of non-payment or non-acceptance may be served by depositing the same in a post-office, prepaid, directed to the drawer or indorser at his reputed place of post-office delivery, as ascertained by the best diligence in getting information: Mich. 1586; Minn. 26,7; Kan. 1883,118.

The notary public protesting is required to give notice in writing immediately (1) by depositing the same in the post-office, postage prepaid, directed to the party at his known or reputed place of residence: Kan.; Tex. 274; Dak.; La. D. 327; (2) by personal service upon such parties as reside within two miles (one mile, in Colorado) of the notary's residence; otherwise, by mail or other safe conveyance: Ill. 99,12; Ore. 40,4-5; Col.

If such residence cannot be ascertained, the notice may be addressed to the person to be charged at the place where the bill or note was drawn: La. D. 328.

Notice must generally be given within a reasonable time: Neb. 1,41,3; Mon. G. L. 103-4; Ga. 2781; Miss. 1129.

Within twenty-four hours after protest: Col. 2463; "immediately:" Mon.; within forty-eight hours thereafter: Ill. 99,11. By the law of Georgia, notice of non-payment or non-acceptance is only necessary, to bind indorsers (1) when the instrument on its face is made payable at a bank or banker's; (2) when it is discounted at a bank or banker's; (3) when it is left at a banker's office for collection: Ga. 2781.

In other states, it probably is so necessary in all cases; but see §§ 4701-2.

The protest and notice must be recorded by the notary in a book: Tex. 274; La. D. 325; so, in most other states. Such record is evidence of the notice: La. See § 4729.

NOTE. — <sup>a</sup> Only when such town has a system of delivery by carriers.

**§ 4731. Protest and Notice Abolished.** In Texas, protest and notice is rendered unnecessary if suit is brought by a law which provides that "the holder of any bill or note negotiable may secure and fix the liability of any drawer or indorser, without protest or notice, by instituting suit against the acceptor or maker before the first term of the court to which suit can be brought after the right of action shall accrue, at the second such term after, if good cause be shown for the delay:" Tex. 262.

And the drawer of a bill of exchange not accepted when duly presented is immediately liable for the payment thereof; and the holder may secure and fix such liability by suing, as above: Tex. 264.

**Waiver of Notice, etc.** The indorsement may prescribe other conditions of demand, notice, etc.: Neb. 1,43,3.

Parol testimony is inadmissible to prove that the drawer or indorser has released the holder from his obligation to use due diligence to collect the same: Me. 32,10; Tex. 268. See § 4141.

**§ 4732. Acceptance for Honor and Reference.** The laws of two states re-enact the Eng. Stat. 6 & 7 Will. IV. C. 58; and when a bill is accepted *supra* protest or for honor, or has a reference thereon in case of need, it is not necessary to present it to such acceptor for honor or referee until the day after it is due, or, if such acceptor for honor, etc., is in another town, to forward the bill to him for payment until such day after; and if that day fall on a Sunday or legal holiday, not until the next secular day: Va. 141,5-6; 1877,37; W.Va. 12,5-6; 1882,77.

On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person for the honor of any party thereto.

The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.



An acceptor or payer for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays, and must give notice to such parties, with reasonable diligence, of the fact of such acceptance or payment. Having done so, he is entitled to reimbursement from such parties, and from all parties prior to them.

A bill of exchange which has been accepted for honor must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor in like manner as to an indorser; after which the acceptor for honor must pay the bill.

The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee: Cal. 8203-7; Dak. Civ. C. 1902-6; Uta. *ib.* 79-83.

§ 4733. **Demand Notes.** In two states, all bills or notes payable on demand are deemed due immediately: N.C. 45; Ga. 2791.

So, in two, when no time is specified for the payment of a bill, note, or order, it is deemed payable (1) on demand: Mass. 77,11; Ga.; (2) immediately: Cal. 8099; Dak. Civ. C. 1830; Uta. *ib.* 10.

In such case, they bear interest from the time they are demanded, unless otherwise expressed: N.C.

But in one state, any negotiable promissory note payable on demand is considered overdue and dishonored if still unpaid after four months from date: Ct. 18,1,2.

So, in others, sixty days is deemed a reasonable time, and a demand made after such time will not charge the indorsers: N.H. 220,11; Mass. 77,12; Vt. 2013; Minn. 24,11.

So, in others, six months if the note is without interest: Cal. 8248; Dak. Civ. C. 1932; Uta. *ib.* 109.

But if the demand be duly made, consequences follow as in time notes: N.H.; Mass.; Vt.; Minn. 24,12.

And the indorsers, if given due notice, are liable in the same way: N.H. 220,12; Mass. 77,13; Vt. 2014; Minn.

Any matter is a legal defence on a demand note as against the indorsee which would be such against the promisee: Mass. 77,14; *except* matters arising after notice of the indorsement or transfer has been given the promisor: Mass.

A demand note bears interest from date, the law presuming a demand instantly: Ga. 2056.

§ 4734. **Death of Parties.** Checks or demand drafts drawn by any person having funds on deposit may be paid by the depositary notwithstanding the death of such drawer, if presented within ten days of date; and the same applies to savings-bank orders if presented within thirty days of the date, or at any subsequent period, provided the depositary has not received actual notice of such drawer's death: Mass. 1885,210.

**Payee Dead.** A bond, note, or other writing to a person or persons any of whom are dead at the time of execution is valid as if they were all alive, and may be proceeded on in the name of the personal representative of such person, or of the survivors: Va. 141,12. See also § 4116.

**Death of Drawer, etc.** If any note or bill, whether filled up before or after being signed or indorsed, shall be passed away within nine months after such drawer's or indorser's death by his agent, it is valid and binding on his estate, provided the holder received it in good faith without knowledge of the death: S.C. 1291.

§ 4735. **Bill of Exchange is Payment.** In several states, § 7 of the statute of Anne is re-enacted; and if any person accepts (*i. e., receives*) a bill of exchange in satisfaction of a former debt or sum of money due unto him, the same is accounted full payment thereof, whether or not such person, accepting any such bill for his debt, takes his due course to obtain payment thereof, by endeavoring to get the same accepted and paid and make his protest as aforesaid: N.J. *ib.* 5; S.C. 1295; Miss. 1131.

And so, in one, § 8 is re-enacted, that "nothing herein is to discharge any remedy that any person may have against the drawer, acceptor, or indorser of such bill:" S.C.

**Art. 474. Of the Parties.**

§ 4740. Neither the drawer nor any other party can, generally, be sued until after protest for non-acceptance or non-payment; see § 4728.

§ 4741. **Who may be Sued.** Suit may generally be brought against the drawer or maker, acceptor or indorsers, any or all of them, in the same action (1) jointly: N.Y.<sup>a</sup> Civ. C. 454; N.J. *Practice*, 29; 1884,108,2; O.<sup>a</sup> 5009; Ind.<sup>a</sup> 270,5516; Mich.<sup>a</sup> 7345; Wis.<sup>a</sup> 2609; Io.<sup>a</sup> 2550; Minn.<sup>a</sup> 66,36; Kan.<sup>a</sup> 80,39; Neb.<sup>a</sup> 2,44; Va. 142,11; W.Va. 12,11; N.C.<sup>a</sup> 186; Tenn.<sup>a</sup> 2715; Ark.<sup>a</sup>,<sup>b</sup> 469,482, 4943-4; Tex.<sup>a</sup> 270 and 1207; Cal. 10383; Ore. Civ. C. 36; Nev.<sup>a</sup> 1078; Wash.<sup>a</sup> 16; Dak.<sup>a</sup> Civ. C. 198; C. Civ. P. 14; Ida. C. Civ. P. 198; Mon.<sup>a</sup> Civ. C. 20; G. L. 105; Uta.<sup>a</sup> C. Civ. P. 240; Ga. 2782; Miss.<sup>a</sup> 1134; Ariz.<sup>a</sup> 2451; (2) jointly or severally: R.I. 142,2; Kan. 14,15; Neb. 1,41,6; (3) or any or either of them separately: Kan., Neb., Miss.

But in Tennessee, the maker and indorsers can only be sued in a joint action, though any one or more of the indorsers can be sued in a joint and several action: Tenn. 2715,2719.

And in several, no judgment can (except as below) be rendered against any person not primarily liable unless judgment has previously been, or is at the same time, rendered against the acceptor or principal obligor: Tex.<sup>a</sup> 1207; Miss. 1135. See also § 4036.

Judgment and costs for the full amount can only be recovered in one such action: Ark. 483. Execution is levied first against the parties primarily liable, as in Art. 510: the makers and acceptors before indorsers and sureties: Miss. 1139. Parties paying the execution are entitled to remedies against the others, as in Art. 511: Miss. 1140. In Tennessee, the drawer may be sued: Tenn. 2717. So, the drawee, after acceptance: Tenn.

In several, any indorsee or holder may sue the indorser, having used first due diligence to obtain payment of the drawer, maker, or obligor: O. 3172; Ind. 5504; Kan. 14,6; Neb. 1,41,2; Miss. 1124. This, of course, is law everywhere. Compare § 4702.

And "due diligence" is defined to be a demand of payment made to the maker or drawee on the last day of grace, and notice of non-payment to the drawer or indorser within a reasonable time thereafter (unless the indorsement express other conditions): O. 3176, Amt.; Kan. 14,7; Neb. 1,41,3. See also § 4728.

Every assignor [indorser], and his executors, of a note, is liable in an action by the assignee [indorsee], his executors, etc., if such assignee used due diligence by the institution and prosecution of a suit against the maker or his executors, etc., for the recovery of the money or property due thereon and damages; *provided*, that if the institution of such a suit would have been unavailing, or the maker had absconded or left the State when the instrument fell due, the assignee may recover against the assignor, as if due diligence by suit had been used: Ill.<sup>a</sup> 98,7; Col.<sup>a</sup> 107. Compare § 4036.

The assignor, indorser, guarantor, and surety upon any contract, and the drawer of any bill which has been accepted, may be sued without the necessity of previously or at the same time suing the maker, acceptor, or other principal obligor, when he resides beyond the State, or in such part of the same that he cannot be reached by ordinary process of law; or when his residence is unknown, or cannot be ascertained; or when he is dead, or actually or notoriously insolvent: Tex. 1208.

NOTES. — <sup>a</sup> This applies, in the noted states, to suits against persons severally liable on all written instruments, negotiable or not. <sup>b</sup> Protest having been duly made.

§ 4742. **Liability of the Drawer.** The rights and obligations of the drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument: Cal. 8177; Dak. Civ. C. 1888; Uta. *ib.* 65.

Drawers of indorsed bills are primarily liable to the holders thereof until the same are accepted, after which they are only secondarily liable thereon: Mon. G. L. 102.

§ 4743. **Liability of the Indorser.** In Georgia, the general contract of the indorser is to pay the money if the parties to the instrument primarily liable thereon fail to pay, according

to the terms thereof: Ga. 2780. Hence, if there are several indorsers, each is liable to subsequent ones in the order of their indorsements: Ga. See Art. 471.

So, in North Carolina, the indorser of a note or negotiable bond is liable as surety to the holder, and no demand on the maker is necessary previous to a suit against the indorser: N.C. 50.

One who indorses a negotiable instrument before it is delivered to the payee, is liable to the payee thereon, as an indorser: Cal. 8117; Dak. Civ. C. 1845; Uta. *ib.* 25.

The indorser of a note payable to bearer is held as a guarantor of payment, unless otherwise expressed in the indorsement: Ill. 98,8.

One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form: Cal. 8125; Dak. Civ. C. 1854; Uta. *ib.* 32.

"In any suit against a remote indorser (of a note only), he has any defence which he might have had as against his immediate assignee:" Ind. 5504. (See § 4701, note c.) The indorser (or, in Vermont, any surety) upon a promissory note, claim, or demand, whether payable on time or on demand, has the same right to pay the same that the principal has; and is discharged upon tender to the holder at maturity: Vt. 2004; so, but after suit brought only: Mon. G. L. 105.

The holder must then, upon such tender or payment, surrender the instrument: Vt. 2005; Mon. If he refuse, the indorser is discharged from all liabilities, and may recover back from the holder the sum he shall have paid thereon: Vt. In such case, if the instrument be lost, the holder shall execute a written release, stating the amount paid by the indorser: Vt.

The indorser of any bill (payable in the State or abroad) who pays to the owner or holder the value of principal, damages, and interest, as duly required (§§ 4752-3), may recover such sum from the drawer or other person liable to the indorser upon the bill: Md. 35,2 and 5; Miss. 1125.

So, the surety upon any chose in action as against the principal debtor: Miss. So, in Dakota, he has all the rights of a guarantor (Art. 519), and is exonerated from liability in like manner: Dak. Civ. C. 1849.

An accommodation indorser has all the rights of a surety (Art. 512), and is exonerated in like manner in respect to every one having notice of the facts, except that he is not entitled to contribution from subsequent indorsers: Dak. Civ. C. 1850. "Indorsers for the drawers of bills" are liable as between the parties thereto only for the default of the drawers, in the order of their indorsements: Mon. G. L. 102. Execution issues first "against the parties primarily liable" on the note or bill: N.J. *Practice*, 36. The assignor of a judgment is not, in Georgia, liable as indorser, unless in such assignment he expressly contracts so to be. See in Part IV. and Art. 403.

Whenever promissory notes are indorsed for the benefit of the drawer or drawers thereof, and the same is mentioned in the notes, if the drawer or drawers cause the notes to be discounted in any bank in the State, or obtain any sum of money upon the notes from any person, the indorsers are bound to the holders as if the notes had been discounted for their own benefit: La. D. 330.

Any person indorsing or transferring a negotiable instrument may limit his own liability upon such indorsement or transfer by express restriction: N.C.; Ga. 2777; N.M. 1725.

As by the words "without recourse:" Cal. 8118; Dak. Civ. C. 1846; Uta. *ib.* 26; N.M.

In such case he is responsible only as in case of a transfer without indorsement: Cal., Dak., Uta.

Except as otherwise prescribed by the last section, an indorsement, without recourse, has the same effect as any other indorsement: Cal. 8119; Dak. Civ. C. 1847; Uta. *ib.* 27.

NOTE. — <sup>a</sup> Applies also to non-negotiable instruments.

§ 4744. **Rights of Holder.** As a general proposition, a *bona-fide* holder for value of a bill, note, or other negotiable instrument, who receives the same before it is due, and without notice of any defect or defence, will be protected from any



defences set up by the maker, acceptor, or indorser: Wis. 2606; Io. 2114,2546; Minn. 66,27; Kan. 80,27; Neb. 2,31; N.C. 177; Tex. 265; Cal.<sup>b</sup> 8122,8124; Wash.<sup>a, b</sup> 15; Dak.<sup>b</sup> Civ. C. 1851,1853; Ida.<sup>b</sup> C. Civ. P. 183; Uta. *ib.* 29 and 31; Ga. 2785; N.M. 1919. But see § 4702. See also § 4031.

The same, being part of the law-merchant, would probably be implied in all other states; see, specially, Ark. 476. See also §§ 4706-4712.

As, in detail, (1) want of consideration for the signature of any party: Ind. 366; Io.; Cal.; Dak.; Uta.; (2) any defect in the title of the person from whom he acquired it: Cal.,<sup>c</sup> Dak.,<sup>c</sup> Uta.;<sup>c</sup> (3) any provision of law making it void or voidable: Cal.,<sup>c</sup> Dak.,<sup>c</sup> Uta.<sup>c</sup>

But he will not be so protected against the following defences: (1) *non est factum*: Ga.; (2) gambling, immoral or illegal considerations: Ga.; (3) fraud in the procurement of the note by such holder: Ga.

An indorsee of a negotiable instrument has the same rights against every prior party thereto that he would have had if the contract had been made directly between them in the first instance: Cal. 8120; Dak. Civ. C. 1848; Uta. *ib.* 28.

The want of consideration for the undertaking of a maker, acceptor, or indorser of a negotiable instrument does not exonerate him from liability thereon to an indorser in good faith for a consideration: Cal. 8122; Dak. Civ. C. 1851; Uta. *ib.* 29.

NOTES. — <sup>a</sup> If he is owner of all the interest therein, in the noted states. <sup>b</sup> Nothing is said about notice; but it is probably implied in the words *bona fide*, or *in good faith*. <sup>c</sup> Such holder being "an indorsee in due course" (§ 4712.)

§ 4745. **Holder for Value.** Every holder is presumed to be a *bona-fide* holder, and for value: Ga. 2787.

So, the signature of every drawer, acceptor, and indorser is presumed to have been made for value, before maturity, and in the ordinary course of business: Cal. 8104; Dak. Civ. C. 1835; Uta. *ib.* 15.

If either fact is negatived by proof, the defendants are let into all their defences: Ga. The presumption is negatived by proof of any fraud in the procurement of the note: Ga. 2787. The holder of a note as collateral security stands upon the same footing as a purchaser for value: Ga. 2788. Any circumstances which would place a prudent man on his guard in purchasing negotiable paper are sufficient to constitute notice to a purchaser of such paper: Ga. 2790.

Any payment made on the instrument before the assignment to the holder may be set up against him if he had notice thereof: Ill. 98,13.

§ 4746. **The Title of the Holder** cannot be inquired into unless it is necessary for the protection of the defendant or to let in the defence which he seeks to make: Ga. 2789.

Possession of the note or bill is *prima facie* evidence that the indorsements are genuine: Minn. 73,89; Wis. 4193. See also in Part IV.

The signature is presumed genuine unless specially denied: Minn.<sup>a</sup> An indorsement of money received on a note appearing to have been made when it was against the interest of the holder is *prima facie* evidence thereof: Minn. 73,90. In actions brought by a corporation or partnership or the indorsers upon a note or bill or other instrument for the payment of money only, executed and delivered by the defendant to such corporation or partnership by the corporate or firm name, the instrument is *prima facie* evidence of the existence of such corporation, or that the persons named are and were partners: Minn. 73,98. Whenever it is necessary in a suit to prove an indorsement or assignment, an affidavit of a competent witness to the same is received as *prima facie* evidence: Mo. 2315. See, for other states, in Part IV., *Evidence*.

NOTE. — <sup>a</sup> Unless the maker or drawer be dead.

## Art. 475. Damages.

§ 4750. **When Allowed.** When a bill <sup>a, b</sup> of exchange drawn, indorsed, or negotiated in the State is regularly (§ 4728) protested for non-acceptance or non-payment,<sup>c</sup> the person liable thereon (§ 4741) is liable for damages, costs, and interest,

according to this article : Mass. 77,18 and 20 ; Me. 82,42 ; R.I. 142,1-3 ; Ct.<sup>c</sup> 18, 1,7 ; N.Y. 2,4,2,18 and 22 ; Pa. *Bills*, 7 ; Ind. 5507 ; Ill. 98,1-2 ; Mich. 1584-5 ; Wis. 1682-3 ; Io. 2096 ; Minn. 13,14-5 ; Kan.<sup>a, b</sup> 14,14 ; Neb. 41,7 ; Md. 35,1 and 4 ; Del. 63,3 ; Va. 141,9 ; W.Va. 12,9 ; N.C. 48 ; Ky. 22,10 ; Tenn. 2720 ; Mo. 539,540 ; Ark. 466 ; Tex. 275 ; Cal. 8234-5 ; Ore. 48,8-9 ; Nev. 20 and 24 ; Col. 101-2 ; Wash. 2308 ; Dak. Civ. C. 1924-5 ; Ida. 1874-5, p. 655,12 and 16 ; Uta. *ib.* 101-2 ; S.C. 1299 ; Ga. 2792 ; Ala. 2106,2110 ; Miss. 1127 ; Fla. 162, 123 ; La. D. 320 ; N.M. 1728 ; Ariz. 3475, 3479.

It seems that the bill must be *drawn* within the State, and indorsement there is not sufficient : Md., Tex.

And in several, the bill must be drawn for value received : Mo., Ark., Col. It must be payable *after date* to order or bearer : Ark.

Negotiable notes in the hands of the purchasers of the same from the makers by way of discount or investment, if protested for non-payment, shall not be subjected to damages : Mo. 549.

No damages except costs of protest are allowed if the bill be paid by the drawer or indorser immediately upon notice of protest and demand : Ind. 5510.

Damages are not allowed upon notes discounted by a bank : Ind. 5513.

NOTES. — <sup>a</sup> So, in many states, of a note. <sup>b</sup> Or, in others, of a bond. <sup>c</sup> In the noted states, for non-payment only.

§ 4751. **To whom Liable.** (For citations, see § 4750.) Generally, such damages or penalties may be recovered by any holder or owner of the bill : Ct. ; Ill. ; Mich. ; Kan. 14,15 ; Md. ; Mo. ; Tex. ; Ga.

But in several, only by a holder who purchased it for value : N.Y. *ib.* 23 ; Ind. 5511 ; Mo. 542 ; Ark. 470 ; Cal. ; Nev. 25 ; Dak. ; Ida. *ib.* 17 ; Uta. ; Ariz. 3480.

And from any person liable : Wis., Del., Va., W.Va., Tenn. So, probably, in all other states ; see § 4750.

From the drawer or indorsers, in case of non-acceptance : Ct., Ill., Wis., Kan., Neb., Mo., Col., Ga.

And from the acceptor also in case of non-payment : Kan., Mo., Ga.

"Such person having due notice of the dishonor of the bill : " Ill., Wis., Mo., Col.

But this article is not to be construed so as to require notice of non-acceptance or payment in cases where not required to be given at common law : Mo. 541.

§ 4752. **Interest and Costs.** The damages provided for in §§ 4753-5 are in full and in lieu of all costs or charges : Mass. 77,18 ; Ct. ; N.Y. *ib.* 19 and 22 ; Mich. 1584 ; Wis. ; Minn. ; Mo. 544 ; Cal. ; Ore. 48,8 ; Nev. 21 ; Wash. 2309 ; Dak. ; Ida. 1874-5, p. 654, § 13 ; Uta. ; Ala. 2107 ; La. D. 321 ; Ariz. 3476.

But legal *interest* on the principal sum is allowed from the date of notice of protest in addition to such damages : Mass. ; R.I. ; Ct. ; N.Y. ; Pa. ; Ind. 5508 ; Ill. ; Mich. ; Wis. ; Io. ; Minn. ; Kan. ; Neb. 1,41,6 ; Md. ; Va. 141,11 ; W.Va. 12, 11 ; N.C.<sup>a</sup> 47 ; Tenn. 2719,2721 ; Tex. 275 ; Cal. 8236 ; Ore. ; Nev. ; Col. ; Wash. ; Dak. Civ. C. 1925 ; Ida. ; Uta *ib.* 103 ; S.C.<sup>a</sup> 1298 ; Ga. ; Ala. ; Miss. ; La. ; N.M. ; Ariz.

So, interest at ten per cent is allowed : Ky. 22,10 (see § 4753) ; Ark. 468.

And if the interest prescribed in the note, bill, or bond is greater or less than the legal rate, such interest is allowed in lieu of the legal rate : Kan.

And in many, such interest is also allowed on the damages : Ct., N.Y., Pa., Tenn., Cal., Nev., Wash., Dak., Ida., Uta., Ala., La., Ariz.

And in a few, such interest is also allowed on the costs of protest : Pa., Va., W.Va., Tenn.

And in some, the *costs of protest* are allowed in addition to damages (and interest) as above: R.I.; Pa.; Ind. 5510; Ill.; Wis.;<sup>b</sup> Minn.;<sup>b</sup> Md.; Va.; W.Va.; Tenn.; Ark.; Col.; S.C.; Ga.; Ala.; Miss.

And also costs of suit: Tex., Miss.

NOTES. — <sup>a</sup> Such interest is, however, always computed from the time of payment mentioned in the note: N.C., S.C. <sup>b</sup> In the case of bills payable in another state, but not in a foreign country.

§ 4753. **Damages.** The party so liable on a bill drawn or negotiated within the State and duly protested for non-acceptance or non-payment, besides the principal sum, is liable, in most of the states, for certain specified damages. Thus, (A) if the bill be payable beyond the United States, (1) five per cent on the principal sum: Mass., Mich., Wis., Io., Uta., Fla.

(2) Ten per cent: R.I., N.Y., Ind., Ill., Minn., Va., W.Va., Ark., Ore., Col., Wash., Dak., Ga., Ala., Miss., La.; (3) fifteen per cent: Md., Cal.; (4) six per cent: Kan.; (5) twelve per cent: Neb., N.M.; (6) twenty per cent: Mo., Nev., Ariz.

So, if payable "beyond sea," twenty per cent: Del. (7) Ten per cent interest on the principal sum from the protest, but not longer than eighteen months unless payment be sooner demanded from the party to be charged, or unless by the contract a rate greater than six per cent is stipulated for; and damages on all other bills are disallowed: Ky. 22, 10. And in other states, varying rates. Thus, in Tennessee, fifteen per cent if payable elsewhere in North America or the West Indies; twenty per cent in the rest of the world. In Pennsylvania, twenty per cent if in China, India, Asia, Africa, Pacific Islands; fifteen per cent if in West Coast of South America; elsewhere in the world, ten per cent. In North Carolina, if in North America, except the Northwest Coast, or in the West Indies and Bahamas, ten per cent; if in the other Atlantic isles, Europe, or South America, fifteen per cent; elsewhere in the world, twenty per cent. In South Carolina, on bills drawn on North America or the West Indies, twelve and a half per cent; elsewhere in the world, fifteen per cent. In Idaho, on bills drawn in any foreign country, except the British Possessions in North America west of the Rocky Mountains, thirty per cent; if in such British Possessions, twenty-five per cent.

(B) If the bill be payable in another state, (1) five per cent: R.I., Ind., Ill.,<sup>a</sup> Wis., Minn., Cal.,<sup>c</sup> Ore., Wash., Ga., Ala., Miss., Fla., La. (2) Three per cent: Io., Va., W.Va., N.C., Tenn. (3) Ten per cent: Mo., Tex., Cal.,<sup>b</sup> Col., S.C. (4) Eight per cent: Md. (5) Six per cent: Kan., Neb., N.M. (6) Two and a half per cent: Uta.

In other states, there are varying special rates. Thus, in Massachusetts, two per cent (in Maine, three per cent), if payable in New England or New York; three per cent (in Maine, six per cent), if payable in N.J., Pa., Md., or Del.; four per cent (in Maine, six per cent), if payable in the Virginias, the Carolinas, Georgia, Florida, and the District of Columbia; and elsewhere in the United States, five per cent (in Maine, nine per cent): Mass., Me. In Connecticut, two per cent, if payable in New York City; three per cent, if in New England, N.Y., N.J., Pa., Md., Del., Va., or D.C.; five per cent, if in O., Ind., Ill., Mich., N.C., Ky., S.C., or Ga.; elsewhere in the United States, eight per cent. In Pennsylvania, five per cent, if payable anywhere in the United States except California, Oregon, and New Mexico, where it is ten per cent. In New York, if so drawn upon a person in New England, N.J., Pa., O., Md., Del., Va., or D.C., three per cent; if upon Ky., N.C., Tenn., S.C., or Ga., five per cent; if elsewhere in the United States, ten per cent. In Michigan, if payable in N.Y., Pa., O., Ind., Ill., or Wis., three per cent; if in New England, N.J., Md., Del., Va., Ky., Mo., or D.C., five per cent; elsewhere in the U.S., ten per cent. In Iowa, if payable in Cal., Ore., Nev., or any of the territories, five per cent, with interest from the time of protest. In Nevada and Arizona, if drawn upon any person in any of the United States east of the Rocky Mountains, fifteen per cent; so, in Idaho, twenty-five per cent; if in any state west of the Rockies, including Utah and Montana, twenty per cent. In Arkansas, if drawn upon Ohio, Indiana, Illinois, Kentucky, Tennessee, Missouri, Alabama, Mississippi, Louisiana, or any point on the Ohio River, four per cent; elsewhere in the United States, five per cent. In Dakota, if in any state but Ill., Wis., Io., Minn., Neb., Mo., and Mon., five per cent; in those states, three per cent.

(C) If the bill be payable in the State (and more than seventy-five miles from the place of drawing or indorsement: Mass.), one per cent damages is allowed: Mass. 77, 21; Me.; Uta.



If payable in the State, four per cent in all cases: Mo. So, two per cent: Ark., Cal., Dak. So, six per cent: N.M. But no damages are allowed as against any person in the State: Kan.; and so in other states not mentioned above.

No damages on account of protest can be recovered on any bond, bill, or note drawn or made within the State, which shall contain a waiver of protest, or be protested, if it was agreed, understood, or intended by and between the drawer or indorser and the payee or indorsee, at the time of delivery, that the same might be paid at any other place than that upon which it was drawn, or by any other person, firm, or company than that upon which it was drawn or by whom it was made: Kan. 14,16.

No damages on bills payable in the State can be recovered if the principal, interest, and charges are paid within twenty days after demand or notice: Mo. 543.

NOTES. — <sup>a</sup> But such damages are only allowed when suit has to be brought. <sup>b</sup> East of the Rocky Mountains. <sup>c</sup> West of the Rocky Mountains.

§ 4754. **Exchange.** The principal (and in Massachusetts, Rhode Island, Pennsylvania, the damages) are, in several, payable at the current rate of exchange (1) at the time of demand for payment: Mass.; Pa.; Mich.; Wis. 1682; Minn. 23,14; Ore. 48,8; Ala.; (2) at the time of the verdict by the jury: Md. 35,4; S.C. 1300; (3) at the time of payment: Mo.

So, in other states, only when the amount of the bill is expressed in such foreign money: N.Y. *ib.* 21; Pa. *Bills*, 8; Mo. 546; Cal. 8238; Nev. 23; Dak. Civ. C. 1927; Ida. *ib.* 15; Uta. *ib.* 105; Ala. 2109; La. D. 323; Ariz. 3478.

But in Connecticut, the amount of the bill and damages so payable is determined without reference to the rate of exchange existing at such time of notice and demand; so, probably, in other states not mentioned above. So, when payable within the United States: Ind. 5509.

So, in most of the other states, if the amount be expressed in United States money no exchange is allowed: N.Y. *ib.* 20; Mo. 545; Cal. 8237; Nev. 22; Dak. Civ. C. 1926; Ida. *ib.* 14; Uta. *ib.* 104; Ala. 2108; La. D. 322; Ariz. 3477.

§ 4755. **Special Provisions.** And in Arkansas, it is further specially provided that if any bill of exchange, expressed to be for value received, payable to order or bearer, is drawn on any person at any place within the State, and accepted and protested for non-payment, there shall be allowed and paid to the holder by the acceptor damages; viz., two per cent if drawn within the state; six per cent if drawn without the state but in the United States; ten per cent if drawn without the United States: Ark. 467.

## Art. 476. Stocks and Bonds.

§ 4760. **General Principles, etc.** For the negotiability, etc., of bonds, see §§ 4031, 4032, 4701.

§ 4761. **Stock-jobbing.** In two states, every contract, written or oral, for the sale or transfer of stock, shares, bonds, of any state or corporation, or evidences of debt thereof, is void unless the vendor is at the time of making the contract the owner or assignee of such stock, etc., or authorized by such owner, etc., or his agent to sell and transfer the same: Mass. 78,6; S.C. 1883,306. But in New York, no such contract is void for such reason, or for want or non-payment of consideration: N.Y. 1858,134. See also in Part V.

§ 4762. **Futures.** So, the buying, selling, or dealing in futures in stocks, petroleum, cotton, grain, or anything else whatever, is made a misdemeanor: O. 1885, p. 254, 6934c; Ill. 38,130; Ark. 1848; Miss. 1882,117.

And the contract is void: O., Ill., Miss. See also in Part V.

So, all contracts to sell or buy produce which the vendor does not own and possess, and which the vendee does not intend actually to receive and pay for, are void: O. 1885, p. 254; Io. 1884,93; Ky. 1884,1613,1 (in Lexington city, only); S.C. 1883,306.

In Wisconsin, no contract for the purchase, sale, transfer, or delivery of personal property to be delivered and paid for at a future day, shall be void when either the buyer or the seller shall in good faith intend to perform the contract (so, in South Carolina also). An intention of either party not to perform such contract shall not vitiate it if the other party shall in good faith intend to perform the same; no such contract shall be vitiated or held to be void because the vendor is not, at the time of making it, the owner of the property contracted to be sold; and in any action by either party to such contract for the enforcement of the terms, or to recover damages for a breach thereof, it shall be incompetent to show in defence, by any extrinsic evidence, that such contract had any other intent or meaning than expressed or stipulated thereby; and such contract and all collateral contracts, agreements, or securities growing out thereof, or of which they may have formed the consideration in whole or part, shall be deemed legal and valid to all intents and purposes; provided nothing herein shall be construed to exclude evidence of fraud in the procuring of any contract for the sale and future delivery of personal property, or of any collateral contract or agreement in security growing out thereof, or that any such contract was not entered into upon sufficient consideration, or is not supported thereby, or that both parties intended to make a wagering contract: Wis. 2319a.

### Art. 477. Letter of Credit.

§ 4770. **Definitions and General Principles.** A letter of credit is a written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn.

A letter of credit may be addressed to several persons in succession.

The writer of a letter of credit is, upon the default of the debtor, liable to those who gave credit in compliance with its terms.

A letter of credit is either general or special. When the request for credit in a letter is addressed to specified persons by name or description, the letter is special. All other letters of credit are general.

A general letter of credit gives any person to whom it may be shown authority to comply with its request, and by his so doing it becomes, as to him, of the same effect as if addressed to him by name.

Several persons may successively give credit upon a general letter.

If the parties to a letter of credit appear by its terms to contemplate a course of future dealing between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor, but is to be deemed a continuing guaranty.

The writer of a letter of credit is liable for credit given upon it without notice to him, unless its terms express or imply the necessity of giving notice.

If a letter of credit prescribes the persons by whom, or the mode in which, the credit is to be given, or the term of credit, or limits the amount thereof, the writer is not bound except for transactions which, in these respects, conform strictly to the terms of the letter: Cal. 7858-7866; Dak. Civ. C. 1688-1696.

## CHAPTER V.—INTEREST, MONEY, AND USURY.

### Art. 480. Money.

§ 4800. **Note.** The banking and currency laws are not generally incorporated in this edition, as they are regulated by the national laws. See *Banking*, etc., in Part III.

§ 4801. **Money of Account.** The legal money of account is, in many states, declared to be the dollar, cent, and mill: N.H. 232,1; Mass. 77,1; Vt. 1995; N.Y. 1,19,3,1; N.J. *Money*, 1; Mich. 1592; Wis. 1685; Io. 2075; Neb. 1,59,1;

Md. 37,2; Va. 137,1; W.Va. 136,1; N.C. 2491; Tenn. 2699; Ark. 4730; Cal. 3272; Nev. 29; Ida. 1879, p. 7,1; S.C. 1287; La. D. 4; N.M. 1732; Ariz. 3448.

But this does not invalidate or affect an account, charge, or entry originally made, or a contract expressed, in other money; but the same shall be reduced to dollars and cents: Mass. 77,2; Vt.; Mich. 1593; Wis. 1686; Io. 2076; Neb. *ib.* 2; Va. 137,2-3; W.Va. 136,2-3; Cal. 3273; Nev. 30; Ida. *ib.* 2; N.M. 1733.

So, in several, all judgments and verdicts are to be rendered in dollars and cents: N.Y. *ib.* 2; Wis. 1687; Tenn.; Ark. 4731; Cal. 3274; Nev. 31; Ida. *ib.* 3; Ariz. 3449.

§ 4802. **Lawful Money.** In many states, no person or corporation unauthorized by law may issue any note, bill, bond, check, ticket, or evidence of debt, or other paper security designed to circulate as money. See in Part III., *Banking*, and Part V., *Offences concerning the Currency*; Part III., *Town Warrants*, etc.

§ 4803. **Specie Payments.** In Nevada, the laws require all salaries, fines, fees, and taxes to be paid in United States gold or silver coin: Nev. 34-5.

## Art. 481. Interest.

§ 4810. **Definition.** Interest is, in some, defined to be the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money (or its equivalent: Dak., La.): Tex. 2972; Cal. 6915; Dak. Civ. C. 1095; La. 2923.

The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more: La. 1935.

Interest is of two kinds, conventional and legal; the rate of both is fixed by law in the chapter on loans on interest: La. 1936.

In contracts stipulating a conventional interest, it is due without demand, from the time stipulated for its commencement until the principal is paid: La. 1937.

Interest is, in Tennessee, defined to be the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money: Tenn. 2700.

§ 4811. **Legal Rate.** There is, in all the states, a legal rate of interest, allowed when no rate is specified in the contract: N.H. 232,2; Mass. 77,3; Me. 45,1; Vt. 1996; R.I. 141,1; Ct. 18,5,1; 1877,151; N.Y. 2,4,3,1; N.J. *Interest*, 1; 1878,26; Pa. *Interest*, 1; O. 3181; Ind. 5198; Ill. 74,1; Mich. 1594; Wis. 1688; Io. 2077; Minn. 1879,66,1; Kan. 51,1; Neb. 1,44,2; Md. 36,1; Del. 63,1; Va. 137,4; 1874,122; W.Va. 137,4; N.C. 3835; Ky. 22,15; 60,1,1; 1878, Mar. 2, § 1; Tenn. 2701; Mo. 2723; Ark. 4732; Tex. 2973; Cal. 6917, Amt.; Ore. 1880, p. 17; Nev. 32; Col. 1706; Wash. 2368; Dak. Civ. C. 1097; Ida. 1874-5, p. 647, 4; Mon. G. L. 728; Wy. 63,2; Uta. 380; S.C. 1288; Ga. 2050; Ala. 2088; Miss. 1141; Fla. 123,1; La. D. 1883; N.M. 1734; Ariz. 3450; D.C. 713.

Such legal rate is, in most of the states, six per cent: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Io., Md., Del., Va., W.Va., N.C., Tenn., Mo., Ark., Miss., N.M., D.C.

In many, seven per cent: Mich., Wis., Minn., Kan., Neb., Cal., Dak., S.C., Ga.; in some, eight per cent: Tex. 2976-7; Ore.; Ala.; Fla.; in a few, ten per cent: Nev., Col., Wash., Ida., Mon., Uta., Ariz.; in one, twelve per cent: Wy.; in Louisiana, five per cent: La. 1938,2924; D. 1883.

In cases where no conventional interest is stipulated, the legal interest at the time the contract was made shall be recovered, although the rate may have been subsequently changed by law: La. 1940.



§ 4812. **Contract Rate.** (A) In Massachusetts, there are no limits by law to the rate that may be contracted for in writing: Mass. 77,3.

So, by the laws of many other states, it is expressly enacted that any rate may be contracted for in writing: Mass.; Me.; R.I.; Cal. 6918; Nev. 33; Col. 1708; Wash.<sup>a</sup> 2369; Dak.<sup>c</sup> Civ. C. 1098; Mon. G. L. 730; Wy. 63,1; Fla.<sup>a</sup> 123,2.

(B) So, in the others, any rate not exceeding twelve per cent: Kan. 51,2; Tex. 2974,2978; Dak. Civ. C. 1098; N.M. 1734,1737; Ariz. 3451; not exceeding ten per cent: Mich. 1594; Wis. 1688; Io. 2077; Minn.; Neb.<sup>a</sup> 1,44,1; Mo. 2724; Ark. 4732-3; Ore.<sup>a</sup> 1880, p. 17; S.C. 1882,21; Miss.; D.C. 714; in others, not exceeding eight per cent: O. 3179; Ind. 5198; Ill.<sup>a</sup> 74,4; Va.; N.C.; Ky.<sup>b</sup> 60,2,1; March 14, 1876; Ga.; La. 2924; D. 1884; in one, not exceeding eighteen per cent: Ida. *ib.* 5; in other states, no rate exceeding the legal interest (§ 4611) can be contracted for in writing or otherwise: Ct., N.J., Md., W.Va., Pa.

This interest is termed *conventional interest*: Tex. 2974-5.

NOTES. — <sup>a</sup> In these states, it does not seem necessary that the contract for such increased rate should be in writing. <sup>b</sup> Only in loans of money; and both the consideration and the interest must be set forth in an obligation signed by the party to be charged. <sup>c</sup> In the counties of Lawrence, Pennington, Custer, Mandan, and Forsythe only.

§ 4813. **Bond Rate.** The laws of Massachusetts provide that no corporation shall issue bonds bearing over seven per cent interest: Mass. 77,3.

But in two others, no bond or other security issued by a railway or canal company is invalid because sold under par: N.J. *Interest*, 6; Pa. *ib.* 6-7.

No municipal corporation can issue bonds bearing more than eight per cent interest (see also in Part III.): Neb. 1,44,10.

§ 4814. **Interest may be paid in Advance.** Interest may be taken yearly, or for a shorter period, in advance: Ind.; Minn. 1879,66,3; Neb. 1,44,1; Dak. Civ. C. 1099.

§ 4815. **Insurance and Taxes.** The borrower may contract to pay insurance on the estate mortgaged in addition to legal interest: Ct.; Pa. *Interest*, 8.

So, to pay taxes on the loan: Ct.; Pa.; Ore. 1885, p. 125.

§ 4816. **Compound Interest.** Interest may not be compounded, nor interest charged upon interest: Wis. 1689; Cal. 6920; Nev.<sup>a</sup> 33; Dak. Civ. C. 1101; Ida. *ib.* 6; Ariz. 3452; unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith: Wis., Ariz.

In the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded; but any contract to pay interest not usurious upon interest overdue shall not be construed to be usury: Minn. 1879,66,1.

The parties may contract in writing for the payment of interest upon interest, the same to be compounded not oftener than once a year: Mo. 2728; Cal. 6919. Compare also § 4855.

Interest upon interest cannot be recovered, unless it be added to the principal, and by another contract made a new debt. No stipulation to that effect in the original contract is valid: La. 1939.

The surety, who is obliged to pay money for his principal, is not bound by the preceding rule respecting interest on interest; he shall receive interest on the whole sum he has paid, whether for principal or interest from the time of the payment, without any demand: La. 1941.

And in Michigan, when any instalment of interest is due upon any bond, mortgage, or written contract, interest may be computed and collected thereon, at the same rate as specified therein, not exceeding the legal rate, or at the legal rate: Mich. 1599.

NOTE. — <sup>a</sup> The prohibition applies to judgments only.

§ 4817. **Bank Discounts.** In Virginia, banks or brokers may discount or loan, for a term not exceeding six months, at the rate of one half per cent a month payable in advance:

Va. 137,6-7 ; 1874,122. In Arkansas, a bank may charge ten per cent only on discounts, including exchange: Ark. 4736.

Banks are subject to the usury law like other persons and corporations: Pa. *Interest*, 3 ; La. D. 1837,1890 ; and their discounts may not exceed the legal contract rate (§ 4812): La.

See in Part III., *Banking*, and § 4800.

Banks established out of the State cannot discount at a higher rate than the law where they are established permits: Miss. 1142.

§ 4818. **Commission Merchants** and agents of persons out of the State may contract for seven per cent on advances made on merchandise: Pa. *ib.* 5.

**Mortgage-Brokers.** No solicitor, scrivener, or broker may, under penalty, take more than one half per cent for brokerage or procuring a loan for one year, and so in proportion, nor more than one fourth per cent for drawing the bill therefor: N.J. *Interest* 5.

§ 4819. **Other Contracts Specially Exempted** from the provisions of this chapter are, in several, the letting of cattle: N.H. 232,5 ; Vt. 2001 ; maritime contracts: N.H., Vt.; bottomry: N.H.; Vt.; N.Y. 2,4,3,5 ; Wis. 1690 ; La. 1942 ; or respondentia bonds: N.Y., Wis., La.; insurance: N.H.; the course of exchange: N.H., Vt.

Any interest or compensation may be contracted for in writing upon advances not less than \$5,000 made upon warehouse receipts, bills of lading, notes, bills, stocks, and bonds as security: N.Y. 1882,237.

§ 4820. **Foreign Rates.** Where it is not specially shown, the rate of interest in other states and countries is presumed to be the same as that established in the State, and may be recovered accordingly, without special allegation: Ky. 60,1,7 ; Tex. 2261 ; and see *Evidence*, in Part IV.

§ 4821. **Lex Loci.** The usury laws and the interest laws of the State apply to all contracts made within the State, although to be performed abroad: Ind. 5204 ; Ill. 74,8 ; Mich. 1600-1603 ; Ga. 2053.

Unless it is apparent on the face of the contract that the parties intended to refer its execution to another forum (compare § 4203): Ga.

They apply to any contract between citizens and corporations of the State, or between a citizen, etc., of the State and a citizen, etc., of a foreign state, wherever payable: Ill., Mich.

They apply to any contract secured by mortgage or trust-deed of lands in the State: Ind., Ill., Mich.

But when the maker of a contract is resident in another state, or the mortgage security is there located, the rate legal in such state may lawfully be contracted for and recovered: Ct. 1875,36.

§ 4822. **Lex Fori.** And conversely, a contract made out of the State will generally be enforced, though usurious, within it. And a judgment on the debt, or on a judgment in such foreign state, will bear interest according to the terms of the contract: Ky. 60,1,7. But in Indiana, when such contract is made abroad, and a mortgage on real estate to secure it made in the State, the land is only liable for the legal contract rate of interest allowed in the State (§ 4812): Ind. 5204.

§ 4823. **Civil Law of Loan on Interest.** It is lawful to stipulate interest for a simple loan, whether of money or other movable things.

Interest is either legal or conventional.

Legal interest is fixed at the following rates, to wit:—

At five per cent on all sums which are the object of a judicial demand, whence this is called judicial interest ;

And on sums discounted by banks, at the rate established by their charters.

The amount of the conventional interest cannot exceed eight per cent. The same must be fixed in writing; *testimonial* proof of it is not admitted in any case.

Except in the cases herein provided, if any person shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within twelve months from the time of such payment.

The owner or discounter of any note or bond, or other written evidence of debt for the payment of money, payable to order or bearer or by assignment, shall have the right to claim and recover the full amount of such note, bond, or other written evidence of debt, and all interest not beyond eight per cent per annum interest that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of eight per cent per annum interest or discount; but this provision shall not apply to the banking institutions of this state in operation under existing laws.

The owner of any promissory note, bond, or other written evidence of debt for the payment of money, to order or bearer or transferable by assignment, shall have the right to collect the whole amount of such promissory note, bond, or other written evidence of debt for the payment of money, notwithstanding such promissory note, bond, or other evidence of debt for the payment of money may include a greater rate of interest or discount than eight per cent per annum; *provided*, such obligation shall not bear more than eight per cent per annum after maturity until paid.

The release of the principal, without any reserve as to interest, raises the presumption that it also has been paid, and operates a release of it: La. 2923-5.

## Art. 483. Usury.

§ 4830. **Definitions.** Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest (§ 4812): Ga. 2051.

§ 4831. **Usury Laws.** (A) Several states have no usury laws, except that interest above the legal rate must be contracted for in writing (§ 4812). (B) But in most states, no person or corporation may take or receive, directly or indirectly, in money, goods, things in action, or in any other way, a greater sum or value than as prescribed in Art. 481: Vt. 1996; Ct. 18,5; 1877,151,3; N.Y. 2,4,3,2; N.J. 1878,26; 1837,430,6; Ill. 74,5; Wis. 1689; Io. 2079; Minn. 1879,66,1; Kan. 51,3; Md. 36,3; Del. 63,1; Va. 137,4; W.Va. 136,4; Mo. 2726; Ark. 4734; Ore. 27,2; Ida. 1874-5, p. 647,8; S.C. 1288; Ga. 2057*a*; Ala. 2092; N.M. 1738. The same is, of course, implied in all other states mentioned in § 4812, B.

§ 4832. **Penalty.** (A) If a greater rate be charged than as allowed in § 4812, the plaintiff cannot recover the excess over the legal rate in § 4811: N.H. 232,4; Ct. 18,5,2; Pa. *Interest*, 2; O. 3183; Ind. 5201; Mich. 1595; Kan. 51,3; Md. 36,5; W.Va. 136,5; Ky.<sup>b</sup> 60,1,2; Tenn. 2707,2710; Ga. 2057*b, c, d*.

(B) But in many states, the whole interest is forfeited; and the plaintiff cannot recover any: N.J. *Interest*, 2; Ill. 74,6; Wis. 1690; Io. 2080; Neb. 1,44,5; Va. 137,5 and 8; 1874,122; N.C. 3836; Mo.<sup>a</sup> 2727; Tex. 2979; Dak. Civ. C. 1100; S.C. 1288; Ala. 2092; Miss. 1141; La. D. 1884; D.C. 715.

(C) And in several states, the bond, bill, note, or contract, and all deposits of goods or other securities therewith, is void (except, in Minnesota, Arkansas, Oregon, as to *bona-fide* purchasers of negotiable paper for value before maturity; and see § 4745): N.Y. 2,4,3,5; Minn. 1879,66,3; Ark. 4732,4735; Ore. 27,3. And all titles to property made as a part of an usurious contract, or to evade usury laws, are void: Ga. 2057*f*.

(D) And in Oregon, the entire debt is forfeited to the county school fund: Ore. 27,3.

NOTES. — <sup>a</sup> But in one state, the plaintiff recovers judgment for the interest; only it is thereupon paid to the county for the use of public schools: Mo.



§ 4833. **Recovery Back.** (A) In several states, if a greater rate than the contract rate (§ 4612) be actually paid, (1) it may be recovered back in a suit by the party paying it: Vt. 2000; N.Y. 2,4,3,3; Pa. *Interest*, 2; Minn. 1879,66,2; Md. 36,4; Va. 137,10; Ky. 60,1,4; Tenn. 2712; Dak. Civ. C. 1100; La. D. 1885,2924.

(2) It may be set off as against the principal debt (*a*) plus the *contract* rate of interest: Vt.; Pa.; O. 3183; Ind.; Kan. 51,3; W.Va. 1882,104; (*β*) without interest: N.J.; Neb.; Ala. 2092; D.C. 716.

(B) In a few, three times the excess over legal interest paid may be so recovered: N.H. 232,3; Wis. 1691; Ida. *ib.* 7; so, in two, double the amount of all the interest paid: N.C. 3836; N.M. 1737. In Indiana, all the excess over *six* per cent may be recovered back.

And interest paid thereon will be allowed (or may be deducted) from the time of payment: Md. In a bill in equity to recover money, goods, or choses in action, taken or received in violation of the usury laws, it is not necessary for the plaintiff, nor can the court require him, to pay any interest whatever on the sum or thing loaned, as a condition of granting relief; nor to deposit any part of the principal sum; N.Y. 2,4,3,8; 1837,430,4.

Such interest, though paid to an assignee, may nevertheless be recovered back from the lender: Va., Ky.

But nothing herein makes usury a cause of action when the obligation has been redeemed or settled by the obligors for a valuable consideration (except a renewal): Md. 36,6.

Such action must, in Pennsylvania, be brought within six months: Pa. *ib.* 2; in others, within a year: N.Y.; Wis.; Va.; Ida.; Ga. 2057*e*; La.; D.C.; within three years: N.M.; within two years: Minn., N.C.

Any person charged with usury may generally be required to answer to the same on oath, in civil suits; see Part IV.

One half the interest thus recovered back must be paid to the county: Minn.

§ 4834. **State Suits.** In New York, if no suit is brought according to § 4833, the sum specified therein may be recovered by any overseer of the poor of the town or county where the usury was paid, at any time within three years after the expiration of the time limited in § 4832 for suits by the party: N.Y. 2,4,3,4; and see in Parts IV., V. And in Connecticut, any person may sue and recover (1) the excess of interest over the legal rate paid: Ct. 18,5,1; Md. 36,4; (2) a sum equal to the money lent, one half to the use of the person suing, the other half to the State: Del. 63,1. Such suit must be brought within a year: Ct. See, generally, in Part V. In many states, usury is also punishable by fine or penalty. And the party has generally his remedy in equity also. See in Part IV.

§ 4835. **Defence of Usury.** (See §§ 4830-2.) In several states, no corporation may interpose the defence of usury in any action: N.Y. 1850,172,1; Ill. 74,11; Wis. 1690; W.Va. 24,22. See, for other states, in Part III., *Corporations*.

In several, the defence of usury must be made by plea, or a notice in writing must be filed in the cause stating that the defendant means to file such defence. See Part IV.

For the defence in the case of notes and bills, see § 4709. No defence of usury can be made, nor application for a relief upon an usurious contract, unless a tender of the principal sum have been first made: Wis. 1692; and see in Part IV. All titles to property made as part of an usurious contract or to evade the usury laws are void: Ga. 2057*f*.

§ 4836. **Assignees.** Nothing in this article, however, prevents the assignee in good faith and without notice of an usurious contract recovering against the usurer the full amount of the consideration paid by him for such contract (less the amount of the principal money): Io. 2081; Ore. 27,4.

§ 4837. **Back Interest.** Interest from date, when stipulated, if the debt is not punctually paid at maturity, may be recovered, *provided* interest has not already been included in the principal amount: Ga. 2052.

**Art. 484. Contracts bearing Interest.**

§ 4840. All Judgments and decrees, in most states, bear interest from their date to satisfaction, at the legal rate: Me. 82,34; R.I. 216,9; Ct. 19,16,1; N.Y. Civ. C. 1211; Pa. *Interest*, 9; *Judgments*, 42; O. 3180-1; Ind. 5199; Ill. 74,3; Mich. 1597; Io. 2078; Kan. 51,5; Neb. 1,44,3; W.Va. 1882,120,18; N.C. 529; Ky.<sup>a</sup> 22,16; 60,1,6; Tenn. 2705; Mo. 2725; Ark. 4740; Tex. 2980; Cal. 6920; Ore. 1880, p. 17; Nev. 32; Col. 1707; Wash. 320; Dak. Civ. C. 1101; Ida.<sup>b</sup> 1879, p. 7,5; Mon. G. L. 729; Wy. 63,3; S.C. 1289; Ga. 2054; Ala. 2090; Miss. 1143,1958; Fla. 123,1; N.M. 1734; Ariz.<sup>b</sup> 3450; D.C. 713,829. See also in Part IV.

And if there be interest specified in a contract on which the judgment is founded, the judgment bears interest at that rate (1) in any case (if not above the lawful contract rate: § 4812): O.; Mich.; Io.; Kan. 51,6; Neb.; Ky. 22,16; Mo.; Ark. 4741; Tex.; Ore. 1880, p. 17; Nev. 33; Wash.; Miss. 1141; N.M. 1735; Ariz. 3451.

(2) Only if such rate be less than the legal rate: Ind.

But after death of the borrower, the rate on a judgment or on the contract, after maturity, is reduced to the legal rate: Ky. 22,17. And the high rate is only allowed on the original sum claimed or due: Nev.

The legal rate is always allowed, whatever be the rate in the contract: Mo.; Fla. 126,3.

When a surety satisfies the debt or obligation of the principal, he may recover on the amount so paid such rate of interest as was originally provided for, and his judgment shall bear such interest, not exceeding ten per cent: Ind. 1219. See Art. 512.

NOTES. — <sup>a</sup> Except for personal injuries. <sup>b</sup> Only judgments for money lent or due upon account settled.

§ 4841. **Verdicts.** (A) In many states, interest is given from the verdict of debt or damages (1) until the judgment is satisfied: R.I. 216,10; Pa. *Interest*, 10; *Verdict*, 3; Ind. 5199; N.C. 530; (2) in others, until the rendition of judgment: N.H. 232,1; N.Y. Civ. C. 1235; (3) in others, interest from any award or verdict to the time of entering judgment is added to and made a part of the judgment: Ill. 74,3; Mich. 1598; for other states, see in Part IV.

(B) So, from awards of referees and reports of masters: R.I.

§ 4842. **Interest as Damages.** (See also in Part IV.) In many states, legal interest may be recovered and allowed in civil actions as damages for the detention of money after it becomes payable: Ct. 18,5,2; Mo. 2126.

So, in any action founded upon contract: Va. 173,14; W.Va. 157,14; 1882,120.

§ 4843. **Other Contracts.** (See also § 4840, for citations.) All bonds bear interest from the time when due: O. 3181; Ill. 74,2; N.C.<sup>c</sup> 44; Tenn.<sup>a,c</sup> 2702; Nev. 32; Col. 1707; Ida.; Mon.; Ariz. So, all bills: O., Ill., N.C.,<sup>c</sup> Tenn.,<sup>a,c</sup> Nev., Col., Ida., Mon., Ariz. So, notes: O.; Ill.; N.C.;<sup>c</sup> Tenn.;<sup>a,c</sup> Nev.; Col.; Ida.; Mon.; Fla. 123,1; Ariz.

So, all liquidated and settled accounts: O.; Ind.<sup>b</sup> 5200; Ill.; Io.;<sup>b</sup> Kan.<sup>b</sup> 51,1; Neb.<sup>b</sup> 1,44,4; N.C.;<sup>a,c</sup> Tenn.;<sup>b,c</sup> Cal.;<sup>b</sup> Ore.;<sup>b</sup> Col.;<sup>b</sup> Dak.;<sup>b</sup> Ida.;<sup>b</sup> Mon.;<sup>b</sup> Wy.<sup>b</sup> 63,4; S.C.; Ga. 2056; N.M.<sup>b</sup>

So, all contracts for the payment of money or loans: O.; Io. 2077; N.C.; Mo.; Tex. 2976; Cal. 6914; Ore.; Dak. Civ. C. 1094,1098; S.C.; Ala. 2089; Fla.; N.M.; "other instruments in writing:" O.; Ind.; Ill.; Neb.; Mo. 2723; Cal.; Nev.; Col.; Dak.; Ida.; Mon.; Wy.; Ariz.

Money due or to become due for the forbearance or payment whereof an express promise to pay interest has been made : Io., Kan., Mo., Ore.

So, all securities for the delivery of specific articles bear interest as moneyed contracts, the articles to be valued by the jury at the time they become due : N.C. 46 ; Tenn. 2703,2706 ; Ala. So, all contracts for the performance of any act or duty, the compensation for not doing it being estimated in money : Ala.

So, in several, on accounts stated, from the day of presentment or settlement and demand : Ind., Ill., Mo., Nev., Ga. ; on all open accounts from the January 1st succeeding each charge : Tex. 2977. But tradesmen's accounts, and all others which by custom become due from the end of the year, bear interest from that time : Ga. 2057.

So, in many states, on money had and received for the use of another, and retained without the owner's knowledge or consent, from the day when so received : Ind., Ill., Io., Kan., Neb., Mo., Cal., Ore., Col., Dak., Mon., Wy., N.M.

On money lent or advanced for the use of another : Ill., Io., Kan., Neb., Mo., Nev., Col., Mon., Wy. On money withheld by an unreasonable and vexatious delay of payment : Ill., Kan., Neb., Col., Mon., Wy.

On money due to employees from the end of each month, unless paid within fifteen days thereafter : Kan. On open accounts from the date of the last charge : Col. Unsettled accounts bear interest (1) after six months from the date of the last item : Io. ; Neb. ; N.M. 1734, 1736 ; (2) after thirty days therefrom : Wy.

All municipal warrants for the payment of money bear legal interest after date of their presentation for payment : Neb. 1,44,10 ; Col. 1709. But state warrants and certificates draw interest at only eight per cent : Col.

So, all contracts for rent : Ga. 2233 ; La. 1944 ; and upon annuities : La. The same rule applies to sums due for the restitution of fruits, or for interest paid by a third person in discharge of the debtor : La.

If the debt be payable on demand, the interest is computed from the day of demand : Tenn. 2704 ; Ga. 2056.

Suing for the debt is declared equivalent to an actual demand : Tenn. For promissory notes payable on demand, see § 4733.

Generally, all debts bear legal interest unless otherwise stipulated : La. 1933.

NOTES. — <sup>a</sup> When in writing and signed by the party. <sup>b</sup> From the day of settlement. <sup>c</sup> Unless stipulated in writing that they shall not bear interest.

**§ 4844. On Instalments.** In Michigan, when any instalment of interest upon any note, bond, mortgage, or other written contract, is due and unpaid, interest may be collected thereon at the same rate as specified in the instrument for interest on the principal, not exceeding ten per cent ; and if no rate be specified in the instrument, at the legal rate : Mich. 1599.

**§ 4845. After Maturity,** when no rate of interest is specified, notes and instruments bear the same rate of interest as before : Minn. 1879,66,5 ; Kan. 51,6. So, after any breach of the contract : Dak. Civ. C. 1102.

The release of the principal, without any reserve as to interest, raises the presumption that it also has been paid, and operates a release of it : La. 2925.

## Art. 485. Time and Payment.

**§ 4850. Computation of Time.** (See also § 1023.) For the purpose of calculating interest, a month is considered the twelfth part of a year, and as equivalent to thirty days : Ct. 18,5,1 ; N.Y. 2,4,3,9 ; Ill. 74,10 ; 98,16 ; Ark. 4737 ; Cal. 6917 ; Dak. Civ. C. 1097.

So, for any period less than a year for the purpose of interest : Cal., Dak. The term year means 365 days ; half year, 182 days ; quarter, 91 days : Cal. 3257.

And interest for any number of days less than a month is estimated in the proportion which such number of days shall bear to thirty : N.Y., Ill., Ark.



Time is computed according to the Gregorian or new style; and since 1752 the 1st of January is the first day in the year: Cal. 3255; N.Y.

"Standard time" is adopted by law in a few states: Mich. 1885,5; Wis. 1885, 216.

§ 4851. "**Per Annum.**" Interest is to be so calculated, whether the words *per annum* or *by the year* be added or not: N.Y. 2,4,3,10; Ind. 5203; Ill. 74,9; Neb. 1,44,9; Ark. 4739; Cal. 6916; Dak. Civ. C. 1096; Wy. 63,5.

§ 4852. **Leap Year.** The year 1900, 2100, 2200, 2300, or any other future hundredth year of which the year 2000 is the first, except only every fourth hundredth year, are not leap years; and the years 2000, 2400, 2800, and every other fourth hundredth year, and also every fourth year, except as above, which by usage is considered a leap year, is a leap year consisting of 366 days: Cal. 3256. The odd day of a leap year is reckoned with the day before it as one day: Cal. 3257.

§ 4853. **Day, Week, etc.** A week is seven consecutive days: Cal. 3258. A day lasts from midnight to midnight: Cal. 3259. *Day-time* is the period between sunrise and sunset; *night-time* between sunset and sunrise: Cal. 3260.

## Art. 486. Weights and Measures.

§ 4860. **Citations.** See N.H. 121,13,14,16,17; 122,3,8,17,19; Mass. 60,22,61,67, 73,79; 65,27; 66, 1-2; Me. 38,56-7; 41,1,6-7,11,15-17,19-20; 43,10; 1885,264, 266; Vt. 3707-15; 1884,86; R.I. Ch. 143; 119,4; 126,6; Ct. T. 16, Ch. 15; N.Y. Part 1, T. 2; 1851,134; N.J. *Weights, etc.*; 1879,48; 1881,109; Pa. *Weights, etc.*; *Grain and Salt*; 1885,111; O. 4428-4446; Ind. 6553-4; 1885,50; Ill. Ch. 147; Mich. 1566-1573; Wis. 1665-1670; Io. 2045,2049-51; Minn. 21,5-10; Kan. 116,9-11; 1885,126 and 127; Neb. 1,95; 1883,81; Md. 32,16-21; 1882,264; 1884,42; Del. Ch. 66; 67,1; V. 13,154; V. 17,552,553; Va. 88,6 and 8; 1877,90 and 167; W.Va. 200,17; 1882,59; N.C. 3843,3849,3850; 1885,26; Ky. 112,6-8; Tenn. 2685-6; 2692-3; Mo. 7663,7667; Tex. 1883,74; Cal. 3209-3223; Ore. 62,4; Col. 3470-2; Wash. 1286; App. p. 9; Dak. 1885,151; Pol. C. Ch. 37; Ida. 1883, pp. 64,65; Mon. G. L. 1226-7; Ga. 1587a; Ala. 1883,50; Miss. 949; La. D. 3925-6; N.M. 2931-2948; Ariz. 3607.

The weights, measures, etc., connected with the inspection laws of various commodities are not here incorporated. See in Part III.

§ 4861. **The Standards** of weights and measures furnished by the United States government are commonly adopted in all the states.

The metric system is also, in several states, expressly legalized (see U. S. July 28, 1866, §§ 3569,3570): Mass., O., Tenn.

The ordinary English measures of length (yard, foot, inch), surveying (mile, chain, rod, link), surface (square mile, acre, rood), troy weight (pound, ounce, dram, scruple), avoirdupois weight (ton, hundred-weight, pound, ounce), liquid measure (hogshead, barrel, gallon), and dry measure (bushel, peck, quart, pint, gill) are commonly adopted in all the states.

In New Mexico, both the United States and the old Spanish standards are used. Of the latter the fanega is 4952½ cubic inches; the almud is ½ of a fanega. The cuartilla equals a pint.

§ 4862. **Special Variations, etc.** The avoirdupois pound bears to the troy pound the relation of 7000 to 5760: N.Y., N.J., Pa., O., Io., Neb., Tenn., Cal.

The hundred-weight contains 100 avoirdupois pounds, and the ton twenty hundred-weight: N.H., Mass., Me., Vt., Ct., N.Y., Pa., O.,<sup>a</sup> Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Ky., Mo., Cal., Ore., Col., Wash., Mon.

So, the "cental" contains 100 lbs.: Mass. But a ton of coal contains 28 bushels: Mon. A bushel of "stone-coal" is commonly 80 lbs.

The barrel contains  $31\frac{1}{2}$  gallons, and the hogshead 2 barrels: N.Y., O., Io., Cal. It contains  $3\frac{1}{4}$  bushels: La.

The dry gallon contains 282 cubic inches: N.H.; the liquid gallon contains 8 lbs. of distilled water at its maximum density at the sea level: N.Y.; the dry-measure gallon contains 10 lbs. of the same: N.Y.; the liquid gallon, 231 cubic inches: N.J., Pa., Ind., Neb., Tenn., Mo.

Goods sold by dry measure must be heaped as full as the measure will hold: O., Ill., Mich., Wis., Minn., Cal., Ore., Wash. Heap measures must be cylindrical, with plane bottom: N.Y., Cal.

The bushel in heap measure contains 2564 cubic inches: Ct.; Kan. 2150.42 inches: N.J.; Pa.; Neb.; Tenn.; Mo.; Wash. The bushel must be  $19\frac{1}{2}$  inches in diameter outside; the half bushel,  $15\frac{1}{2}$ ; and the peck,  $12\frac{1}{2}$ : N.Y., Cal. So,  $18\frac{1}{2}$ ,  $13\frac{3}{4}$ ,  $10\frac{3}{4}$ , and the half peck 9 inches, respectively; but all *inside*: N.H., Minn. The half-bushel is  $13\frac{3}{8}$  in interior diameter, and  $7\frac{1}{4}$  inch deep: O. It contains  $1075\frac{1}{2}$  cubic inches: Ind.

NOTE. — <sup>a</sup> Except of pig-iron and iron ore.

§ 4863. **Particular Commodities.** The bushel of wheat contains 60 lbs.: N.H., Mass., Me., Vt., Minn., Kan., Neb., Del., Va., W.Va., N.C., Ky., Mo., Tex., Cal., Ore., Col., Wash., Dak., Mon., Ga., La. Of rye, 54 lbs.: Cal.; 32 lbs.: La.; 56 lbs.: N.H., Mass., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Va., W.Va., N.C., Ky., Mo., Tex., Ore., Col., Dak., Mon., Ga. Of Indian corn, 52 lbs.: Cal.; 58 lbs.: N.Y.; 56 lbs.: Mass., Me., Vt., R.I., Ct., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Del., Va., W.Va., N.C., Ky., Mo., Tex., Ore., Col., Wash., Dak., Mon., Ga., La. Of barley, 50 lbs.: Cal.; 32 lbs.: La.; 48 lbs.: Mass., Me., Vt., R.I., Ct., N.Y.; N.J., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Va., W.Va., N.C., Mo., Tex., Col., Dak., Mon.; 47 lbs.: Pa., Ky., Ga.; 46 lbs.: Ore.; 45 lbs.: Wash. Of buckwheat, 40 lbs.: Cal.; 42 lbs.: Minn., Tex., Ore., Wash., Dak.; 50 lbs.: N.J., O., Ind., Wis., Kan., N.C.; 48 lbs.: Mass., Me., Vt., Ct., N.Y., Pa., Mich.; 56 lbs.: Ky.; 52 lbs.: Ill., Io., Neb., Va., W.Va., Mo., Col., Mon., Ga. Of oats, 32 lbs.: N.H., Mass., Vt., R.I., Ct., N.Y., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Va., W.Va., N.C., Ky., Tenn., Mo., Tex., Cal., Col., Dak., Ga., La.; 30 lbs.: Me., N.J.; 26 lbs.: Md.; 36 lbs.: Ore.; 35 lbs.: Mon.; 36 lbs.: Wash.; Rice corn, 56 lbs.: Kan. Rice, 44 lbs.: N.C. Corn meal, 50 lbs.: N.H., Mass., Me., R.I., Ct., Ind., Mich., Kan., Neb., Va., Ky., Mo., Col., Mon.; 48 lbs.: Ill., Del., N.C., Ga. Rye meal, 50 lbs.: N.H., Mass., Me., R.I., Ct. Pease, 60 lbs.: N.H., Me., Vt., Ct., N.Y., N.J., O., Mich., Neb., Va., N.C., Ky., Mo., Wash., Dak., Ga. Beans, 60 lbs.: N.H., Me., Ct., N.J., O., Ind., Ill., Mich., Wis., Io., Kan., Neb., Va., W.Va., Ky., Mo., Tex., Col., Wash., Dak., Mon., Ga.; 62 lbs.: Vt., N.Y. Potatoes, 60 lbs.: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Va., W.Va., N.C., Ky., Mo., Tex., Ore., Col., Wash., Dak., Mon., Ga.; 56 lbs.: Md. Apples, 44 lbs.: Me.; 48 lbs.: Mich., Io., Mo.; 46 lbs.: Vt.; 50 lbs.: N.J.; 57 lbs.: Wis.; 45 lbs.: Ore., Wash. Carrots, 50 lbs.: Me., Vt., Wis., Mo., Mon.; 55 lbs.: Ct. Onions, 52 lbs.: Mass., Me., Vt., R.I., Dak.; 48 lbs.: Ind.; 50 lbs.: Ct., O., Wis., Wash.; 57 lbs.: N.J., Ill., Io., Kan., Neb., Va., Ky., Mo., Tex., Col., Mon., Ga.; 54 lbs.: Mich. Ruta-baga, beets, and mangelwurzel, 60 lbs.: Me., Vt., Ct.; 56 lbs.: Wis.; 50 lbs.: Mo. English turnips, 50 lbs.: Me., Ct., Wash., Mon.; 42 lbs.: Wis., Mo.; 55 lbs.: Ill., Kan., Neb., Va., Tex., Ga.; 58 lbs.: Mich.; 60 lbs.: Ky., Dak. Clover seed, 60 lbs.: Vt., N.Y., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Va., W.Va., N.C., Ky., Mo., Tex., Ore., Col., Dak., Mon., Ga.; 64 lbs.: N.J. Herdgrass or timothy seed, 45 lbs.: Mass., Vt., O., Ind., Ill., Mich., Wis., Io., Kan., Neb., Va., W.Va., Ky., Mo., Tex., Col., Mon., Ga.; 44 lbs.: N.Y.; 42 lbs.: Dak.; 40 lbs.: Wash. India wheat, 46 lbs.: Vt. Root crops generally,

50 lbs. : R.I., Wis., Wash., Mon. Parsnips, 45 lbs. : Ct. ; 44 lbs. : Wis., Mo. ; 55 lbs. : Ind. ; 50 lbs. : Mon. Bran and shorts, 40 quarts to the bushel : N.Y. ; 20 lbs. : Ill., Io., Kan., Neb., Ky., Mo., Tex., Dak., Ga. Flaxseed, 55 lbs. : N.Y., N.J., Ill., N.C. ; 56 lbs. : O., Mich., Wis., Io., Kan., Va., W.Va., Ky., Mo., Tex., Dak., Mon., Ga. Coarse salt, 70 lbs. : Mass., Me. ; 50 lbs. : Ky., Mo., Tex., Mon. ; 80 lbs. : Col., Dak. Fine salt, 60 lbs. : Me. ; 50 lbs. : Ind., Io., Kan., Neb., Va., Ky. ; 55 lbs. : Ill., Ky. ; 56 lbs. : Mich. Sweet potatoes : 54 lbs. : N.J. ; 46 lbs. : Dak. ; 50 lbs. : O., Kan., Neb. ; 55 lbs. : Ind., Ill., Ky., Tex., Ga. ; 56 lbs. : Mich., Va., Mo. ; 46 lbs. : Io. Cottonseed, 30 lbs. : N.C., Ga. ; 33 lbs. : Mo. ; 32 lbs. : Tex., Ala. The barrel of potatoes weighs 165 lbs. : Me. ; of flour, 196 lbs. : Vt., Ind., Miss. ; of beef or pork, 200 lbs. : Ind. ; 196 lbs. : Miss.

Cords of wood must be either 4 feet, 3 feet, or 2 feet long of the wood (N.H., Mass.), including half the kerf, and being well and closely laid together, 8 feet in length, 4 in width, and 4 in height : N.H., Mass., Me., Vt., Va.



## DIVISION II.—ABNORMAL LAW.

### TITLE I.—CONTRACT RELATIONS.

#### CHAPTER I.—DEBTOR AND CREDITOR.

##### **Art. 500. General Principles.**

§ 5000. **Definitions.** A debtor, within the meaning of this title, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent. A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money (Cal., Dak.). So, substantially, in Georgia: Ga. 1944.

In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract: Cal. 8429-8430; Dak. Civ. C. 2018-20.

§ 5001. **Rights of Debtors.** A debtor may prefer one creditor to another, and to that end give *bona fide* a lien by mortgage or otherwise, or he may sell in payment of the debt, or transfer negotiable papers as collateral security: Cal. 8432; Dak. Civ. C. 2021; Ga. 1953.

The surplus in such cases not being reserved for his own benefit or that of any other favored creditor to the exclusion of other creditors: Ga.

§ 5002. **The Rights of Creditors** should be favored by the courts, and every remedy and facility afforded them to detect, defeat, and annul any effort to defraud them of their just rights: Ga. 1945.

Creditors may attack as fraudulent a judgment or conveyance or any other arrangement interfering with their rights, either in law or equity: Ga. 1947.

§ 5003. **Equitable Assets.** Where a creditor is entitled to resort to each of several funds for the satisfaction of his claim, and another person has an interest in or is entitled as a creditor to resort to some, but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons: Cal. 8433; Dak. Civ. C. 2022.

Courts of equity should assist creditors in recovering equitable assets in every case where to refuse interference would jeopard the collection of their debts: Ga. 1946.

§ 5004. **Two Remedies.** The creditor cannot pursue the person and property of the debtor at the same time, except in cases specially provided for; but the process last sued out shall be void: Ga. 1948.

As among themselves, creditors must so prosecute their own rights as not unnecessarily to jeopard the rights of others; hence, a creditor having a lien on two funds of the debtor equally accessible to him will be compelled to pursue the one on which other creditors have no lien: Ga. 1949.

§ 5005. **Appropriation of Payments.** See § 4166.

§ 5006. **Fraudulent Removal.** If any person removes or aids in removing any debtor out of the county where he has resided for six months, with the intent of defrauding creditors, such person is liable for all the debtor's debts in such county: N.C. 1551.

§ 5007. **Civil Law of Debtor and Creditor.** See, for other states, *Insolvency*, in Part IV.

**What Contracts shall be Avoided by Persons not Parties to them.** Contracts, considered with respect to their operation on property, either purport to transfer ownership or to give some determinate right upon it. A sale or exchange is an example of the first, a pledge or mortgage of the second of these species of contracts. There is a third right implied in all obligations, to wit: that the property of the debtor shall be liable for all consequences attending their non-performance; but this right cannot be exercised, unless the contract be broken, nor until judgment be obtained for the recovery of what is due in consequence of its breach.

From the principle established by the last preceding paragraph, it results that every act done by a debtor with the intent of depriving his creditor of the eventual right he has upon the property of such a debtor, is illegal, and ought, as respects such creditor, to be avoided. This can be done in the mode and under the circumstances set forth in the following rules: La. 1968-9.

**Of the Action of the Creditors in Avoidance of Contract, and its Incidents.** The law gives to every creditor, when there is no cession of goods, as well as to the representatives of all the creditors when there is any such cession, or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights.

This action can only be exercised when the debtor has not property sufficient to pay the debt of the complaining creditor, or of all his creditors where there has been a cession, or any proceeding analogous thereto.

It cannot be exercised by individual creditors, until their debts are liquidated by a judgment, unless the defendant in such action be made party to the suit for liquidating the debt brought against the original debtor in the manner hereinafter directed.

The defendant in such action may demand a discussion of the property belonging to the original debtor, before any judgment shall be pronounced in the suit to avoid the contract; and on his pointing out and proving the existence of such property situate within this state, and the title to which is not in dispute, the suit against him shall be stayed until such property shall be dismissed, and if the result of this discussion be that the property pointed out is not applicable to the payment of the plaintiff, the defendant shall bear all the expenses of the same.

If, during the pendency of the action given by this section, the original debtor discharges the debt due to the plaintiff, or acquires the property applicable to its payment and sufficient in amount, such action can no longer be sustained, it being the true intent of the law that a contract avoidable by creditors under this section cannot, on that account, be avoided by either of the parties.

The plaintiff in the action given in this section may join the suit for annulling the contract to that which he brings against the original debtor for liquidating his debt by a judgment, and in such suit either of the defendants may controvert the demand of the plaintiff.

When the defendant in the action given by this section has not been made party to the suit against the original debtor, he may controvert the demand of the plaintiff, although it be liquidated by a judgment, in the same manner that the debtor might have done before the judgment.

The judgment in this action, if maintained, shall be that the contract be avoided as to its effects on the complaining creditors, and that all the property or money taken from the original debtor's estate, by virtue thereof, or the value of such property to the amount of the debt, be applied to the payment of the plaintiff: La. 1970-7.

**What Contracts shall be Avoided by this Action.** No contract shall be avoided by this action but such as are made in fraud of creditors, and such as, if carried into execution, would have the effect of defrauding them. If made in good faith, it cannot be annulled, although it prove injurious to the creditors; and although made in bad faith, it cannot be rescinded, unless it operate to their injury.

If the contract be onerous, and the original debtor made it with intent to defraud his creditors, but the person with whom he contracted was in good faith, the contract cannot be annulled, except under the circumstances and in the manner hereinafter provided.

If the contract be purely gratuitous, it shall be presumed to have been made in fraud of creditors, if, at the time of making it, the debtor had not, over and above the amount of his debts, more than twice the amount of the property passed by such gratuitous contract.

If the contract be onerous, but made in fraud on the part of the debtor, but in good faith on the part of the person with whom he contracted, if the value of the property transferred by such contract exceed by one fifth the price or consideration given for it, the creditors may annul the contract, and take back the property on paying the price or the value of the consideration with interest, but in this case they shall not receive the fruits.

If the party with whom the debtor contracted be in fraud as well as the debtor, he shall not, on the annulling the contract, be entitled to a restitution of the price or consideration he may have paid, except for so much as he shall prove has inured to the benefit of the creditors by adding to the amount of property applicable to the payment of their debts; but if the only consideration be a sum due from such debtor to the party with whom he contracted, then the only restitution to be made is the placing the parties in the situation in which they were before the contract complained of was made.

But if such fraud consist merely in the endeavor to obtain a preference over other creditors, for the securing of payment of a just debt, under circumstances in which by law the endeavor to obtain such preference is declared to be a constructive fraud, in such case the party shall only lose the advantage endeavored to be secured by such contract, and shall be reimbursed what he may have given or paid, but without interest; and he shall restore all advantages he has received from the transaction.

Every contract shall be deemed to have been made in fraud of creditors, when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor.

By being in insolvent circumstances is meant, that the whole property and credits are not equal in amount, at a fair appraisalment, to the debts due by the party. And if he who alleges the insolvency shows the amount of debts, it is incumbent on the other party to show property to an equal or greater amount. To prove the state of his affairs at the period of the contract, the debtor may, at the option of the plaintiff, be examined as a witness in the action for annulling the contract.

No sale of property, or other contract made in the usual course of the party's business, nor any payment of a just debt in money, shall be affected by virtue of any provision in this section, although the party was in insolvent circumstances, and the person with whom he contracted, or to whom he made the payment, knew of such insolvency.

No contract made between the debtor and one of his creditors for the purpose of securing a just debt, shall be set aside under this section, although the debtor were insolvent to the knowledge of the creditor with whom he contracted, and although the other creditors are injured thereby, if such contract were made more than one year before bringing the suit to avoid it, and if it contain no other cause of nullity than the preference given to one creditor over another.

If a debtor, in insolvent circumstances, shall anticipate the payment of a debt not yet payable, and shall make this payment to the injury of the creditors whose debts were either then due, or would fall due before that of which he anticipated the payment, this shall be deemed to have been done in fraud of the creditors, and the creditor so preferred shall be obliged to share the loss ratably with the complaining creditors, each creditor, however, preserving the right of mortgage or privilege, if any, which his original debt gave him by law.

Not only contracts which dispose of property, but all others which are made in fraud of creditors, and deprive them of their recourse to the property of their debtor, come within the provisions of this section. The renunciation of a succession or other right to property, the release of a debt without payment, or any other act of this kind, may be avoided by creditors, when done to their prejudice, under the rules above established.

In case the debtor refuse or neglect to accept an inheritance to the prejudice of his creditors, they may accept the same, and exercise all his rights in the manner provided for in the title of successions, and they are authorized, by virtue of the action given by this section, to exercise all the rights existing in favor of the debtor for recovering possession of the property to which he is entitled, in order to make the same available to the payment of their debts.

There are rights of the debtor, however, which the creditor cannot exercise, even should he refuse to avail himself of them.

They cannot require the separation of property between husband and wife; nor can they oblige their debtor to accept a donation *inter vivos* made to him, nor can they accept it in his stead. Neither can they call on a co-heir of the debtor to collate, when such debtor has not exercised that right.



There are also rights which are merely personal, that cannot be made liable to the payment of debts, and therefore no contract respecting them comes within the provision of this section; these are the rights of personal servitude, of use and habitation, of usufruct of the estate of a minor child, to the income of dotal property, to money due for the salary of an office, or wages, or recompense for personal services.

No creditor can, by the action given by this section, sue individually to annul any contract made before the time his debt accrued.

The action given by this section is limited to one year; if brought by a creditor individually, to be counted from the time he has obtained judgment against the debtor; if brought by syndics or other representatives of the creditors collectively, to be counted from the day of their appointment: La. 1978-1994.

## **Art. 501. Joint Debtors.**

§ 5010. **Rights of Creditor.** See § 5013.

§ 5011. **Rights of Debtors.** No creditor on any joint or joint and several obligation shall have more than one satisfaction and the costs of one suit: Ark. 3902.

§ 5012. **Payment.** If a judgment be recovered, and is satisfied by one of several joint-debtors, he is entitled to an assignment of the debt from the obligee, and may sue his co-debtors in his own name: Del. 65,3.

§ 5013. **Release.** (Compare also Art. 533, which generally applies to joint debtors also.) (A) Any creditor may release one or more of several joint debtors; and such release will operate as a satisfaction or discharge of such person's equitable share of the debt; and the balance of the debt remains valid against the others: N.Y. Civ. C. 1942; Wis. 4204; Kan. 21,5; Nev.<sup>a</sup> 465; Miss. 1003.

(B) So, in others, a creditor may compound or compromise with any joint contractor or co-obligor, and release him from all liability without impairing the contract or obligation as to the other co-obligors: Va. 142,14; Mo. 666; Cal. 6543; Dak. Civ. C. 869. "Unless such others are mere guarantors:" Cal., Dak.

*Provided*, that if the amount paid by the person released exceed his such equitable proportion of the debt, it is a discharge of the debt *pro tanto*: Wis., Miss. And if the person released is a surety, his release operates as payment of the joint debt only to the extent of the money actually paid to procure his release: Wis.

But this section does not enable the principal debtor to be released without the discharge of his or their sureties: Wis. 4205; Mon. G. L. 763.

But in such case the contract or obligation must be credited with the full share of the one released, except where the compounding or compromise is made with a surety; in that case, as between the creditor and the principal, the credit shall be for the sum actually paid by the surety so compounding: Va. *ib.* 15.

Nothing in this section affects or impairs the right of contribution between joint contractors or co-obligors: Va. *ib.* 16; Mo.; Cal.; Dak.; Miss.

In many states, all the provisions of § 5330 apply also to joint debtors, as well as partners; and also, in several, to all joint obligors or contractors.

NOTE.<sup>a</sup>—This applies also to the release of judgment-debtors.

§ 5014. **Joint Obligations** and covenants are all, in many states, taken and held to be joint and several obligations, etc.; see § 4113.

For survival of joint obligations, see also in Part IV. Generally, all joint debts survive against the personal representatives of one of the joint debtors who may die. And if all die, the debt, etc., survives against the executors, etc., of all. See § 4113.

§ 5015. **Suits.** (See also §§ 4741, 4113.) When two or more persons are bound by contract, judgment, decree, or statute, whether jointly only or jointly and severally, or severally only, and including the parties to negotiable paper, common orders, and checks and sureties on the same, or separated instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them: Io. 2550; Minn. 66,36; Kan. 21,4; Ky. Civ. C. 26; Tenn. 3484; Mo. 3467; S.C. Civ. C. 141; N.M. 1885; D.C. 827.

An action or judgment against one or more persons jointly bound is not, in several, a bar to proceedings against the others: Vt. 941; Io.; Ky. Civ. C. 27; N.M.; D.C.

So, in all cases of joint obligations or joint assumptions of co-partners and others, suits may be brought against any one or more of those liable: Mo. 661; N.M. 1846.

§ 5016. **Contribution.** When one joint debtor pays more than his proportion, he may generally compel contribution from the others: Minn. 66,330; Kan. 80,480. See also in Part IV., *Execution*.

So, one of several defendants satisfying a judgment may enforce it against his co-defendants to collect their due proportions: Wash. 649.

So, one co-debtor or co-obligor has all the rights of a surety in §§ 5120, 5140: Ky. 104,10. See also § 5160.

§ 5017. **Limitation.** Generally, a payment or promise by one joint debtor is not sufficient to revive a claim against the others which is barred by limitation. See in Part IV., *Statute of Limitations*.

### § 5018. Louisiana Law.

**Of the Rules which govern Obligations between Creditors in Solido.** The obligation is *in solido* or joint and several between several creditors when the title expressly gives to each of them the right of demanding payment of the total of what is due, and when the payment made to any one of them discharges the debtor, although the benefit of the obligation be to be shared and divided among the different creditors.

It is at the option of the debtor to pay any one of the creditors *in solido* as long as he has not been prevented by a suit instituted by one of them.

Yet if one of the creditors *in solido* remits the debt, the debtor is hereby exonerated only as to the part coming to that individual creditor.

Every act which interrupts prescription with regard to one of the creditors *in solido* avails the other creditor: La. 2088-2090.

**Of the Rules which govern Obligations with respect to Debtors in Solido.** There is an obligation *in solido* on the part of the debtors when they are all obliged to the same thing so that each may be compelled for the whole, and when the payment which is made by one of them exonerates the others toward the creditor.

The obligation may be *in solido* although one of the debtors be obliged differently from the other to the payment of one and the same thing, — for instance, if the one be but conditionally bound whilst the engagement of the other is pure and simple, or if the one is allowed a term which is not granted to the other.

An obligation *in solido* is not presumed; it must be expressly stipulated.

This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law.

The creditor of an obligation contracted *in solido* may apply to any one of the debtors he pleases, without the debtors' having a right to plead the benefit of division.

A suit brought against one of the debtors does not bar the creditor from bringing suits on the same account against the others.

If the thing due has perished through the fault of one or more debtors *in solido*, or while he or they delayed to deliver it, the other co-debtors are not discharged from the obligation of paying the value of the thing; but the latter are not liable for damages.

The creditor can claim damages only from the debtors by whose fault the thing was lost, and from those who delayed to deliver it.

A suit brought against one of the debtors *in solido* interrupts prescription with regard to all.

A co-debtor *in solido* being sued by the creditor may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself as well as such as are common to all the co-debtors.

He cannot plead such exceptions as are merely personal to some of the other co-debtors.

When one debtor becomes sole heir of the creditor, or when the creditor becomes sole heir of one of the debtors, the confusion extinguishes the debt *in solido* only for the part and portion of the debtor or of the creditor.

The creditor who consents to the division of the debt with regard to one of the co-debtors still has an action *in solido* against the others, but under the deduction of the part of the debtor whom he has discharged from the debt *in solido*.

The creditor who receives separately the part of one of the debtors without reserving in the receipt the debt *in solido* or his right in general, renounces the debt *in solido* only with regard to that debtor.

The creditor is not deemed to remit the debt *in solido* to the debtor when he receives from him a sum equal to the portion due by him, unless the receipt specifies that it is for his part.

The same is to be observed of the mere demand made of one of the co-debtors for his part, if the latter has not acquiesced in the demand, or if a judgment has not been given against him.

The creditor who receives separately and without reservation the portion of one of the co-debtors in the arrearages or interest of the debt, loses his claim *in solido* only as to the arrearages and interest due, and not as to those that may in future become due, nor as to the capital, unless the separate payment has been continued during ten successive years.

The obligation contracted *in solido* towards the creditor is of right divided amongst the debtors, who amongst themselves are liable each only for his part and portion.

If one of the co-debtors *in solido* pays the whole debt, he can claim from the others no more than the part and portion of each.

If one of them be insolvent, the loss occasioned by his insolvency must be equally shared amongst all the other solvent co-debtors and him who has made the payment.

In case the creditor has renounced his action *in solido* against one of the debtors, and one or more of the other co-debtors become insolvent, the portion of the insolvent shall be made up by equal contribution by all the debtors, and even those preceadently discharged from the debt by the creditor *in solido* shall contribute their part.

If the affair for which the debt has been contracted *in solido* concern only one of the co-obligors *in solido*, that one is liable for the whole debt towards the other co-debtors, who with regard to him are considered only as his securities.

There are many contracts in which the obligation is declared by law to be *in solido* without any express stipulation to that effect; these will be found in the different chapters which treat of such contracts: La. 2091-2107.

## CHAPTER II. — PRINCIPAL AND SURETY.

### Art. 510. General Principles.

§ 5100. **Definitions.** The contract of suretyship is that whereby one obligates himself to pay the debt of another, in consideration of credit or indulgence or other benefit given to his principal, the principal remaining bound therefor. It differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor: Ga. 2148.

This chapter includes, as sureties, indorsers, guarantors, drawers of bills accepted, and "every other suretyship:" Tex. 3668.

A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.



One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal: Cal. 7831-2; Dak. Civ. C. 1673-4.

In contracts for the payment of money to banks, sureties in fact, known to the parties to be such at the time the contract was made, may be proved to be, and shall have the duties and privileges of, and be considered as, sureties, anything in the contract to the contrary notwithstanding: O. 5832; see in Part IV. So, suretyship in fact may be proved by parol: Ga. 2165.

**§ 5101. Obligation of the Surety.** It is accessory to that of the principal; and if the latter for any cause becomes extinct, the former ceases, of course, even though it be in judgment. If, however, the original contract of the principal was invalid from a disability to contract, and this disability was known to the surety, he is still bound: Ga. 2149.

No surety can be sued unless the principal be joined with him or a judgment have been previously rendered against him, except when the principal cannot be reached: Tex. 3667.

No surety can be compelled in any action to pay more than his due proportion of the original demand: Mo. 3903.

The contract of suretyship is one of strict law, and his liability will not be extended by implication or interpretation: Ga. 2150. The form of the contract is immaterial, provided the fact of the suretyship exists; hence, an accommodation indorser is considered merely as a surety: Ga. 2151.

A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty.

In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts.

Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety: Cal. 7836-8; Dak. Civ. C. 1675-7.

**§ 5102. Release of Surety.** The creditor may release or compound with the surety without releasing the principal; but the release of or compounding with one surety discharges a co-surety: Ga. 2152.

Performance of the principal obligation, or an offer of such performance, duly made as provided in this code, exonerates a surety.

A surety is exonerated, —

1. In like manner with a guarantor;
2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or,

3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do: Cal. 7839-7840; Dak. Civ. C. 1678-9.

If by any act of the creditor, the surety is discharged, and in ignorance of the fact of such discharge he promises to pay, such promise is not binding: Ga. 2158.

**§ 5103. Release by Novation.** A change of the nature or terms of a contract is called a *novation*; such novation, without the consent of the surety, discharges him: Ga. 2153.

**§ 5104. Release by Negligence of the Creditor.** Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability, will discharge him; a mere failure by the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety: Ga. 2154.

**§ 5105. Suit by the Creditor.** (A) A surety may, in several states, when he apprehends that the principal is about to become insolvent or remove permanently from the State without discharging the contract, require the creditor to sue, if a right of action has accrued (or permit the surety to sue in such creditor's name, but at his own cost, in Iowa), and if the creditor neglect or refuse to sue (1) within ten days, and do not permit and enable the surety so to do, he is discharged: Ill.<sup>a</sup> 132,1; Io.<sup>a</sup> 2108-9; (2) so, within thirty days: Tenn.<sup>a</sup> 2725.

(B) In others, a surety, his executors, etc., on a bond, bill, or note for the payment of money or delivery of property, may at any time after an action has accrued thereon, require in writing the creditor to commence suit forthwith; and if not so commenced (1) within thirty days and forwarded with due diligence, the surety is discharged: N.C.<sup>a</sup> 2097-9; Mo.<sup>a</sup> 3896-7, 3899; Ark.<sup>a</sup> 6398-9; (2) at the next term of court, or the second term if good cause be shown for the delay: Ky.<sup>b</sup> 104, 11; Tex. 3660-1; Ala.<sup>a</sup> 3414-5; Miss. 997; (3) within a reasonable time, and prosecuted to judgment and execution: O.<sup>a</sup> 5833-5; Ind. 1210-1; Va. 143, 4-5; 1878, 237; W.Va. 184, 1-2; Wash.<sup>c</sup> 644-5; (4) within three months: Ga. 2156.

These provisions do not affect the rights of the creditor against the principal debtor: Va.; W.Va.; Tenn. 2729.

(C) A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced: Cal. 7845; Dak. Civ. C. 1681.

These provisions do not extend (1) to the official bonds of public officers, administrators, or guardians: Ill. 132, 2; Io. 2111; Tenn.; Mo. 3899; Ark. 6400; and so in the other states noted<sup>a</sup>; (2) nor to bonds with a collateral condition except as specified in the principal provision: Mo., Ark. It does extend to the assignors of any bond, bill, or note legally assignable (§ 4031): Tenn. 2728.

NOTES. — <sup>a</sup> This does not apply to probate, official, and court bonds. <sup>b</sup> Applies also to co-obligors or debtors. <sup>c</sup> Except in case of creditors under legal disabilities: Wash. 651.

§ 5106. **Execution** issues, if a suit be brought jointly against a principal and sureties, first against the property of the principal, and in default thereof only against that of the sureties: N.J. *Practice*, 199; O. 5419; Ind. 780, 1213; Io. 3039; Kan. 80, 470; Neb. 2, 511; N.C. 2100-1; Tenn. 3741; Tex. 2284, 3663; Wash. 647; Dak. C. Civ. P. 358; Mon. G. L. 769; Wy. Civ. C. 455; Miss. 1001. See also in Part IV.

The term *surety* as here used includes accommodation indorsers, stayers, and all other persons whose liability on the claim is posterior to that of another: Io. 3040.

§ 5107. **Louisiana Law of Suretyship.** *Of the Nature and Extent of Suretyship.* *Suretyship* is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not.

Suretyship can only be given for the performance of valid contracts. A man may, however, become surety for an obligation of which the principal debtor might get a discharge by an exception merely personal to him; such as that of being a minor, or a married woman.

The suretyship cannot exceed what may be due by the debtor, nor be contracted under more onerous conditions.

It may be contracted for a part of the debt only, or under more favorable conditions.

The suretyship which exceeds the debt or which is contracted under more onerous conditions shall not be void, but shall be reduced to the conditions of the principal obligation.

A man may be surety without the order or even the knowledge of the person for whom he becomes surety.

Surety may also be given, not only for the principal debtor, but also for the person who has become his surety.

Suretyship cannot be presumed; it ought to be expressed, and is to be restrained within the limits intended by the contract.

A general and indefinite suretyship extends to all the accessories of the principal debt, and even to the costs.

Suretyship does not operate a mortgage on the property of the surety, unless there has been an express agreement.

The debtor obliged to furnish security must offer a person able to contract, of property sufficient to answer for the amount of the obligation, and whose domicile is in the jurisdiction of the court where it is to be given.

Whenever it shall be made to appear to the satisfaction of the judge having jurisdiction thereof that any person who has been appointed to discharge the duties of administrator, executor, tutor, curator, or of any fiduciary trust whatever, is unable to give security in the parish, the judge shall have power to order that sureties residing in any other parish be received.

Where surety is tendered of persons residing out of the parish, the judge alone shall pass on the sufficiency thereof, and shall require such proof as he may deem necessary.

All actions on bonds against the sureties aforesaid may be instituted in the court having original jurisdiction of the subject-matter; and the parties thereto, when legally cited, shall be subject to the jurisdiction of such court.

When the surety received by the creditor, either voluntary or by the direction of law, becomes insolvent, his place should be supplied by another.

An exception to this rule takes place only, where by the agreement the creditor has required that a certain person shall be given as surety.

The obligations of sureties descend to their heirs: La. 3035-3044.

**§ 5108. Of the Effects of Suretyship between the Creditor and the Surety.** The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound *in solido* jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*.

The creditor is not bound to discuss the principal debtor's property, unless he should be required to do so by the surety, on the institution of proceedings against the latter.

The surety who does require the discussion is bound to point out to the creditor the property of the principal debtor, and furnish a sufficient sum to have the discussion carried into effect.

He must not point out the property of the principal debtor situated out of the state, nor the property which is in litigation, nor that which is mortgaged for debt, and no longer in the possession of the debtor.

When the surety has pointed out property in the manner directed in the foregoing article, and has furnished a sufficient sum to have the discussion effected, the creditor is, to the amount of property pointed out, responsible to the surety for the insolvency of the principal debtor, provided it has occurred through remissness in commencing proceedings.

When several persons have become sureties for the same debt, each of them is individually liable for the whole of the debt, in case of insolvency of any of them.

Any one of them may, however, demand that the creditor should divide his action by reducing his demand to the amount of the share and portion due by each surety, unless the sureties have renounced the benefit of division.

A creditor can by no means claim the whole sum from the surety who applied for a division, when the other sureties have become insolvent since the time of that application. The same thing takes place if the creditor has himself voluntarily divided his action.

The creditor may include in the same suit, both the debtor and the surety. If he obtains judgment against both, the surety who is entitled to the benefit of discussion may insist that the judgment shall be first executed against the principal debtor: La. 3045-3051.

## **Art. 512. Rights of Surety against the Principal.**

**§ 5120. Payment by the Surety.** (A) One of several sureties, or any surety, paying or satisfying the note, bill, bond, or contract, is entitled to an assignment of it from the obligee, and can sue in his own name the principal debtor: Md. 64,45; Del. 65,1; Ky. 104,9; Tex. 3664; Ala. 3418; Miss. 999.

(B) So, in others, he is entitled to repayment from the principal: Minn. 66,330; Kan. 80,480; Ky. 104,8; Mo. 3900; Ark. 6401; Cal. 7847; Dak. Civ. C. 1683; La. 3052. See also *Executions*, in Part IV.- With interest at ten per cent: Mo., Ark.

A surety paying money may, nevertheless, recover it from the principal, unless he had notice of the latter's intention to resist it: Ga. 2163.



If the principal executes any mortgage or other security to the surety or indorser to indemnify him, the latter may foreclose or enforce such lien immediately after judgment has been rendered against him on his contract: Ga. 2164.

(C) So, he is entitled to an assignment of the judgment against the principal or to prosecute it for his own use: N.J. *Practice*, 199; O. 5836, Amt.; Ind. 1214; Md. 64,46; 1880,161; Del. 65,3; Va. 143,6; 1878,237; W.Va. 184,3; Mo. 3904; Wash. 648; S.C. 2180; Ga. 2166-7; Miss. 998; Fla. 162,409. And he may recover interest and five per cent damages: Va., W.Va.

But nothing herein prevents the party sued (principal or surety) from making any defence which might have been made against the original demand, unless the payment was made after, and in consequence of a judgment in an action of which he had notice: Va. 143,7; 1878,737; W.Va. 184,4; Ky.; Ga. 2162; Miss. 1000.

Any surety or joint obligor is entitled to a summary judgment against the principal when he has satisfied a judgment against the principal or against the surety, he having given notice to the principal to defend: Ga. 2161; Ala. 3410-1. See, generally, in Part IV. A surety paying usury may nevertheless recover it from the principal, unless he had notice of the latter's intention to resist it: Ga. 2163.

If the principal executes any mortgage or other security to the surety or indorser to indemnify him, the latter may foreclose or enforce such lien immediately after judgment has been rendered against him on his contract: Ga. 2164.

A surety has all the rights of a guarantor, whether he becomes personally responsible or not: Cal. 7844; Dak. Civ. C. 1680.

If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section: Cal. 7847; Dak. Civ. C. 1683.

**§ 5121. Subrogation.** A surety so paying the claim (§ 5120) is entitled to a transfer of all the creditor's securities to him: Del. 65,7.

So, a surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such: Cal. 7848; Dak. Civ. C. 1684; Ga. 2176.

A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation: Cal. 7848-7850; Dak. Civ. C. 1684-6.

**§ 5122. Tender by Surety.** The surety may tender to the creditor the amount of his debt, and demand that the evidence of and the securities for the same be delivered up to him, to be enforced against his principal or co-sureties; and a failure of the creditor to comply when within his power shall operate to discharge the surety: Ga. 2155.

**§ 5123. Statute of Limitations.** Commonly, no payment or promise by the principal or by a co-surety can extend the obligation of the surety or the remedy of the creditor against him (see, generally, in Part IV.): Ga. 2157.

**§ 5124. Suits against the Principal.** A surety may maintain an action against his principal (1) to compel him to discharge the debt or liability for which the surety is bound after the same has become due: O. 5845; Kan. 80,529; Ky. Civ. C. 661; Ark. 6395; Cal. 7846; Dak. Civ. C. 1682; Wy. Civ. C. 500; (2) to obtain indemnity before it is due when there is ground for attachment (Part IV.): O. 5846; Kan. 530; Ark. 6396; Wy. Civ. C. 501; Ga. 2160.

He has, in many states, a summary action. See in Part IV.

§ 5125. **Of the Effects of Suretyship between the Debtor and the Surety.** With regard to that remedy, the surety has the same right of action and the same privilege of subrogation, which the law grants to co-debtors *in solido* (§ 5018).

When there exist several principal debtors *in solido* for the same debt, he who became a surety to them all, has his remedy against each of them for the whole amount of what he may have paid.

The surety has no remedy against the principal debtor, who has paid a second time for want of being warned by the surety of the payment made by him. But the surety may have his action against the creditor for his reimbursement.

When the surety has paid without being sued and without informing the principal debtor, he shall have no recourse against the latter, provided that, at the time of payment, the debtor was in possession of such means as would have enabled him to have the debt declared extinct; but in this case the surety has recourse to the creditor for restitution.

A surety may, even before making any payment, bring suit against the debtor to be indemnified by him:—

1. When there exists a lawsuit against him for payment.
2. When the debtor has become a bankrupt, or is in a state of insolvency.
3. When the debtor was bound to discharge him within a certain time.
4. When the debt has become due by the expiration of the term for which it was contracted.
5. At the expiration of ten years, when the principal obligation is of a nature to last a longer time; unless the principal obligation, such as that of guardianship, be of a nature not to be extinguished before a determinate time: La. 3053-7.

#### Art. 514. Rights of Sureties among Themselves.

§ 5140. **Contribution.** Any one surety paying or satisfying the bond or contract is entitled (1) to an assignment of it, or of the judgment on it, from the obligee, and may sue or have execution against the other sureties in his own name (compare § 5120): N.J. *Practice*, 199; Ind. 1215; Md. 64,47; 1880,161; Del. 65,1; Ky.<sup>a</sup> 104,9; Tex. 3665; (2) to recover their due proportion from the others: Va.<sup>b</sup> 143,8; 1878,237; W.Va.<sup>b</sup> 184,5; N.C. 2094; Ky. 104,8; Tenn. 4369; Mo. 3902; Ark. 6403-4; Tex.; Ga. 2173; Ala. 3412; Fla. 162,111; (3) “to control the debt or execution against his co-sureties in order to compel contribution:” Ky.;<sup>a</sup> S.C. 2181; Ga.<sup>c</sup> 2170-1; Miss. 998.

If one of the co-sureties be insolvent, the deficiency must be borne equally by the solvent sureties: Ga. 2173.

NOTES.—<sup>a</sup> In case of a judgment only. <sup>b</sup> If the principal be insolvent. <sup>c</sup> Applies also to indorsers of negotiable paper.

§ 5141. **Process.** The sum recovered as contribution bears interest from the time it is paid by the surety, and shall be deemed and held to be a liquidated demand: Ga. 2174.

A surety suing for contribution must first account for all money and other things received by him from the principal to indemnify him against loss; and if he has paid the entire debt, he may compel his co-surety to transfer to him any mortgage or other security taken from the principal for the protection of such co-surety by relieving him of all liability for contribution: Ga. 2175.

§ 5142. **Of the Effects of Suretyship between the Sureties.** When several persons have been sureties for the same debtor and for the same debt, the surety who has satisfied the debt has his remedy against the other sureties in proportion to the share of each; but this remedy takes place only when such person has paid in consequence of a law-suit instituted against him: La. 3058.

#### Art. 515. Rights of Sureties against Other Persons.

§ 5150. **Subrogation.** Where one co-debtor or co-surety pays the debt or an amount exceeding his proportion, he is entitled to a transfer of the creditors' securities, to enable him to obtain contribution from the others, and has all the remedies of the principal creditor; and his

release to such other debtors, etc., or satisfaction of the judgment, will be of no avail: Del. 65,7; V. 16, C. 91.

A surety who has paid the debt of his principal is subrogated, both at law and in equity, to all the rights of a creditor, and in a controversy with other creditors ranks in dignity the same as the creditor whose claim he paid: Ga. 2176. He is entitled also to be substituted in the place of the creditor as to all securities held by him for the payment of the debt: Ga. 2177.

### **Art. 516. Rights of the Principal.**

§ 5160. **Confessing Judgment.** A surety may not, generally, confess judgment or suffer default when the principal is willing to defend and indemnifies the surety against costs, etc.: Ind. 1216; Ill. 132,4; Va. 143,7; 1878, 237; W.Va. 184,4; Wash. 650; Ala. 3413; Miss. 1000. See, for other states, in Part IV.

§ 5161. **Rights of the Creditor.** A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction: Cal. 7854; Dak. Civ. C. 1687.

### **Art. 517. Discharge of Sureties.** See in Part IV., Division I.

§ 5170. **Louisiana Law of the Extinction of Suretyship.** The obligation which results from a suretyship is extinguished by all the different modes in which other obligations may be extinguished; but the confusion which results in case the principal debtor or his surety should become heirs one to the other does not extinguish the action of the creditor against the person who has become the surety of the surety.

The surety may oppose to the creditor all the exceptions belonging to the principal debtor, and which are inherent to the debt; but he cannot oppose exceptions which are personal to the debtor.

The surety is discharged when by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety.

The voluntary acceptance, on the part of the creditor, of an immovable or any other property, in payment of the principal debt, is a full discharge of the surety, even in case the creditor should be afterwards evicted from the property so accepted.

The prolongation of the terms granted to the principal debtor without the consent of the surety operates a discharge of the latter: La. 3059-3063.

### **Art. 518. Indemnity.**

§ 5180. **Indemnity, what.** Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person: Cal. 7772; Dak. Civ. C. 1639.

§ 5181. **Indemnity against Future Wrongful Act Void.** An agreement to indemnify a person against an act thereafter to be done is void, if the act be known by such person at the time of doing it to be unlawful.

An agreement to indemnify a person against an act already done is valid, even though the act was known to be wrongful, unless it was a felony: Cal. 7773-4; Dak. Civ. C. 1640-1.

§ 5182. **Indemnity extends to Acts of Agents.** An agreement to indemnify against the acts of a certain person applies not only to his acts and their consequences, but also to those of his agents: Cal. 7775; Dak. Civ. C. 1642.

§ 5183. **Indemnity to Several.** An agreement to indemnify several persons applies to each, unless a contrary intention appears: Cal. 7776; Dak. Civ. C. 1643.



**§ 5184. Persons Indemnifying Liable Jointly or Severally with Person Indemnified.** One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act: Cal. 7777; Dak. Civ. C. 1644.

**§ 5185. Rules for Interpreting Agreement of Indemnity.** In the interpretation of a contract of indemnity the following rules are to be applied, unless a contrary intention appears:—

1. Upon an indemnity against liability, expressly or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.

3. An indemnity against claims, or demands, or liability, expressly or in other equivalent terms, embraces the costs of defence against such claims, demands, or liability incurred in good faith and in the exercise of a reasonable discretion.

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity; but the person indemnified has the right to conduct such defences if he chooses to do so.

5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith is conclusive in his favor against the former.

6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defence, judgment against the latter is only presumptive evidence against the former.

7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying is inapplicable if he had a good defence upon the merits, which by want of ordinary care he failed to establish in the action: Cal. 7778; Dak. Civ. C. 1645.

**§ 5186. When Person Indemnifying is a Surety.** Where one at the request of another engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety for whatever he may pay: Cal. 7779; Dak. Civ. C. 1646.

**§ 5187. Bail, what.** Upon those contracts of indemnity which are taken in legal proceedings as security for the performance of an obligation imposed or declared by the tribunals, and known as undertakings or recognizances, the sureties are called bail (see Part IV.): Cal. 7780; Dak. Civ. C. 1648.

## Art. 519. Guaranty.

**§ 5190. Definition of Guaranty.** A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

A person may become guarantor even without the knowledge or consent of the principal: Cal. 2787-8; Dak. Civ. C. 1649-1650.

**§ 5191. Creation of Guaranty.** Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

Except as prescribed by the next section, a guaranty must be in writing and signed by the guarantor; but the writing need not express a consideration.

A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance: Cal. 7792-5; Dak. Civ. C. 1651-4.

§ 5192. **Interpretation of Guaranty.** In a guaranty of a contract the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed.

A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.

A guaranty such as is mentioned in the last section is not discharged by an omission to take proceedings upon the principal debt or upon any collateral security for its payment, if no part of the debt could have been collected thereby.

In the cases mentioned in § 2800 the removal of the principal from the State, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect upon the rights and obligations of the guarantor: Cal. 7799-7802; Dak. Civ. C. 1655-8.

§ 5193. **Liability of Guarantors.** A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.

A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice.

Where one guarantees a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable by the exercise of reasonable diligence to acquire information of such default, and the creditor has actual notice thereof.

The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

A guarantor is not liable if the contract of the principal is unlawful; but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal: Cal. 7806-7810; Dak. Civ. C. 1659-1663.

§ 5194. **Continuing Guaranty.** A guaranty relating to a future liability of the principal under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.

A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce: Cal. 7814-5; Dak. Civ. C. 1664-5.

§ 5195. **Exoneration of Guarantors.** A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation, or suspend or impair the remedy, within the meaning of the last section.

The rescission of an agreement altering the original obligation of a debtor, or impairing the remedy of a creditor, does not restore the liability of a guarantor who has been exonerated by such agreement.

The acceptance by a creditor of anything in partial satisfaction of an obligation reduces the obligation of a guarantor thereof in the same measure as that of the principal, but does not otherwise affect it.

Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor.

A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal.

A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor: Cal. 7819-7825; Dak. Civ. C. 1666-1672.

## CHAPTER III.—PRINCIPAL AND AGENT.

**Art. 520. General Principles.**

§ 5200. **Definitions.** An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.

An agent for a particular act or transaction is called a special agent. All others are general agents.

An agency is either actual or ostensible.

An agency is actual when the agent is really employed by the principal.

An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him : Cal. 7295, 7297-7300 ; Dak. Civ. C. 1337, 1339-1342.

§ 5201. **Creation of Agency.** Any person having capacity to contract may appoint an agent, and any person may be an agent : Cal. 7296 ; Dak. Civ. C. 1338 ; Ga. 2181.

The act creating the agency must be executed with the same formality (and need have no more) as the law prescribes for the execution of the act for which the agency is created. A corporation may create an agent in its usual mode of transacting business, and without its corporate seal : Ga. 2182.

An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification (Cal. ; Dak. ; Ga. 2178).

A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal.

An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing : Cal. 7307-9 ; Dak. Civ. C. 1346-8.

§ 5202. **Objects of Agency.** An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention (Cal. ; Dak. ; Ga. 2179).

Every act which, according to this code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.

An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals, to be a fraud upon the principal : Cal. 7304-6 ; Dak. Civ. C. 1343-5.

§ 5203. **Who may be Agent.** (See § 5201.) A principal is bound by the acts of his infant agent ; but a married woman cannot be an agent for another than her husband except by his consent, in which case he is bound by her acts : Ga. 2181.

§ 5204. **Termination.** An agency is terminated, as to every person having notice thereof, by (1) the expiration of its term ; (2) the extinction of its subject ; (3) the death of the agent ; (4) his renunciation of the agency ; (5) the incapacity of the agent to act as such : Cal. 7355 ; Dak. Civ. C. 1383.

Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated (as to every person having notice thereof : Cal., Dak.) by, —

1. Its revocation by the principal (Cal., Dak.) ;
2. His death (Cal. ; Dak. ; Ga. 2183) ; or
3. His incapacity to contract : Cal. 7356 ; Dak. Civ. C. 1384 ;
4. The appointment of a new agent for the performance of the same act : Ga. ;
5. The death of the agent : Ga.

The agent may in all cases recover from the principal any damages he may have suffered for an unreasonable revocation : Ga.

§ 5205. **Death of Principal.** If any lawfully constituted agent does any act for his principal otherwise lawful, it is valid and binding, though the principal be dead, upon his estate, provided the party treating with such agent dealt in good faith and not knowing of the principal's death at the time : S.C. 1302.



§ 5206. **Authority of the Agent.** An agent has such authority as the principal, actually or ostensibly, confers upon him.

Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.

Every agent has actually such authority as is defined by this section, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.

An agent has authority, —

1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency; and,

2. To make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

An agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.

When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

An authority expressed in general terms, however broad, does not authorize an agent, —

1. To act in his own name, unless it is the usual course of business to do so;

2. To define the scope of his agency; or,

3. To do any act which a trustee is forbidden to do by Art. 174: Cal. 7315-7322; Dak. Civ. C. 1354-1361.

A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price.

A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards: Cal. 7325-6; Dak. Civ. C. 1364-5.

§ 5207. **Special Cases.** An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property.

An authority to sell and convey real property includes authority to give the usual covenants of warranty: Cal. 7323-4; Dak. Civ. C. 1362-3.

§ 5208. **Agents Exceeding Authority.** An agent must not exceed the limits of his actual authority, as defined by the title on agency: Cal. 7019; Dak. Civ. C. 1164.

The agent must act within the authority granted to him, reasonably interpreted: Ga. 2184; if he exceeds or violates his instructions, he does it at his own risk, the principal having the privilege of affirming or dissenting, as his interest may dictate. In cases where the power is coupled with an interest, unreasonable instructions detrimental to the agent's interest may be disregarded: Ga.

## **Art. 521. Duties of the Agent.**

§ 5210. **Diligence.** An agent for hire is bound to exercise about the business of his principal that ordinary care and diligence required of a bailee for hire; a voluntary agent without reward is liable only for gross neglect: Ga. 2185.

An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency: Cal. 7020; Dak. Civ. C. 1165.

An agent employed to collect a negotiable instrument must collect it promptly and take all measures necessary to charge the parties thereto, in case of its dishonor; and if it is a bill of exchange, must present it for acceptance with reasonable diligence: Cal. 7021; Dak. Civ. C. 1166.

§ 5211. **Sales and Purchases.** Without the express consent of the principal, after a full knowledge of all the facts, an agent employed to sell cannot be himself the purchaser; and an agent to buy cannot be himself the seller: Ga. 2186.

§ 5212. **Personal Profit.** The agent must not make a personal profit from his principal's property; for all such he is bound to account: Ga. 2187.

§ 5213. **Title of Principal.** An agent cannot dispute his principal's title, except in such cases where legal proceedings, at the instance of others, have been commenced against him: Ga. 2188.

§ 5214. **Agent of Several.** When several persons appoint an agent to do an act for their joint benefit, the instructions of one, not inconsistent with the general directions, shall protect the agent in his act: Ga. 2189.

§ 5215. **Commission and Expenses.** An agent who has discharged his duty is entitled to his commission and all necessary expenses incurred about the business of his principal. If he has violated his engagement he is entitled to no commission: Ga. 2190.

§ 5216. **Illegal Purpose.** No rights can arise to either party out of an agency created for an illegal purpose: Ga. 2191.

§ 5217. **Mingling Goods.** An agent, by wilfully mingling his own goods with those of his principal, does not create a tenancy in common, but, if incapable of separation, the whole belongs to the principal: Ga. 2193.

## Art. 522. Ratification.

§ 5220. **Manner.** A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.

Ratification of part of an indivisible transaction is a ratification of the whole.

A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act: Cal. 7310-2; Dak. Civ. C. 1349-1351.

§ 5221. **Effect.** A ratification by the principal relates back to the act ratified, and takes effect as if originally authorized. It may be express or implied from the acts or silence of the principal. A ratification once made cannot be revoked: Ga. 2192.

No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent: Cal. 7313; Dak. Civ. C. 1352.

§ 5222. **Rescission.** A ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise: Cal. 7314; Dak. Civ. C. 1353.

## Art. 523. Of the Principal.

§ 5230. **Bound by Acts of Agent.** The principal is bound by all the acts of his agent within the scope of his authority; if the agent exceeds his authority, the agent cannot ratify in part and repudiate in part, but must adopt either the whole or none: Ga. 2194. If the credit is given to the agent by the choice of the seller, he cannot afterward demand payment from the principal: Ga. 2198. The principal shall have advantage of his agent's contracts, in the same manner as he is bound by them, so far as they come within the scope of his agency. If, however, the agency has been concealed, the party dealing with him may set up any defence against the principal which he has against the agent: Ga. 2204.

An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

A principal is bound by an incomplete execution of an authority, when it is consistent with the whole purpose and scope thereof, but not otherwise.

When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized.

A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without ordinary negligence, incurred a liability or parted with value, upon the faith thereof.

If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible.

An instrument within the scope of his authority by which an agent intends to bind his principal, does bind him if such intent is plainly inferable from the instrument itself : Cal. 7330-1, 7333-5, 7337 ; Dak. Civ. C. 1366-7, 1369-1371, 1373.

§ 5231. **Form of Act.** The form in which the agent acts is immaterial ; if the principal's name is disclosed, and the agent professes to act for him, it will be held to be the act of the principal : Ga. 2195.

§ 5232. **Principal Undisclosed.** If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may call directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent : Ga. 2197.

One who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction, may set off against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency : Cal. 7336 ; Dak. Civ. C. 1372.

§ 5233. **Representations.** The principal is bound by all representations made by his agent in the business of his agency, and also by his wilful concealment of material facts although they are unknown to the principal, and known only to the agent : Ga. 2199.

§ 5234. **Notice to the Agent** of any matter connected with his agency is notice to his principal : Ga. 2200.

As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other : Cal. 7332 ; Dak. Civ. C. 1368.

§ 5235. **Neglect.** The principal is bound for the care, diligence, and fidelity of his agent in his business, and hence he is bound for the neglect and fraud of his agent in the transaction of such business : Ga. 2201.

Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his wilful omission to fulfil the obligations of the principal : Cal. 7338 ; Dak. Civ. C. 1374.

§ 5236. **Injuries by Co-agent.** The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business (except in railroads ; see Part III.) : Ga. 2202.

A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service : Cal. 7339 ; Dak. Civ. C. 1375.

§ 5237. **Trespass.** The principal is not liable for the wilful trespass of his agent, unless done by his command or assented to by him : Ga. 2203.

## **Art. 525. Of the Agent.**

§ 5250. **Powers.** (Compare § 5202.) The agent's authority will be construed to include all necessary and usual means for effectually executing it. Private instructions or limitations not known to persons dealing with a general agent cannot affect them. In special agencies for a particular purpose, persons dealing with the agent should examine his authority : Ga. 2196.



§ 5251. **Money Paid under Mistake.** The principal may recover back money paid illegally, or by mistake of his agent, or goods wrongfully transferred by the agent, the party receiving the goods having notice of the agent's want of authority or wilful misconduct: Ga. 2205. If money be paid to an agent by mistake, and he in good faith pays it over to his principal, he is not thereafter personally liable therefor. In all other cases he is liable for its repayment. If money be paid by an agent by mistake, he may recover it back in his own name: Ga. 2203.

§ 5252. **Action by the Agent.** Any act authorized or required to be done under the code by any person in the prosecution of his legal remedies, may be done by his agents; and for this purpose he is authorized to make an affidavit and execute any bond required, though his agency be created by parol. In all such cases, if the principal repudiate the act of his agent, the agent shall be personally bound, together with his sureties: Ga. 2207. Generally an agent has no right of action on contracts made for his principal; except (1) a factor contracting on his own credit; (2) when promissory notes or other evidences of debt are made payable to an agent of a corporation; (3) when the contract is made with the agent in his individual name, though his agency be known; (4) auctioneers may sue in their own name for goods sold by them; (5) in cases of agency coupled with an interest in the agent known to the party contracting with him. In all these cases, payment to the principal before notice of the agent's claim is a good defence: Ga. 2209. An agent having possession, actual or constructive, of the property of his principal has a right of action for any interference with that possession by third persons: Ga. 2210.

§ 5253. **Agent Exceeding Authority.** All agents, by an express undertaking to that effect, may render themselves individually liable. And every agent exceeding the scope of his authority is individually liable to the person with whom he deals; so, also, for his own tortious act, whether acting by command of his principal or not, he is responsible; for the negligence of his under-servant, employed by him on behalf of his principal, he is not responsible: Ga. 2213. When the agent exceeds his authority, so that the principal is not bound, the agent cannot enforce the contract in his own name against the person with whom he deals, unless the contract has been fully executed upon the part of the agent, or the credit was originally given to him: Ga. 2214.

§ 5254. **Liabilities.** When the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract. The question to whom credit is given is for the jury to decide: Ga. 2211.

A mere agent of an agent is not responsible as such to the principal of the latter: Cal. 7022; Dak. Civ. C. 1167.

One who assumes to act as an agent thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes.

One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:—

1. When, with his consent, credit is given to him personally in a transaction;
2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,
3. When his acts are wrongful in their nature.

If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal: Cal. 7342-4; Dak. Civ. C. 1376-8.

§ 5255. **Delegation of Agency.** An agent may not delegate his authority to another, unless specially empowered to do so: Ga. 2179.

An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:—

1. When the act to be done is purely mechanical;
2. When it is such as the agent cannot himself, and the sub-agent can, lawfully perform;
3. When it is the usage of the place to delegate such powers; or,

4. When such delegation is specially authorized by the principal.

If an agent employs a sub-agent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter: Cal. 7349-7351; Dak. Civ. C. 1380-2.

§ 5256. **Public Agents**, contracting in behalf of the public, are not individually liable upon such contracts: Ga. 2212.

## Art. 526. Special Agencies.

§ 5260. **Overseers**. There are special statutes concerning the contract of overseers in Georgia: Ga. 2215-7.

§ 5261. **Seamen and Mariners, Shipmasters and Pilots**. This subject belongs properly to the law of Admiralty, and is not touched upon in this edition.

§ 5262. **Auctioneers**. Compare § 4582.

An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller, only as follows:—

1. To sell by public auction to the highest bidder;
2. To sell for cash only, except such articles as are usually sold on credit at auction;
3. To warrant, in like manner with other agents to sell.
4. To prescribe reasonable rules and terms of sale;
5. To deliver the things sold, upon payment of the price;
6. To collect the price; and,
7. To do whatever else is necessary, or proper and usual, in the ordinary course of business, for effecting these purposes.

An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of the contract as prescribed in the title on sale: Cal. 7362-3; Dak. Civ. C. 1385-6.

§ 5263. **Of Mandate: Of the Nature and Form of Mandates**. A *mandate, procuration, or letter of attorney* is an act by which one person gives power to another to transact for him, and in his name, one or several affairs.

The mandate may take place in five different manners: for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third person and that of the party granting it; and finally, for the interest of the mandatary and a third person.

The object of the mandate must be lawful, and the power conferred must be one which the principal himself has a right to exercise.

The contract of mandate is completed only by the acceptance of the mandatary.

A power of attorney may be accepted expressly in the act itself, or by a posterior act.

It may also be accepted tacitly; and this tacit acceptance is inferred, either from the mandatary acting under it, or from his keeping silence when the act containing his appointment is transmitted to him.

If the proxy or attorney in fact pleads that he has not accepted or acted under the power, it is incumbent on the principal to prove he has.

The procuration is gratuitous unless there has been a contrary agreement.

A power of attorney may be given, either by a public act or by a writing under private signature, even by letter.

It may also be given verbally, but of this testimonial proof is admitted only conformably to the title: *Of Contracts*.

A blank may be left for the name of the attorney in fact in the letter of attorney.

In that case the bearer of it is deemed the person empowered.

It may be either general for all affairs, or special for one affair only.

It may vest an indefinite power to do whatever may appear conducive to the interest of the principal, or it may restrict the power given to the doing of what is specified in the procuration.

A mandate conceived in general terms confers only a power of administration.

If it be necessary to alienate or give a mortgage, or do any other act of ownership, the power must be express.

Thus the power must be express and special for the following purposes: To sell or to buy. To incumber or hypothecate. To accept or reject a succession. To contract a loan or acknowledge a debt. To draw or indorse bills of exchange or promissory notes. To compromise or refer a matter to arbitration. To make a transaction in matters of litigation; and in general where things to be done are not merely acts of administration, or such as facilitate such acts.

A power to compromise on a matter in litigation does not include that of submitting or referring to arbitrators.

A power to receive includes that of giving a receipt in acquittance.

Powers granted to persons who exercise a profession, or fulfil certain functions, of doing any business in the ordinary course of affairs to which they are devoted, need not be specified, but are inferred from the functions which these mandataries exercise.

Women and emancipated minors may be appointed attorneys; but in the case of a minor, the person appointing him has no action against him, except according to the general rules relative to the obligations of minors; and in the case of a married woman, who has accepted the power without authority from her husband, she can only be sued in the manner specified under the title: *Of Marriage Contract, and the Respective Rights of the Parties in Relation to their Property* (Art. 650): La. 2935-3001.

**§ 5264. Of the Obligations of a Person acting under a Power of Attorney.** The attorney in fact is bound to discharge the functions of the procuration, as long as he continues to hold it, and is responsible to his principal for the damages that may result from the non-performance of his duty.

He is bound even to complete a thing which had been commenced at the time of the principal's death, if any danger result from delay.

The attorney is responsible, not only for unfaithfulness in his management, but also for his fault or neglect.

Nevertheless, the responsibility with respect to faults is enforced less rigorously against the mandatary acting gratuitously than against him who receives a reward.

He is obliged to render an account of his management, unless this obligation has been expressly dispensed with in his favor.

He is bound to restore to his principal whatever he has received by virtue of his procuration, even should he have received it unduly.

In case of an indefinite power, the attorney cannot be sued for what he has done with good intention.

The judge must have regard to the nature of the affair, and the difficulty of communication between the principal and the attorney.

The attorney is answerable for the person substituted by him to manage in his stead, if the procuration did not empower him to substitute.

He is also answerable for his substitute, if, having the power to appoint one, and the person to be appointed not being named in the procuration, he has appointed for his substitute a person notoriously incapable, or of suspicious character.

Even where the attorney is answerable for his substitute, the principal may, if he thinks proper, act directly against the substitute.

The attorney cannot go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity.

The mandatary is not considered to have exceeded his authority, when he has fulfilled the trust confided to him in a manner more advantageous to the principal than that expressed in his appointment.

The mandatary who has communicated his authority to a person with whom he contracts in that capacity is not answerable to the latter for anything done beyond it, unless he has entered into a personal guarantee.

The mandatary is responsible to those with whom he contracts only when he has bound himself personally or when he has exceeded his authority without having exhibited his powers.

When there are several attorneys in fact empowered by the same act, they are not responsible *in solido* for the acts of each, unless such responsibility be expressed in the procuration.



The attorney is answerable for the interest of any sum of money he has employed to his own use from the time he has so employed it, and for that of any sum remaining in his hands from the day he becomes a defaulter by delaying to pay it over: La. 3002-3015.

**§ 5265. Of the Mandatary or Agent of Both Parties.** The *broker* or *intermediary* is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatary of both.

The obligations of a broker are similar to those of an ordinary mandatary, with this difference, that his engagement is double, and requires that he should observe the same fidelity towards all parties, and not favor one more than another.

Brokers are not responsible for events which arise in the affairs in which they are employed; they are only, as other agents, answerable for fraud or faults.

Brokers, except in case of fraud, are not answerable for the insolvency of those to whom they procure sales or loans, although they receive a reward for their agency and speak in favor of him who buys or borrows.

Commercial and money brokers, besides the obligations which they incur in common with other agents, have their duties prescribed by the laws regulating commerce: La. 3016-3020.

**§ 5266. Of the Obligations of the Principal who acts by his Attorney in Fact.** The principal is bound to execute the engagements contracted by the attorney conformably to the power confided to him.

For anything further he is not bound, except in so far as he has expressly ratified it.

The principal ought to reimburse the expenses and charges which the agent has incurred in the execution of the mandate, and pay his commission where one has been stipulated.

If there be no fault imputable to the agent, the principal cannot dispense with this reimbursement and payment, even if the affair has not succeeded; nor can he reduce the amount of reimbursement under pretence that the charges and expenses ought to have been less.

The mandatary has a right to retain out of the property of the principal in his hands a sufficient amount to satisfy his expenses and costs.

He may even retain, by way of offset, what the principal owes him, provided the debt be liquidated.

The attorney must also be compensated for such losses as he has sustained on occasion of the management of his principal's affairs, when he cannot be reproached with imprudence.

If the attorney has advanced any sum of money for the affairs of the principal, the latter owes the interest of it from the day on which the advance is proved to have been made.

If the attorney has been empowered by several persons for an affair common to them, every one of these persons shall be bound *in solido* to him for all the effects of the procuration: La. 3021-6.

**§ 5267. How the Procuration Expires.** The procuration expires: —

By the revocation of the attorney.

By the attorney's renunciation of the power.

By the change of condition of the principal.

By the death, seclusion, interdiction, or failure of the agent or principal.

The principal may revoke his power of attorney whenever he thinks proper, and, if necessary, compel the agent to deliver up the written instrument containing it, if it be an act under private signature.

If the principal only notifies his revocation to the attorney, and not to the persons with whom he has empowered the attorney to transact for him, such persons shall always have the right of action against the principal to compel him to execute or ratify what has been done by the attorney; the principal has, however, a right of action against the attorney.

The appointment of a new attorney to transact the same business produces the same effect as a revocation of the first, from the day such appointment is notified to the first attorney.

The attorney may renounce his power of attorney by notifying to the principal his renunciation.

Nevertheless, if this renunciation be prejudicial to the principal, he ought to be indemnified by the agent, unless the latter should be so situated that he cannot continue the agency without considerable injury.

If the attorney, being ignorant of the death or of the cessation of the rights of his principal, should continue under his power of attorney, the transactions done by him, during this state of ignorance, are considered as valid.

In the cases above enumerated, the engagements of the agent are carried into effect in favor of third persons acting in good faith.

In case of the death of the attorney, his heir ought to inform the principal of it, and, in the mean time, attend to what may be requisite for the interest of the principal: La. 3027-3034.

## **Art. 528. Master and Servant.**

**§ 5280. General Principles.** The contract of employment is a contract by which one who is called the employer engages another, who is called the employee, to do something for the benefit of the employer or of a third person: Cal. 6965; Dak. Civ. C. 1128.

**§ 5281. Obligations of the Employer.** An employer must indemnify his employee, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee at the time of obeying such directions believed them to be unlawful.

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee.

An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care: Cal. 6969-6971; Dak. Civ. C. 1129-1131.

**§ 5282. Obligations of the Employee.** One who, without consideration, undertakes to do a service for another, is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

One who, by his own special request, induces another to intrust him with the performance of a service, must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.

A gratuitous employee who accepts a written power of attorney, must act under it so long as it remains in force, or until he gives notice to his employer that he will not do so.

One who, for a good consideration, agrees to serve another, must perform the service, and must use ordinary care and diligence therein so long as he is thus employed.

One who is employed at his own request to do that which is more for his own advantage than for that of his employer, must use great care and diligence therein to protect the interest of the latter.

A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant (Art. 666), cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

An employee must substantially comply with all the directions of his employer concerning the service on which he is engaged, except (1) where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee: Cal. 6981; Dak. Civ. C. 1138. So, (2) in case of an emergency which, according to the best information which the employee can with reasonable diligence obtain, the employer did not contemplate, in which he cannot with reasonable diligence be consulted, and in which non-compliance is judged by the employee, in good faith and in the exercise of reasonable discretion, to be absolutely necessary for the protection of the employer's interests. In all such cases the employee must conform as nearly to the directions of his employer as may be reasonably practicable and most for the interest of the latter: Dak. Civ. C. 1138.

An employee must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable or manifestly injurious to his employer to do so.

An employee is bound to exercise a reasonable degree of skill, unless his employer has notice, before employing him, of his want of skill.

An employee is always bound to use such skill as he possesses, so far as the same is required, for the service specified.

Everything which an employee acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.

An employee must, on demand, render to his employer just accounts of all his transactions in the course of his service as often as may be reasonable, and must, without demand, give prompt notice to his employer of everything which he receives for his account.

An employee who receives anything on account of his employer, in any capacity other than that of a mere servant, is not bound to deliver it to him until demanded, and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employee himself.

An employee who has any business to transact on his own account similar to that intrusted to him by his employer, must always give the latter the preference (Cal. 6988; Dak. Civ. C. 1145. If intrusted with similar affairs by different employers, he must give them preference according to their relative urgency, or, other things being equal, according to the order in which they were committed to him : Dak.)

An employee who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter ; and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

Where service is to be rendered by two or more persons jointly, and one of them dies, the survivor must act alone, if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

The obligations peculiar to confidential employments are defined in the title on trusts : Cal. 6975-6992; Dak. Civ. C. 1132-1149.

**§ 5283. Termination of Employment.** Every employment in which the power of the employee is not coupled with an interest in its subject is terminated by notice to him of, —

1. The death of the employer ; or,
2. His legal incapacity to contract.

Every employment is terminated, —

1. By the expiration of its appointed term ;
2. By the extinction of its subject ;
3. By the death of the employee ; or,
4. By his legal incapacity to act as such.

An employee, unless the term of his service has expired, or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employee for such service according to the terms of the contract of employment.

An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this article.

An employment, even for a specified term, may be terminated at any time by the employer in case of any wilful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it.

An employment, even for a specified term, may be terminated by the employee at any time in case of any wilful or permanent breach of the obligations of his employer to him as an employee.

An employee dismissed by his employer for good cause is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

An employee who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance as the services which he has already rendered bear to the services which he was to render as full performance : Cal. 6996-7003; Dak. Civ. C. 1150-6.



§ 5284. **Master and Servant.** A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.

A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece-work, for no specified term.

In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

The entire time of a domestic servant belongs to the master, and the time of other servants to such an extent as is usual in the business in which they serve, not exceeding in any case ten hours in the day.

A servant must deliver to his master, as soon as with reasonable diligence he can find him, everything that he receives for his account, without demand; but he is not bound, without orders from his master, to send anything to him through another person.

A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not:—

1. If he is guilty of misconduct in the course of his service or of gross immorality, though unconnected with the same; or,

2. If, being employed about the person of the master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed him: Cal. 7009-7015; Dak. Civ. C. 1157-1163.

§ 5285. **Contracts** entered into between master and servant during the term of service are void, except such as are clearly beneficial to the servant: Ky. 74,2,4.

§ 5286. **Contracts with Aliens.** (Compare § 6056.) No contract made for labor or services with any alien previous to the time that he came into the territory can be enforced within the territory for any period after six months from its date: Wy. 37,1. Such alien performing services for any person or corporation within the territory may recover from such person, etc., a reasonable compensation for such labor, etc., notwithstanding the person, employer, or company may have paid any other parties for the same; and it is no defence that the defendant had contracted with other parties who had or pretended to have power or authority to hire out the labor of such party plaintiff: Wy. 37,2. So, in Indiana, the importation of aliens into the State under contract to labor made previously is unlawful, and the contract void: Ind. 1885, Ex. 51. But in others, all persons who come into the state under contract to serve another are bound to perform the same, or for so much of the time as shall not exceed seven years: Ky. 74,2,1. So, not exceeding two years: Va. 4,5; Ala. 1750.

§ 5287. **Torts.** For the liability of a master for torts committed by his servant, see in Part IV.

§ 5288. **Louisiana Law of Servants.** There is only one class of servants in this state, to wit: free servants.

Free servants are in general all free persons who let, hire, or engage their services to another in this state, to be employed therein at any work, commerce, or occupation whatever, for the benefit of him who has contracted with them, for a certain price or retribution, or upon certain conditions.

There are three kinds of free servants in this state, to wit:—

1. Those who only hire out their services by the day, week, month, or year, in consideration of certain wages; the rules which fix the extent and limits of those contracts are established in the laws: *Of Letting and Hiring*.

2. Those who engage to serve for a fixed time for a certain consideration, and who are, therefore, considered not as having hired out but as having sold their services.

3. Apprentices, that is, those who engage to serve any one in order to learn some art, trade, or profession.

The regulations, manner, and mode according to which persons may be bound to serve, either as apprentices or otherwise, are prescribed by special laws.

The time of the engagement of minors, if there be no stipulation that it shall terminate sooner, shall expire for males when they attain the age of eighteen years, and females when they attain the age of fifteen.

Persons who have attained the age of majority cannot bind themselves for a longer term than five years.

Engagements of service contracted in a foreign country for a longer term, shall be reduced to five years, to count from the day of the arrival of the person bound in this state.

An implied condition of the contract entered into between the master and bound servant or apprentice, is that the latter binds himself to serve the former during all the time of his engagement, and the master on his side binds himself to maintain the indented servant or apprentice during the same time.

The master is also bound to instruct the apprentice in his art, trade, or profession, and to teach him or cause him to be taught to read, write, and cipher: La. 162-9.

A master may justify an assault in defence of his servant, and a servant in defence of his master, the master because he has an interest in his servant, not to be deprived of his service; the servant because it is part of his duty for which he receives wages, to stand by and defend his master.

The master is answerable for the offences and *quasi*-offences committed by his servants, according to the rules which are explained under Art. 425.

The master is answerable for the damage caused to individuals or to the community in general by whatever is thrown out of his house into the street or public road, and inasmuch as the master has the superintendence and police of his house, and is responsible for the faults committed therein: La. 175-7.

**§ 5289. Of the Letting and Hiring of Service.** Labor may be let out in three ways:—

1. Laborers may hire their services to another person.

2. Carriers and watermen hire out their services for the conveyance either of persons or of goods and merchandise.

3. Workmen hire out their labor or industry to make buildings or other works: La. 2745.

A man can only hire out his services for a certain limited time or for the performance of a certain enterprise.

A man is at liberty to dismiss a hired servant attached to his person or family without assigning any reason for so doing. The servant is also free to depart without assigning any cause.

Laborers who hire themselves out to serve on plantations or to work in manufactures have not the right of leaving the person who has hired them, nor can they be sent away by the proprietor until the time has expired during which they had agreed to serve, unless good and just causes can be assigned.

If, without any serious ground of complaint a man should send away a laborer whose services he has hired for a certain time before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive had the full term of his services arrived.

But if, on the other hand, a laborer, after having hired out his services, should leave his employer before the time of his engagement has expired without having any just cause of complaint against his employer, the laborer shall then forfeit all the wages that may be due to him, and shall moreover be compelled to repay all the money he has received, either as due for his wages or in advance thereof on the running year or on the time of his engagement: La. 2746-2750.

## CHAPTER IV. — PARTNERSHIP.

**Art. 530. Creation.**

§ 5300. **Definitions.** Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them.

Part owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship: Cal. 7395-6; Dak. Civ. C. 1404-5.

Every partnership that is not formed in accordance with the law concerning special or mining partnerships, and every special partnership, so far only as the general partners are concerned, is a general partnership: Cal. 7424; Dak. Civ. C. 1419.

For joint-stock companies, and partnerships with limited liability, see Part III., *Corporations*.

**Louisiana Law.** *Partnership* is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry, furnished in determined proportions by the parties. It may be made by all persons capable of contracting. It is regulated by the rules laid down in the title: *Of Contracts*, in all things not differently provided for by this title. All partnerships are null and void which are formed for any purpose forbidden by law or good morals. But all the partners in such a partnership are liable *in solido* to third persons who may contract with them without a knowledge of the illegal or immoral object of the partnership. Partnerships must be created by the consent of the parties. A community of property does not of itself create a partnership, however that property may be acquired, whether by purchase, donation, accession, inheritance, or prescription. The community of property created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this code. Property, when brought into partnership or acquired by it, and the profits when they are kept undivided for the benefit of the partnership, are called partnership stock: La. 2801-8.

**Of the Division of Partnerships.** Partnerships are divided, as to their object, into commercial partnerships and ordinary partnerships.

Commercial partnerships are such as are formed, —

1. For the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture.

2. For buying or selling any personal property whatever, as factors or brokers.

3. For carrying personal property for hire, in ships or other vessels.

Ordinary partnerships are all such as are not commercial; they are divided into universal and particular partnerships.

Commercial partnerships are divided into two kinds, general and special.

There is also a species of partnership, which may be incorporated with either of the other kinds, called partnership *in commendam*: La. 2824-8.

**A Universal Partnership** is a contract by which the parties agree to make a common stock of all the property they respectively possess; they may extend it to all property, real or personal, or restrict it to personal only; they may, as in other partnerships, agree that the property itself shall be common stock or that the fruits only shall be such; but property which may accrue to one of the parties, after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining the property aforesaid, is void.

A universal partnership of profits includes all the gains that may be made from whatever source, whether from property or industry, with the restriction contained in the last article, and subject to all legal stipulations to be made by the parties.

If nothing more is agreed between the parties, than that there shall be a universal partnership, it shall extend only to the profits of the property each shall possess, and of their credit and industry.

If commercial business be carried on under a universal partnership, it must, as to that business, be governed by the rules prescribed for other commercial partnerships.

Universal partnership shall only be contracted between persons, who are not respectively incapacitated by law from conveying to or receiving from each other, to the injury of others.



Universal partnership cannot be created without writing signed by the parties, and registered in the manner hereafter prescribed: La. 2829-2834.

**Particular partnerships** are such as are formed for any business not of a commercial nature.

If any part of the stock of this partnership consists of real estate, it must be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded as is hereafter prescribed with respect to partnership *in commendam* (§ 5361.)

The business of this partnership must be conducted in the name of all the persons concerned, unless a firm is adopted by the articles of partnership reduced to writing, and recorded in the manner directed by the last paragraph.

If the articles be recorded, the parties may themselves adopt a firm which shall be composed of the name of one or more of the partners, but no other name than those of the parties concerned shall enter in such firm: La. 2835-8.

**§ 5301. Formation.** A partnership can be formed only by the consent of all the parties thereto, and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof: Cal. 7397; Dak. Civ. C. 1406.

Any two or more persons may bind themselves for a certain time, and under certain conditions, to do business on their common account and risk and at the risk of each one separately, both in losses and profits: N.M. 1799. See also § 5343.

A partnership may be created either by written or parol contract, or it may arise from a joint ownership, use, and enjoyment of the profits of undivided property, real or personal: Ga. 1887.

A joint interest in the partnership property or a joint interest in the profits and losses of the business constitutes a partnership as to third persons. A common interest in profits alone does not: Ga. 1890. By the laws of Pennsylvania, any person may loan money to any individual, firm, or corporation, upon agreement to receive a share of the profits in lieu of interest; and such agreement shall not render him a partner as against creditors, except as to money so loaned: Pa. *Partnership*, 16. *Provided* (1) such agreement be in writing: Pa.; and (2) that he do not hold himself out as a partner or induce credit to be given to the firm: Pa.

So, individuals and corporations may give a share of the profits to employees in lieu of wages, without rendering them partners, either as against creditors or between each other: Pa. *ib.* 17. So, in North Carolina, no lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, shall be held as a partner of the lessee: N.C. 1744.

**Louisiana Law.** The contract of partnership may depend upon conditions. When a partnership is made without specifying any time for its commencement, it begins at the time the contract is made.

If there has been no agreement respecting the time the partnership is to last, it is supposed to have been entered into for the whole time of the life of the partners, under the modifications mentioned in § 5331, or if the partnership be entered into for some affair the duration of which is limited, for the whole time such affair is to last: La. 2853-5.

**§ 5302. Proof of Partnership,** when necessary in any suit, may often be made *prima facie* by the affidavit of any competent witness, stating the names and residence of all the partners, the name of the firm, the general nature of the business and where transacted, and the time of commencement of the partnership; see in Part IV.

When partners sue or are sued by the firm name, the partnership need not generally be proved, unless denied by the defendant upon oath; see in Part IV.

**§ 5303. Certificate.** In two states, every copartnership is required to file with the town clerk (in Pennsylvania, with the prothonotary of the county) a certificate of the names and residences of all the partners, or no suits against them will be abated for non-joinder: N.H. 117,1-2; Pa. *Partnership*, 1-2. Compare § 5343.

**§ 5304. The Partnership Contract.** If no time is specified for the commencement of the partnership, it commences immediately: Ga. 1891. If there is no agreement as to the time of continuance, the partnership is at will, and may be dissolved at any time by any partner on giving three months' notice to his copartners: Ga. 1893.

§ 5305. **Firm Name.** In three states, no partner may transact business in the name of a partner not interested in his firm : N.Y.<sup>a</sup> 1833,281 ; Ga.<sup>a</sup> 1897 ; La. D. 2668.

Nor continue in the firm name the name of a retired partner : Ga.<sup>a</sup>

In two states, where the designation "and Co.," or "Company," is used it must represent an actual partner or partners : N.Y., La.

But the above does not apply to copartnerships located or doing business in other countries : N.Y. 1849,347.

Except as otherwise below provided, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated a certificate stating the names in full of all the members of such partnership and their places of residence, and publish the same once a week for four successive weeks in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in an adjoining county.

A commercial or banking partnership established and transacting business in a place without the United States may, without filing the certificate or making the publication prescribed in the last section, use in this state the partnership name used by it there, although it be fictitious or does not show the names of the persons interested as partners in such business.

The certificate filed with the clerk, as provided above, must be signed by the partners and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property. (Where the partnership is hereafter formed the certificate must be filed, and the publication designated in that section must be made within one month after the formation of the partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership; where the partnership has been heretofore formed, the certificate must be filed and the publication made within six months after the passage of this act : Cal.) Persons doing business as partners contrary to the provisions of this article shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name in any court of this state until they have first filed the certificate and made the publication herein required.

On every change in the members of a partnership transacting business in this state under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned above, a new certificate must be filed with the county clerk, and a new publication made, as required by this article, on the formation of such partnership : Cal. 7466-9 ; Dak. Civ. C. 1443-6. *Provided*, however, that if such partners at any time comply with the above provisions, they may sue on all contracts or partnership transactions, prior or subsequent : Dak.

When any copartnership has used any firm name, and the business is continued by any of the partners, they may continue to use the firm name upon filing a new certificate, as in § 5342 : N.Y. 1854,400.

Partnerships transacting business under a fictitious name, or a firm not showing the names of the partners, must file with the county recorder a certificate stating the names and residence of all the partners, except a commercial or banking partnership established without the United States, and on every change of members a new certificate must be filed : Ariz. 1885,51.

All persons transacting a mercantile, mechanical, or manufacturing business must record their names, or the names of the partners, and their residences, with the county recorder : O. 1884, p. 131. Failure so to do will prevent them from recovering in any suit upon such business : O. *ib.* 3.

If any resident of the State dies, who at the period of his death and for five years or more immediately prior thereto was conducting and carrying on in his sole name any business in the state, the right to use his name survives and forms a part of his personal estate : N.Y. 1880, 561,1.

Any person intending to continue the business under such his name shall file and publish a certificate of the persons so intending and their residences, with the county clerk : N.Y. *ib.* 2.

NOTE. — <sup>a</sup> Under penalty.

§ 5306. **Sign.** If any person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," "and Company," or the like words, and

fail to disclose the name of his principal or partner by a sign in letters conspicuously posted ; or if any person shall transact business in his own name without such addition, all the property, stock, money, choses in action, used or acquired in such business, shall, as to creditors of any such person, be liable for his debts : Va. 142,13 ; W.Va. 145,13 ; Miss. 1300.

### **Art. 531. Right of Partners among themselves.**

§ 5310. **General Principles.** As among partners, the extent of the partnership is determined by the contract and their several interests. As to third persons, all are liable not only to the extent of their interest in the partnership property, but also to the whole extent of their separate property : Ga. 1888. Unless otherwise provided in the agreement, partners are equally interested in all the stock or property brought into the business, it matters not by which partner ; are equally bound to pay the losses, and equally entitled to share the profits : Ga. 1901.

The relations of partners are confidential. They are trustees for each other within the meaning of Chapter I. of the title on trusts, and their obligations as such trustees are defined by that chapter.

In all proceedings connected with the formation, conduct, dissolution, and liquidation of a partnership, every partner is bound to act in the highest good faith toward his copartners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Each member of a partnership must account to it for everything that he receives on account thereof, and is entitled to reimbursement therefrom for everything that he properly expends for the benefit thereof, and to be indemnified thereby for all losses and risks which he necessarily incurs on its behalf.

A partner is not entitled to any compensation for services rendered by him to the partnership : Cal. 7410-3 ; Dak. Civ. C. 1413-6.

The copartners must act in good faith, placing punctually in the concern the capital or services as stipulated, under penalty of indemnifying the others for the damages which may arise : N.M. 1800. They must keep their books in due form, with an inventory of stock and capital : N.M. 1802. No partner shall withdraw from the capital or profits, before dissolution, any sums not stipulated in the indenture : N.M.

§ 5311. **Powers.** A partnership cannot be executor, curator, or tutor, and cannot exercise any other private office.

By *private office* in this code is meant such trust as relates solely to the interest or affairs of one or more designated individuals, but which cannot be executed without the assent of the magistrate.

The nomination of a partnership to any private office is not of itself void ; where it is a trust susceptible of being exercised by more than one person, it shall be considered as a nomination of all the members of the partnership, individually, who belonged to it at the time of such nomination ; where the trust can by law only be exercised by one person, the first-named partner shall be deemed to have been the person intended.

A partnership may be appointed attorney or agent for the performance of any act or duty which comes within the object for which the partnership is formed ; and the responsibility of such trust or agency attaches to all the members ; and they are also entitled to all the advantages resulting therefrom, although one of them may execute the trust in the name of the partnership, unless it be differently provided in the appointment.

Where a partnership is appointed to perform a trust or agency foreign to the object for which the partnership was formed, the appointment is not void ; it may be performed in the name of the partnership if all the partners assent, and then the like responsibilities and advantages attach to the parties as are set forth in the last preceding paragraph ; if the assent of all the parties be not given, the trust or agency cannot be performed under the power.

If the trust or agency is executed by writing, whether required by law to be so done or not, the assent required by the last paragraph must also be in writing.



In an ordinary partnership, if a partner, having no authority to make purchases for the joint account, shall make any purchase in the name of the partnership or in his own name with the partnership funds, the other partners may elect whether they will take such purchase on the joint account or not: La. 2816-2822.

A partner may be a creditor of the partnership not only for the sums which he has disbursed, but likewise for the obligations he has entered into *bona fide* for the partnership, and for losses reasonably incurred in his administration: La. 2864.

The partner intrusted with the administration of the affairs of the partnership by a special power given in writing, either by the articles of partnership or otherwise, may, without the assent of the other partners and contrary to their prohibition, do any act which they have authorized him to do by such power, provided it be without fraud, and in his opinion for the advantage of the society.

This power, if contained in the articles of copartnership, cannot be revoked without a lawful cause, as long as the partnership lasts. But if the power of administering be given subsequent to the articles of partnership, it is a simple mandate and may be revoked.

When several partners are intrusted with the administration without their duties being pointed out, or when it is not expressed that one shall not be able to act without the other, they may do separately all the acts relating to such administration.

If it has been stipulated that one of the administrators shall not do anything without the other, one alone cannot act, even when the other is prevented by sickness or otherwise from taking a part in the acts which relate to the administration, until there be a new agreement between the partners.

When there is no agreement respecting administration in the act of partnership, the following rules are adhered to:—

1. The partners are supposed to have given, reciprocally, to each other the power of administering one for the other. What one does is valid, even for the share of his partners, without receiving their approbation, saving the right which they or every one of the partners has to oppose the operation, before it be concluded.

2. Every partner may make use of the things belonging to the partnership, provided he employs the same to the uses for which they are intended, and he does not use them in such a manner as to prevent his partners from using them according to their rights, or against the interest of the partnership.

3. Every partner has a right to bind his partners to contribute with him to the expenses which are necessary for the preservation of the things of the partnership

4. A partner can neither dispose of nor make any change in any real property belonging to the partnership, without the consent of his partners, should even this disposition or change be advantageous to the partnership.

5. In other than commercial partnerships a partner cannot, as partner only and if he has not the administration, alienate or engage the things which belong to the partnership.

Every partner may, without the consent of his partners, enter into a partnership with a third person, for the share which he has in the partnership, but he cannot, without the consent of his partners, make him a partner in the original partnership, should he even have the administration of it.

He is responsible for the damages occasioned by this third person to the partnership, in the same manner as he answers for those he has occasioned himself, according to § 5312: La. 2867-2871.

A power of attorney to transfer stock standing in the name of a partnership, signed in the name of the partnership, and sealed and acknowledged by one of the members, is valid as if all had signed it: Md. 44,32-3.

Every partner has a right to examine into the affairs of the firm, and, unless otherwise agreed to, to have joint possession of its effects, to collect and apply its assets, to contract or otherwise bind the firm in matters connected with its business, and to execute any writing or bond in the course of the business; at no time transgressing the privileges of other partners or seeking in bad faith to evade or violate their wishes: Ga. 1904. Unless otherwise stipulated, a majority of the partners must control on any question within the scope of the partnership business; but outside of such business, any partner may veto the use of the partnership assets: Ga. 1906. In all legal proceedings, wherein it becomes necessary for partners to give bond, any one of the partners may execute such bond in the firm name: Ga. 1900.

§ 5312. **Duties.** The strictest good faith is required among partners, and that which would not amount to fraud as to third persons may be such a violation of this faith as to justify a court of equity to compel a partner to give up any advantage thus obtained: Ga. 1903.

All profits made by a general partner in the course of any business usually carried on by the partnership belong to the firm.

A general partner, who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an interest adverse to that of the partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

A partner may engage in any separate business, except as otherwise provided above.

A general partner transacting business contrary to the provisions of this article may be required by any copartner to account to the partnership for the profits of such business: Cal. 7435-8; Dak. Civ. C. 1424-7.

**Louisiana Law.** A participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses. But the proportion, like that of the profits, may be regulated by the stipulation of the parties, and where they make none, is provided for by law.

A stipulation that one of the contracting parties shall participate in the profits of a partnership, but shall not contribute to losses, is void, both as it regards the partners and third persons. But in the case of a partnership *in commendam*, hereinafter provided for, the liability to loss may be limited to the amount of stock furnished.

The foregoing paragraph does not prevent the partners, or any one of them, from making a donation of their or his profits arising from the partnership stock to another, or even from selling the same for a valuable consideration; but the donee or vendee is not on that account considered as a partner: La. 2813-5.

Every partner owes to the partnership all that he has promised to bring into the same.

When this proportion consists of a certain thing, and the partnership is evicted from the same, such partner is accountable for it towards the partnership in the same manner as a seller is answerable to the purchaser who buys from him.

The partner who promised to bring into the partnership a certain thing is bound, in case of eviction of it, in the same manner as a seller towards the purchaser who buys from him.

The partner who promised to put a sum of money into the partnership owes the interest of the same from the day when he was bound to pay such sum.

In the same manner he owes the interest on such sums as he may have taken out of the funds of the partnership, from the day he has received them.

Any partner who has bound himself to bring into the partnership his skill, industry, or credit, owes the partnership all the profits which he has made by the exercise of such skill, industry, or credit, or of such proportion thereof as he was bound to furnish.

When one of the partners is, for his own particular account, creditor of a person who is at the same time indebted unto the partnership for a debt of the same nature which is due likewise, the partner is bound to apply what he receives from the debtor to the discharge of what is due to the partnership and to him, in the proportion of both debts, although by his receipt he should have applied the whole sum paid to what is due to him in particular.

When one of the partners has received his full share of what is due to the partnership, if the debtor has become insolvent since, the partner who has received his full share is bound to return the same to the partnership, although he should have given a receipt for his own share.

Every partner is answerable to the partnership for the damages which it may have suffered by his fault, without being able to compensate such damages by the profits which his industry, skill, or credit may have produced in the business of the partnership; provided that no partner shall be held liable for any loss which has happened in consequence of anything *bona fide* done or omitted by him in the legal exercise of his power, either as administrator or partner, although such act or omission should be injudicious and injurious to the partnership.

If the use only of certain specified property has been brought into partnership, and that property is of such a nature that it may be used and enjoyed without destroying it, the ownership remains in the partner who brought it in, and is at his risk. But if such property be destroyed, or grow worse by keeping or by the use that is made of it, if it was brought into partnership with the intent that it should be sold, or if it was taken at an estimated value ascertained by an inventory or some other writing, — in either of these cases, although the use only was contributed, the property is at the risk of the partnership; and in case of loss or

injury, the partner who brought it in is a creditor of the partnership to the amount of the credit or loss; *provided*, that all the provisions of this article may be controlled by the covenants of the parties: La. 2856-2863.

**§ 5313. Contribution.** If one of several partners proves to be insolvent, each partner is bound to contribute according to his interest to sustain the *pro rata* loss of such insolvent in the debts of the firm: Ga. 1902.

In the absence of any agreement on the subject the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated.

Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance, if any, due to him: Cal. 7403-5; Dak. Civ. C. 1409-1411.

**§ 5314. The Partnership Property.** The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and all that is subsequently acquired thereby.

The interest of each member of a partnership extends to every portion of its property.

Property, whether real or personal, acquired with partnership funds, is presumed to be partnership property: Cal. 7401-2, 7406; Dak. Civ. C. 1407-8, 1412.

Any goods put in as capital by any partner are valued at cash at a fair valuation made by mutual consent: N.M. 1804. If any credits are so put in they are not placed to such partner's credit as capital until in fact collected; if uncollected the partner must make them good with interest: N.M. 1805.

**Louisiana Law.** Property, credit, skill, and industry being the sources from which the profits of a partnership may be drawn, each of the partners may furnish either or all of these, in such proportions as they may mutually agree.

By *credit*, in the foregoing article, is meant, not only a reputation for responsibility as to pecuniary concerns, but also any quality or other circumstance that may acquire the good will of others, and contribute to the prosperity of the partnership: La. 2809-10.

The partnership property is liable to the creditors of the partnership in preference to those of the individual partner; but the share of any partner may, in due course of law, be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; but such seizure, if legal, operates as a dissolution of the partnership: La. 2823.

**§ 5315. The Profits.** It is of the essence of this contract that a profit is contemplated, and that each of the parties is to partake therein; the proportion they are respectively to receive is regulated by the stipulation of the parties, where they make any; where none are made for this purpose, the proportion is regulated by law.

It is not necessary, under the last paragraph, that the contract of partnership should provide for the actual partition of the profits. A stipulation that the profits shall be converted into stock for the benefit of all the parties in determined proportions, is valid: La. 2811-2.

When the contract of partnership does not determine the share of each partner in the profits or losses, each one shall be entitled to an equal share of the profits, and must contribute equally to the losses.

If the partners have agreed to refer to one of them or to a third person for the regulation of the shares, this regulation cannot be annulled, unless it be by certain proofs that it is contrary to equity: La. 2865-6.

**Private Business.** Any partner having private means may invest them in his private business, if he use them in his own name and private signature, so as not to confound them with the partnership business: N.M. 1807.

**§ 5316. Account.** An action of account lies by one or more copartners against the others, to settle and adjust partnership affairs: Vt. 1214; Ct. 19, 7, 5; Pa. *Partnership*, 10; Ill. 2, 2; N.M. 2304. See Part IV. and § 5371.

Assumpsit lies, when there only two partners: Ct. All the partners must account for the capital put in, and its profits when used in any business transacted with other persons than the



partners in the name of the partnership: N.M. 1806. The courts of chancery have general jurisdiction in all partnership affairs: N.M. 1809. See in Part IV.

§ 5317. **New Partners.** No partner, by assigning his interest or otherwise, can introduce a new partner without the consent of the others, unless such consent is reserved in the contract: Ga. 1905.

§ 5318. **Renunciation.** A partner may exonerate himself from all future liability to a third person, on account of the partnership, by renouncing, in good faith, all participation in its future profits, and giving notice to such third person, and to his own copartners, that he has made such renunciation, and that, so far as may be in his power, he dissolves the partnership and does not intend to be liable on account thereof for the future.

After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his copartners may proceed to dissolve the partnership: Cal. 7417-8; Dak. Civ. C. 1417-8.

## **Art. 532. Liabilities of the Partners as to Third Persons.**

§ 5320. **General Principles.** Third persons are bound by no stipulations among the partners themselves, unless actual notice of such stipulation be proven prior to their action: Ga. 1908.

All the partners are bound by the acts of any one, within the legitimate business of the partnership, until dissolution or the commencement of legal process for that purpose, or express notice of dissent to the person about to be contracted with: Ga. 1909. An agent of the partnership is generally bound to obey each partner. If contradictory instructions are given by different partners, he is not bound to obey either, but should act for the best interest of the partnership: Ga. 1910. Third persons acting with a partner in a matter not legitimately connected with the partnership have no right against the firm or any other member: Ga. 1911.

A person lending money to a partner for the firm is not bound to see to its application, but if he knows, or has reasonable grounds to suspect, that it is intended to be applied to other purposes than the business of the firm, he cannot recover it from the partnership: Ga. 1912.

Third persons acquire no title to partnership assets by purchase from one member, when notice or a reasonable ground of suspicion is known to them that the partner is misapplying or seeks to misapply such assets: Ga. 1913.

A guaranty or an accommodation indorsement is not within the legitimate business of ordinary partnership: Ga. 1914.

All the partners are responsible to innocent third persons for damages arising from the fraud of one partner in matters relating to the partnership: Ga. 1915. So, for the negligence of their agents or servants; but not for a tort committed by a copartner: Ga. 1916.

Unless otherwise expressly stipulated, the decision of the majority of the members of a general partnership binds it in the conduct of its business.

Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing.

A partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting: —

1. To make an assignment of the partnership property or any portion thereof to a creditor, or to a third person in trust for the benefit of a creditor or of all creditors.
2. To dispose of the good will of the business.
3. To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise.
4. To do any act which would make it impossible to carry on the ordinary business of the partnership.

5. To confess a judgment.

6. To submit a partnership claim to arbitration.

7. To do any other act not within the scope of the preceding section.

A partner is not bound by any act of a copartner in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act: Cal. 7428-7431; Dak. Civ. C. 1420-3.

**Louisiana Law.** Ordinary partners are not bound *in solido* for the debts of the partnership, and no one of them can bind his partners, unless they have given him power so to do, either specially or by the articles of partnership.

Commercial partners are bound *in solido* for the debts of the partnership.

In the ordinary partnership, each partner is bound for his share of the partnership debt, calculating such share in proportion to the number of the partners, without any attention to the proportion of the stock or profits each is entitled to.

If a debt be contracted by one of the partners of an ordinary partnership, who is not authorized, either in his own name or that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction.

All engagements made relative to the partnership affairs, by the person appointed to administer the business of an ordinary partnership by articles of partnership duly recorded and pursuant to those powers, shall bind all the partners : La. 2872-5.

§ 5321. **Ostensible and Sleeping Partners.** An ostensible partner is one whose name appears to the world as such, and he is bound, though he have no interest in the firm. A dormant or secret partner is one whose connection with the firm is really or professedly concealed from the world : Ga. 1889.

§ 5322. **Liabilities.** Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners.

The liability of general partners for each other's acts is defined by the title on agency.

Any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership.

No one is liable as a partner who is not such in fact, except as provided above : Cal. 7442-5 ; Dak. Civ. C. 1428-1431.

The private property of the partners is liable for the debts of the firm when the partnership property proves insufficient : Uta. 377.

§ 5323. (See, generally, §§ 5015, 4741.) **Suits** may be brought either (1) against a partnership as such : Io. 2553 ; N.M. 1886 ; (2) or against all the individual members thereof : Io., N.M. ; (3) or against any or either of them : Io., N.M.

A new action may be brought against the partners not sued, upon the same cause : Io., N.M.

§ 5324. **Assignments.** The assignment of any partner in trade made to secure or satisfy a creditor of the firm is valid ; but this does not authorize the assignment of any of the effects of the partnership to satisfy the individual claim of any of the parties, or other than such debts as are incurred for the effects or proceeds thereof thus assigned : Uta. 378-9.

§ 5325. **Judgments** against the firm may generally be enforced against the partnership property ; and against the property of such of the members as are parties to the suit. See in Part IV.

## Art. 533. Dissolution of Partnerships.

§ 5330. **Release of One Partner.** (Compare § 5013.) When any partnership is dissolved, any partner may make a separate composition with one or all of the firm creditors ; and such composition will be a full discharge to the debtors making it, and to them only, of all liabilities to the creditors with whom the same is made, incurred by reason of such partner's connection with the firm : R.I. 134,1-2 and 5 ; N.Y. Civ. C. 1942 ; N.J. 1884,202,1 ; Pa. *Partnership*, 11 ; O. 3162 ; Mich. 7783 ; Kan. 75,1 ; Mon. G. L. 763 ; S.C. 1883,282.

Such debtor or debtors shall take from the creditor or creditors a note or memorandum exonerating them from all individual liability, which shall be a bar of such creditor's right of recovery from them, and a satisfaction, so far as they are concerned, of

any judgment against the firm: R.I. *ib.* 4; N.Y.; N.J. *ib.* 2; Pa. *ib.* 12; O. 3163; Mich. 7784; Kan. 75,2; Mon. G. L. 764; S.C.

Such composition is not a discharge of the other partners, except for the sums actually so paid, nor does it impair the right of the creditors to proceed against them, in law or equity: R.I. 134,5; Pa. *Partnership*, 13; O. 3164; Mich. 7785; Kan. 75,3; S.C.

So, in others, a creditor having a debt or demand against a partnership, or against several joint obligors or promisors, may discharge one or more of such copartners or co-debtors without impairing his right against the others as to the residue of his debt or demand: Vt. 936; Ct. 19,12,1; Minn. 66,37; Mo. 666.

So, in one state, of several debtors or obligors: Mo.

If an amount exceeding the proportion due from such debtor be paid, it shall be taken as payment of the whole debt *pro tanto*: R.I. 134,3.

This act does not affect the liability of copartners or joint debtors or obligors as to each other, or to contribution; Minn. 66,40; Mo.; Mon. G. L. 766.

The copartners not parties to such compromise are discharged by it from all liability to the creditors beyond their joint ratable proportion, but not otherwise: N.J. *ib.* 3; O.; Mich. 7783,7785; Minn.; Mon. G. L. 765.

They may set off any demand against creditors which could have been set off by the whole firm, or avail themselves of any other defence that would otherwise be open to them: R.I.; Ct.; N.Y. Civ. C. 1944; N.J.; Pa.; O.; Mich.; Kan. 75,3; Mon.; S.C. *ib.* 3.

Such settlement or compromise in nowise affects the right of the other partners to demand from their copartners making it their ratable proportions of such debt as if this act had not been passed: N.Y.; N.J. *ib.* 4; Pa. *ib.* 14; O. 3165; Mich. 7786; Minn. 66,38; Kan. 75,4; Mon.; S.C.

But in several, the composition so made is considered, in reference to the other partners, as an actual payment of such partner's full proportion, whether in fact so or not: Vt. 937; R.I.; O.; Minn. 66,39; S.C.

Except that the copartners may call on such partners for any sum to which they are liable, beyond their original proportion, on account of the insolvency, inability to pay, or absconding of any partner: R.I. 134,6.

All the provisions of this section apply to the case of joint debtors: Vt. 936; R.I. 134,7; Ct.; N.Y. Civ. C. 1942; N.J. *ib.* 5; Pa. *ib.* 15; O. 3166; Mich. 7787; Minn.; Kan. 75,5; Mon. G. L. 763,767; S.C.; to other joint contractors or obligors; Vt.

**§ 5331. General Principles.** If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law.

A general partnership is dissolved as to all the partners, —

1. By lapse of the time prescribed by agreement for its duration;
2. By the expressed will of any partner, if there is no such agreement;
3. By the death of a partner;
4. By the transfer to a person, not a partner, of the interest of any partner in the partnership property;
5. By war, or the prohibition of commercial intercourse between the country in which one partner resides and that in which another resides; or,
6. By a judgment of dissolution: Cal. 7449-7450; Dak. Civ. C. 1432-3.

It is dissolved, at any time, by the mutual consent of the parties, by the death, insanity, or conviction for felony of one of them, by the marriage of a *feme sole* partner, by the extinction of the business for which it was formed, or by such misconduct of either party as will justify a court of equity to decree a dissolution: Ga. 1894.

**Louisiana Law.** A partnership ends: —

1. By the expiration of the time for which such partnership was entered into.
2. By the extinction of the thing, or the consummation of the negotiation.
3. By the death of one of the partners, or by his interdiction.
4. By his bankruptcy.



5. By the will of all the parties, legally expressed, or by the will of any of them, founded on a legal cause, and expressed in the manner directed by law.

When a partnership has been entered into for a limited time, it ends of course at the expiration of that time.

The prorogation which may be agreed upon between the parties shall be made and proved in the same manner as the contract of partnership itself.

If a partnership has been entered into, the stock of which is to be formed with the proceeds of a sale, to be made in common, of several things belonging to each partner, and if it happen that the thing belonging to one of them is destroyed, the partnership shall be extinguished.

Every partnership ends of right by the death of one of the partners, unless an agreement has been made to the contrary.

The death of one partner dissolves the partnership between the surviving partners, unless there be a contrary stipulation.

If it has been stipulated that, in case of the death of one of the partners, the partnership should continue between the heir of the deceased and the surviving partners, or between the surviving partners only, either of these stipulations shall be observed.

But if the stipulation be, that the partnership shall continue between the survivors only, the heir of the deceased shall be entitled to a division of the partnership property, as it stood at the day of the death of his ancestor, and to a share in the profits of any partnership operation in which his share of the stock was employed, and which was unfinished at that time.

The interdiction of one of the partners, or his bankruptcy, has, as to the dissolution of the partnership, the same effect as the death of one of the partners.

If the partnership has been contracted without any limitation of time, one of the partners may dissolve the partnership by notifying to his partners that he does not intend to remain any longer in the partnership, *provided*, nevertheless, the renunciation to the partnership be made *bona fide*, and it does not take place unseasonably.

The renunciation is not *bona fide* when the partner renounces for the purpose of appropriating to himself the profits which the partners expected to receive from the partnership.

The renunciation is made unseasonably, if it be made at the time when things are no longer entire, and when the interest of the partnership requires that its dissolution be postponed. The common interest of the partnership is considered, and not the interest of the partner who opposes the renunciation.

Although the partnership may have been entered into for a limited time, one of the partners may, provided he has just cause for the same, dissolve the partnership before the time, even where inconveniences might result for the partners, and although it might have been stipulated that the partners could not desist from the partnership before the stipulated time.

There is just cause for a partner to dissolve the partnership before the appointed time, when one or more of the partners fail in their obligations, or when an habitual infirmity prevents him from devoting himself to the affairs of the partnership which require his presence or his personal attendance.

The renunciation of the partnership by one of the partners does not operate the dissolution of the partnership, unless it be notified to all the other partners.

The rules concerning the partition of successions, the manner of making such partition, and the obligations which result from the same, between heirs, apply to partners: La. 2876-2890.

**§ 5332. Death of a Partner.** On the death of a partner, the surviving partners succeed to all the partnership property, whether real or personal, in trust, for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in such property passes to those who succeed to his other personal property: Dak. Civ. C. 1442.

If the contract specifies the term for which the partnership is formed, it will continue for that time or until the death of one partner. If it is desired to continue, notwithstanding the death of a partner, it must be so specified: Ga. 1892.

The surviving partner has the right to control the assets of the firm, to the exclusion of the executors, etc., of the one deceased, and is primarily liable to the creditors of the firm for their debts. But when these are all paid, the assets of the firm may be divided between the surviving partners and the representatives of the one deceased *in kind*, upon appraisal: Ga. 1907. If during the copartnership any partner die, be absent, or disappear [*faltore — por ausencia*

*ú otro motivo*], the widow and heirs shall abide by what has been done up to that time and, by the contingencies of pending business, according to such partner's interest: N.M. 1803. If the widow and heirs wish to go on with the copartnership, they may either draw up a new agreement or submit to the one then existing: N.M.

**§ 5333. Notice.** The dissolution of a general partnership by the retiring of an ostensible partner must be made known to creditors and the world (of a dormant partner, to all who had knowledge of his connection with the firm): Ga. 1895; N.M. 1808; so, whenever a partnership is dissolved, notice must be given by advertisement: Ga., N.M.

The liability of a general partner for the acts of his copartners continues, even after a dissolution of the copartnership, in favor of persons who have had dealings with and given credit to the partnership during its existence, until they have had personal notice of the dissolution; and in favor of other persons until such dissolution has been advertised in a newspaper published in every county where the partnership, at the time of its dissolution, had a place of business, if a newspaper is there published, to the extent in either case to which such persons part with value in good faith, and in the belief that such partner is still a member of the firm.

A change of the partnership name, which plainly indicates the withdrawal of a partner, is sufficient notice of the fact of such withdrawal to all persons to whom it is communicated; but a change in the name, which does not contain such an indication, is not notice of the withdrawal of any partner: Cal. 1753-4; Dak. Civ. C. 1436-7.

**§ 5334. Effect.** A dissolution puts an end to all the powers and rights resulting from a partnership to the partners, except for the purpose of a general account and winding up the business. As to third persons, it absolves the partners from all liabilities for future contracts and transactions, but not for those already past: Ga. 1896.

After dissolution, a partner has no power to bind the firm by a new contract, or to revive one already for any cause extinct, nor to renew or continue an existing liability, nor to change its dignity or nature: Ga. 1917.

When a partnership is insolvent, and one of the partners is deceased insolvent, the creditors of the partnership in equal degree with individual creditors cannot claim to share in the individual assets of the deceased partner until the individual creditors shall have first received upon their debts such a percentage from the individual assets as such partnership creditors have received from the partnership assets: Ga. 1918.

After the dissolution of a partnership, the powers and authority of the partners are such only as are prescribed herein.

Any member of a general partnership may act in liquidation of its affairs, except as provided below.

If the liquidation of a partnership is committed, by consent of all the partners, to one or more of them, the others have no right to act therein; but their acts are valid in favor of persons parting with value, in good faith, upon credit thereof.

A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property.

A partner authorized to act in liquidation may indorse, in the name of the firm, promissory notes, or other obligations held by the partnership, for the purpose of collecting the same, but he cannot create any new obligation in its name, or revive a debt against the firm, by an acknowledgment when an action therein is barred by limitation (Part IV.): Cal. 7458-7462; Dak. Civ. C. 1438-1442.

**§ 5335. Partial Dissolution.** A general partnership may be dissolved, as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance, subject however to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as entitle him to a judgment of dissolution: Cal. 7451; Dak. Civ. C. 1434.

**§ 5336. Dissolution by Action.** A general partner is entitled to a judgment of dissolution, —

1. When he, or another partner, becomes legally incapable of contracting;
2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or,

3. When the business of the partnership can be carried on only at a permanent loss: Cal. 7452; Dak. Civ. C. 1435.

**Art. 534. Limited Partnerships.** For partnerships with limited liability, see in Part III.

§ 5340. **Purposes.** Limited partnerships may, in the several states, be formed by two or more (in the District of Columbia, the special partners cannot be more than six in number) persons (1) for any mercantile business: N.H. 118,1; Me. 33,1; Vt. 3689; R.I. 135,1; N.Y. 2,4,1,1; N.J. *Partnership*, 1; Pa. *Limited Partnership*, 1; O. 3141; Ill. 8; Mich. 2341; Wis. 1703; Minn. 30,1; Kan. 74,1; Neb. 1,65,1; Md. 33,1; 1880,482; Del. 64,1; Va. 142,1; W.Va. 145,1; N.C. 3088; Ky. 82,1; Tenn. 2399; Mo. 3401; Ark. 4822; Tex. 3442; Ore. 43,1; Nev. 468; Wash. 2370; Mon. G. L. 943; Uta. 1884,16,1; S.C. 1303; Ga. 1920; Ala. 2063; Miss. 1005; Fla. 159,1; D.C. 488-490.

(2) For any mechanical business: Me., Vt., R.I., N.Y., N.J., Pa., O., Mich., Wis., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Ore., Nev., Wash., Mon., Uta., S.C., Ga., Ala., Fla., D.C.

(3) For any manufacturing business: Me., Vt., R.I., N.Y., N.J., Pa., O., Mich., Wis., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Ore., Nev., Wash., Mon., Uta., S.C., Ga., Ala., Miss., Fla., D.C.

(4) For any commercial business: Ark. 4348; Ga.; Miss.; Fla. (5) For the business of mining: Pa., O., Ky., Tenn., Mo., Nev., Mon., Uta., Ga.

(6) Or of transportation: Mo., S.C. So, of coal only: Pa. So, of navigation: Ark. (7) For any agricultural business: Pa., Ky., Tenn., Mo., Ga., Fla. (8) Or in "any work of improvement:" Miss. (9) For insuring: Ark. (10) For the construction of roads, railways, canals, etc.: Ark. (11) For the banking business: Md. (12) Or for any lawful trade or business: N.H.; Mass. 75,1; Ct. 18,8,1; N.Y.; Ind. 6033; Ill. 84,1; Io. 2147; Tex.; Cal. 7477; Col. 2514; Dak. Civ. C. 1449; Ida. 1885, p. 148, § 1; Wy. 1878, p. 84, § 1; S.C.; Ga.

*Except*, limited partnerships may not be formed (1) for carrying on a banking business: N.H., Me, Vt., R.I., Ct., N.Y., N.J., Pa., O., Mich., Wis., Minn., Kan., Neb., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Cal., Nev., Dak., Ida., Mon., Wy., Uta., S.C., Ga., Ala., Fla. (2) Nor for the brokerage business: Va., W.Va., Ky., Mo.

(3) Nor for making insurance: N.H., Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Mich., Wis., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Tex., Cal., Nev., Dak., Ida., Mon., Wy., Uta., S.C., Ga., Ala., Fla.

(4) Nor for railroad or canal business: Fla.

§ 5341. **Special Partners.** Such partnerships consist of one or more (in Washington, two or more) persons, called general partners, who are jointly and severally responsible as general partners now are by law; and of one or more (in Washington, two or more; and in Maryland and District of Columbia, the number can never exceed six) persons, who shall contribute capital to the common stock, who shall be called special partners: N.H. 118,2; Mass. 75,2; Me. 33,1; Vt. 3690; R.I. 135,2; Ct. 18,8,2; N.Y. 2,4,1,2; N.J. *Partnership*, 2; Pa. *Limited Partnership*, 2; O. 3142; Ind. 6034; Ill. 84,2; Mich. 2342; Wis. 1704; Io. 2148; Minn. 30,2; Kan. 74,2; Neb. 1,65,2; Md. 33,2; Del. 64,2; Va. 142,2; W.Va. 145,2; N.C. 3089; Ky. 82,2; Mo. 3402; Ark. 4823; Tex. 3443; Cal. 7478,7500-1; Ore. 43,2; Nev. 469; Col. 2515; Wash. 2371; Dak. Civ. C. 1450,



1467-8; *Ida. ib.* 2; *Mon. G. L.* 944; *Wy.* 1878, p. 84, § 2; *Uta. ib.* 2; *S.C.* 1304; *Ga.* 1921; *Ala.* 2064; *Miss.* 1006; *Fla.* 159,1; *D.C.* 489.

Such capital must be a specific sum, contributed either (1) in actual cash payments (in all states).

(2) Or in goods, machinery, or fixtures: *Pa. ib.* 33; *Neb.*; *Ark.* 4847; *Col.* (3) It may be secured, if unpaid, by mortgage of real estate: *Ark.* 4849. (4) In real or personal property: *Ill.*, *Mich.*, *Kan.*, *Uta.*

§ 5342. **Certificate of Limited Partnership.** The persons desirous of forming such a partnership must, in all states below cited, except when otherwise specified, make and severally sign a certificate which shall contain (1) (except in New Mexico) the name or firm under which such partnership is to be conducted.

(2) (Except in Connecticut and New Mexico) the general nature of the business to be conducted (and, in New Hampshire, Virginia, Kentucky, Missouri, Colorado, the place where it is to be carried on).

(3) The names, christian and surname, and places of residence, of all the general and special partners interested therein, distinguishing (in all except Oregon, Washington, Idaho, New Mexico) which are general and which special (and also, in Connecticut, Florida, distinguishing which of the general partners are authorized to transact partnership business and sign the firm name).

(4) The amount of capital which each special partner shall have contributed to the common stock <sup>a</sup> (and in Missouri, the amount he shall have agreed so to contribute yet unpaid).

(5) The periods at which the partnership is to commence and terminate.

(6) In Missouri and New Mexico, the amount of means each special partner may annually withdraw for his individual use from the partnership. (7) The administration or branches in which each one shall act, in New Mexico. (8) The manner in which they shall divide profits or losses, in New Mexico. (9) The obligation that the partners will submit, under a conventional penalty, to the adjudication of arbitrators without appeal, in New Mexico. (10) Such other conditions as may be desired, in New Mexico. (11) The terms upon which the partnership may be dissolved, and that the death of a partner shall not cause dissolution, in Illinois: *N.H.* 118,3; *Mass.* 75,4; *Me.* 33,2; *Vt.* 3691; *R.I.* 135,3; *Ct.* 18,8,4; *N.Y.* 2,4,1,4; *N.J. Partnership*, 4; *Pa. Limited Partnership*, 4; *O.* 3143; *Ind.* 6035; *Ill.* 84,4; *Mich.* 2344; *Wis.* 1705; *Io.* 2150; *Minn.* 30,4; *Kan.* 74,4; *Neb.* 1,65,4; *Md.* 33,3; *Del.* 64,3; *Va.* 142,3; *W.Va.* 145,3; *N.C.* 3090; *Ky.* 82,3; *Tenn.* 2401; *Mo.* 3403; *Ark.* 4825; *Tex.* 3445; *Cal.* 7479; *Ore.* 43,3; *Nev.* 470; *Col.* 2517; *Wash.* 2372; *Dak. Civ. C.* 1451; *Ida. ib.* 3; *Mon. G. L.* 945; *Wy.* 1878, p. 84, § 3; *Uta. ib.* 4; *S.C.* 1306; *Ga.* 1923; *Ala.* 2066; *Miss.* 1007; *Fla.* 159,1-2; *N.M.* <sup>b</sup> 1801; *D.C.* 492.

Such certificate may be signed by power of attorney, which must be duly recorded with it (§ 5345): *Ga.*

NOTES. — <sup>a</sup> And in Florida, "the nature of such capital, whether in cash, merchandise, or business experience and skill." <sup>b</sup> This contract or certificate is required in all partnerships, general or limited, in New Mexico.

§ 5343. **Acknowledgment and Proof.** In most states, the several persons signing this certificate must acknowledge it (or their signatures may be proved as in the case of a deed) before (1) the same persons authorized to take the acknowledgment or proof of deeds of land: *Mass.* 75,5; *Ct.* 18,8,4; *N.Y.* 1837,129; *N.J. Partnership*, 5; *Pa. Limited Partnership*, 5; *O.* 3144; *Ill.* 84,5; *Mich.* 2345; *Wis.* 1706; *Io.* 2151; *Minn.* 30,5; *Kan.* 74,5; *Neb.* 1,65,5; *Md.* 33,4; 1884,66; *Ky.* 82,4; *Tenn.* 2402; *Mo.* 3404; *Tex.* 3446; *Cal.* 7480; *Ore.* 43,3; *Nev.* 471; *Col.* 2518; *Wash.* 2372; *Dak. Civ. C.* 1452; *Ida. ib.* 4; *Mon. G. L.* 946; *Wy. ib.* 4; *Uta. ib.* 5; *S.C.* 1307; *Miss.* 1008; *Fla.* 159,3.

(2) Or before any justice of the peace : N.H. 118,4 ; Me. 33,3 ; Vt. 3692 ; R.I. 135,4 ; Ind. 6036 ; Md. 33,4 ; Del. 64,3 ; Ark. 4826 ; Ga. 1924. (3) Or a notary public : R.I. ; Neb. ; Uta. ; Ga. ; D.C. 493. (4) Or a judge : Md. ; N.C. 3091 ; Ark. ; Ga. ; Ala. 2067 ; D.C. (5) Or clerk of court : N.C., Ky. (6) Before any court of record : N.M. 1801. (7) Before any chancellor or judge of the supreme, circuit, or county courts : N.Y. 2,4,1,5.

This acknowledgment or proof is, generally, to be made in the same manner (1) as in the case of a deed conveying real estate : N.Y., N.J., Pa., Ill., Mich., Minn., Kan., Neb., Md., Ky., Tenn., Mo., Ark., Tex., Col., Uta., S.C., Miss., Fla., D.C.

Or, in two, as in the case of a power of attorney : Va. 142,4 ; W.Va. 145,4. It must be proved by two witnesses : Fla.

§ 5344. **Record.** The certificate so made is required to be recorded (1) in the land record office of the county (or town) wherein is situated the chief place of business of the partnership : N.H. 118,4 ; Me. 33,3 ; Pa. *Limited Partnership*, 6 ; O. 3145 ; Ind. 6036 ; Minn. 30,6 ; Del. 64,3 ; N.C. 3092 ; Tenn. 2402 ; Mo. 3404 ; Cal. 7480 ; Nev. 471 ; Dak. Civ. C. 1452 ; Ida. *ib.* 4 ; Mon. ; Wy. ; Uta. *ib.* 6. (2) In the office of the county clerk (or, in Vermont, Rhode Island, Connecticut, the town clerk) in such county or town : Vt. 3692 ; R.I. 135,4 ; Ct. 18,8,4 ; N.Y. 2,4,1,6 ; N.J. *Partnership*, 6 ; Ill. 84,6 ; Mich. 2346 ; Kan. 74,6 ; Neb. 1,65,6 ; Va. 142,4 ; W.Va. 145,4 ; 1883,5 ; Ky. 82,4 ; Tex. 3447 ; Ore. 43,3 ; Col. 2519 ; Wash. 2372-3 ; Wy. ; S.C. 1308 ; Ga. 1925. (3) In the office of the clerk of the superior court for the county : Wis. 1706 ; Io. 2152 ; Md. 33,4 ; Ark. 4827 ; Fla. 159,4.

(4) With the secretary of state : Mass. 75,5. (5) With the judge of probate : Ala. 2068. (6) With the chancery clerk : Miss. 1008 ; (7) With the clerk of the supreme court : D.C. 493.

The record is made in books kept open to public inspection : N.H., Mass., Me., Vt., N.Y., N.J., Pa., O., Ind., Ill., Mich., Io., Minn., Kan., Md., Tenn., Ark., Tex., Nev., Col., Ida., Mon., Wy., S.C., Ga., Ala., Miss., Fla., D.C.

If the partnership has places of business in different counties (or towns), record of the certificate, or a copy, must be made in like manner in every such county (or town) : Me. ; Vt. ; R.I. ; Ct. ; N.Y. ; N.J. ; Pa. ; O. ; Ind. ; Ill. ; Mich. 2347 ; Wis. ; Io. ; Minn. ; Kan. 74,7 ; Neb. ; Md. ; Del. ; Va. ; W.Va. ; N.C. ; Ky. ; Tenn. 2403 ; Mo. ; Ark. 4828 ; Tex. ; Cal. ; Nev. ; Col. ; Dak. ; Ida. ; Wy. ; Uta. ; S.C. ; Ga. ; Ala. ; Miss. ; Fla.

§ 5345. **Publication.** A copy of such certificate, or the essential facts contained therein, must then be published (1) by advertisement in a newspaper : N.H. 118,4 ; Mass. 75,6 ; Me. 33,5 ; Vt. 3693 ; R.I. 135,5 ; Ct. 18,8,6 ; N.Y. 2,4,1,9 ; N.J. *Partnership*, 9 ; Pa. *Limited Partnership*, 9-10 ; O. 3146 ; Ind. 6037 ; Ill. 84,9 ; Mich. 2350 ; Wis. 1709 ; Io. 2155 ; 1882, Ch. 8 ; Minn. 30,9 ; Kan. 74,10 ; Neb. 1,65,9 ; Md. 33,7 ; Del. 64,3 ; Va. 142,4 ; W.Va. 145,4 ; N.C. 3096 ; Ky. 82,4 ; Tenn. 2407 ; Mo. 3404 ; Ark. 4831 ; Tex. 3450 ; Cal. 7483 ; Ore. 43,4 ; Nev. 472 ; Col. 2522 ; Wash. 2373 ; Dak. Civ. C. 1455 ; Ida. *ib.* 7 ; Wy. *ib.* 7 ; Uta. *ib.* 9 ; S.C. 1311 ; Ga. 1928 ; Ala. 2072 ; Miss. 1011 ; Fla. 159,8 ; D.C. 497.

(2) By posting, when no paper is published in the county where the principal place of business is situated : Md., S.C.

In a few states, this publication must be made in two newspapers : R.I., N.Y., Pa., Mich., Wis., Io., Neb., Md., Ga., Ala. Such publication or other notice must, generally, be made immediately after filing the certificate for record : N.H., Mass., Vt., R.I., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Va., N.C., Tenn., Ark., Tex., Ore., Nev., Col., Wash., Wy., Uta., S.C., Ala., Miss., Fla., D.C. ; within two months thereafter : Ga. ; twenty days : Me. ; one month : Ida.

The newspaper or newspapers must be published in the county, city, or district where the principal place of business of the partnership is to be: Mass., Me., Vt., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Va., W.Va., N.C., Ky., Mo., Cal., Ore., Nev., Col., Wash., Dak., Ida., Wy., Uta., S.C., Ga., Miss., Fla.

But in many states, the paper is designated by the clerk or recorder: Pa., Mich., Wis., Io., Neb., Md., Tenn., Ark., Tex., Uta., Ala., D.C.

If no paper is published in such county, then in a paper published in some adjoining county: Me., Vt., N.J., O., Ind., Ill., Ky., Mo., Cal., Nev., Col., Dak., Ida., Wy., Uta., S.C., Miss., Fla.

Or in the same judicial district: Neb.; or in the paper in which the sheriff advertises: Ga.; or in some paper published in the principal city or capital of the State: Mass., Minn.; or in the state paper: Me.; or some paper designated by the clerk: Md.

But in two states, publication may be made in any paper published in the State: R.I., Del.; "having general circulation in the county:" Ore., Wash.

If the firm has places of business in more than one county, publication must be made in each of such counties: O., Md., Va., W.Va., Ky., Mo.

Such publication must be made once a week (1) for six successive weeks: Mass., Me., Vt., R.I., Ct., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Neb., Md., Del., Va., W.Va., N.C., Tenn., Ark., Tex., S.C., Ga., Ala., Fla.; (2) for three successive weeks: N.H., Nev.; (3) for four successive weeks: Kan., Ky., Mo., Cal., Ore., Col., Wash., Dak., Ida., Wy., Uta., D.C.; (4) for three months: Miss.

Failure to publish, as herein required, in most of the states, renders the partnership general, as in § 5347: Me.; Vt.; R.I.; N.Y.; N.J.; Pa.; O.; Ind.; Ill., Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Del.; Va.; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Cal.; Ore.; Nev.; Col.; Wash.; Dak.; Ida.; Wy.; Uta.; S.C.; Ga.; Ala.; Miss.; D.C. 498.

§ 5346. **Affidavit.** At the time of recording the certificate, there must also, in most of the states, be recorded an affidavit, made and signed by one or more of the general partners (or, in Connecticut, Arkansas, Texas, Idaho, Wyoming, all of them), stating that the sums specified in the certificate to have been contributed by each of the general partners have been actually and in good faith paid in cash (or its equivalent, as provided in § 5341): N.H. 118,5; Ct. 18,8,4; N.Y. 2,4,1,7; N.J. *Partnership*, 7; Pa. *Limited Partnership*, 7; Ill. 84,7; Mich. 2348; Wis. 1707; Io. 2153; Minn. 30,7; Kan. 74,8; Neb. 1,65,7; Md. 33,5; Va. 142,3; W.Va. 145,3; N.C. 3093; Ky. 82,3; Tenn. 2404; Mo. 3403; Ark. 4829; Tex. 3448; Cal. 7481; Col. 2520; Dak. Civ. C. 1453; Ida. *ib.* 5; Wy. *ib.* 5; Uta. *ib.* 7; S.C. 1309; Ga. 1926; Ala. 2069; Miss. 1009; Fla. 159,5; D.C. 494.

When property constitutes a part of such capital it must be appraised: Fla. 159,6.

§ 5347. **Partnership deemed General.** Until the certificate is duly made, acknowledged, and recorded, and, in states where it is required, the affidavit filed, as above, no such limited partnership is deemed to be formed: N.H. 118,4; Me. 33, 3; Vt. 3692; R.I. 135,4; Ct. 18,8,4; N.Y. 2,4,1,8; N.J. *Partnership*, 8; Pa. *Limited Partnership*, 8; O. 3147; Ind. 6036; Ill. 84,8; Mich. 2349; Wis. 1708; Minn. 30,8; Kan. 74,9; Neb. 1,65,8; Md. 33,6; Del. 64,3; Va. 142,4; W.Va. 145,4; N.C. 3094; Ky. 82,4; Tenn. 2405; Mo. 3404; Ark. 4830; Tex. 3449; Cal. 7482; Ore. 43,4; Nev. 471; Col. 2521; Wash. 2373; Dak. Civ. C. 1454; Ida. *ib.* 6; Mon. G. L. 946; Wy. *ib.* 6; Uta. *ib.* 8; S.C. 1310; Ga. 1927; Ala. 2069-70; Miss. 1110; Fla. 159,7; D.C. 495. The same would be implied in the other states having similar requirements.



So, if any false statement is made in such certificate or affidavit, all the persons interested in the partnership are, in nearly all states, liable as general partners (see § 5344 for citations) : N.H. 118,4 ; Mass. 75,4 ; Me. 33,4 ; Vt. ; R.I. 135,7 ; Ct. 18,8,5 ; N.Y. ; N.J. ; Pa. ; O. 3145 ; Ind. ; Ill. ; Mich. ; Wis. ; Io. 2154 ; Minn. ; Kan. ; Neb. ; Md. ; Va. ; W.Va. ; N.C. 3095 ; Ky. ; Tenn. 2406 ; Mo. ; Ark. ; Tex. ; Cal. 7501 ; Ore. ; Nev. ; Col. ; Wash. ; Dak. Civ. C. 1468 ; Ida. *ib.* 4 and 19 ; Mon. G. L. 946 ; Wy. *ib.* 4 ; Uta. ; S.C. ; Ga. ; Ala. 2071 ; Miss. ; Fla. ; D.C. 496.

§ 5348. **Effect of Certificate.** A copy of such certificate is *prima facie* evidence of the matters therein contained : Ct. 18,8,4 ; Ga. 1926.

The partnership is responsible only for the acts of the general partners designated as specially authorized as aforesaid [§ 5343 (3)] : Ct.

One who, upon making a contract with a partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special, and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract by reason of an error or defect in the proceedings for the creation of the special partnership, prior to the acceptance of the memorandum, if an effort has been made by the partners, in good faith, to form a special partnership in the manner required by § 5342 : Cal. 7503 ; Dak. Civ. C. 1470 ; Ida. *ib.* 21 ; Wy. *ib.* 21.

§ 5349. **Evidence of Publication.** The affidavit of the fact of publication made by the editor or publisher of the newspaper may, in many states, be filed with the clerk or record officer, and will be evidence of the facts therein contained : N.Y. 2,4,1,10 ; N.J. *Partnership*, 10 ; Pa. *Limited Partnership*, 11 ; Ill. 84,10 ; Mich. 2351 ; Wis. 1710 ; Io. 2156 ; Minn. 30,10 ; Kan. 74,11 ; Neb. 1,65,10 ; Md. 33,8 ; N.C. 3097 ; Tenn. 2408 ; Ark. 4832 ; Tex. 3451 ; Cal. 7484 ; Dak. Civ. C. 1456 ; Ida. *ib.* 8 ; Wy. *ib.* 8 ; Uta. *ib.* 10 ; S.C. 1312 ; Ga. 1929 ; Ala. 2073 ; Miss. 1012 ; D.C. 499.

So, in Maryland, the affidavit of any disinterested person, when the publication is by posting.

§ 5350. **Renewals** or continuances of a limited partnership beyond the time originally fixed for its termination must, in all the above states, be certified, acknowledged, recorded, published, and an affidavit of a general partner made in states where it is required (§ 5346) in the manner required for an original partnership : N.H. 118,9 ; Mass. 75,7 ; Me. 33,5 ; Vt. 3694 ; R.I. 135,6 ; Ct. 1882,8 ; N.Y. 2,4,1,11 ; N.J. *Partnership*, 11 ; Pa. *Limited Partnership*, 12 ; O. 3148 ; Ind. 6038 ; Ill. 84,11 ; Mich. 2352 ; Wis. 1711 ; Io. 2157 ; Minn. 30,11 ; Kan. 74,12 ; Neb. 1,65,11 ; Md. 33,9 ; Del. 64,3 ; Va. 142,6 ; W.Va. 145,6 ; N.C. 3098 ; Ky. 82,6 ; Tenn. 2409 ; Mo. 3406 ; Ark. 4833 ; Tex. 3452 ; Cal. 7485,7507-8 ; Ore. 43,5 ; Nev. 473 ; Wash. 2374 ; Dak. Civ. C. 1457 ; 1471-2 ; Ida. *ib.* 9 and 23 ; Mon. G. L. 947 ; Wy. *ib.* 9 and 23 ; Uta. *ib.* 11 ; S.C. 1313 ; Ga. 1930 ; Ala. 2074 ; Miss. 1018 ; D.C. 500.

But in one, no publication of such renewal is required, though required in the first instance : Tenn. Publication for two weeks only is enough : Ct.

And in several, no affidavit is required in the case of renewal : Ct., Va., W.Va., Ky.

So, in one other, the affidavit may state that the cash was originally paid in, and has not been impaired, but is now represented by stock : N.C.

And in one other, that the books have been balanced, and the balance of profit or loss ascertained, and it must also state the amount to the credit of the special partners, after a true account of the assets : Mo.

Such renewal may be made within thirty days after the dissolution : N.H. 1879,15.

And in nearly all of them, every partnership not thus renewed or continued will be deemed general: N.H.; Me.; Vt.; R.I.; N.Y.; N.J.; Pa.; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Va.; W.Va.; N.C.; Tenn.; Mo.; Ark.; Tex.; Ore.; Nev.; Wash.; Ida.; Mon.; Wy. *ib.* 22; Uta.; S.C.; Ga.; Ala.; Miss.; D.C. 501. And the same is implied in the other states cited above.

Notice of alterations must be given to the general partner, and must be duly acknowledged, certified, and recorded as in § 5344: Pa. *ib.* 32.

§ 5351. **Dissolution.** Any alteration in the number or persons of the partners or the nature of the business will, in most states, be deemed a dissolution of the partnership: N.H. 118,8; N.Y. 2,4,1,12; N.J. *Partnership*, 12; Pa. *Limited Partnership*, 13; O. 3149; Mich. 2353; Wis. 1712; Io. 2158; Minn. 30,12; Kan. 74,13; Neb. 1,65,12; Md. 33,10; Va. 142,5; W.Va. 145,5; N.C. 3099; Ky. 82,5; Tenn. 2410; Mo. 3405; Ark. 4834; Tex. 3453; Cal. 7507; Dak. Civ. C. 1471; Ida. *ib.* 22; Wy. *ib.* 22; Uta. *ib.* 12; S.C. 1314; Ga. 1931; Ala. 2075; Miss. 1019; D.C. 502.

So, any alteration in the capital or shares thereof contributed, held, or owned by any special partner: N.H., N.Y., N.J., Pa., O., Mich., Wis., Io., Minn., Kan., Neb., Md., Va., W.Va., N.C., Tenn., Ark., Tex., Uta., S.C., Ga., Ala., D.C.

So, in two of them, any withdrawal of capital: Ky., Mo. Or any diminution thereof otherwise than by a loss in business or the defraying of such personal expenses as may have been originally agreed for (see also § 5356): Va., W.Va., Ky., Mo.

Anything which would effect the dissolution of a general partnership (§ 5331): O. 3154; Cal. 7509; Dak. Civ. C. 1473.

Or, in most states, any alteration in any other matter specified in the original certificate: N.H., N.J., Pa., O., Mich., Wis., Io., Minn., Kan., Neb., Md., Va., W.Va., N.C., Tenn., Ark., Tex., Uta., S.C., Ga., Ala., Miss., D.C.

And generally limited partnerships formed under the statute may be dissolved in the same cases which would in equity be cause of dissolving an ordinary partnership: O. 3154; Ill. 84,15; Miss. 1020.

Any partnership carried on after such alterations specified above shall, in most states, thereupon become general: N.H.; N.Y.;<sup>a</sup> N.J.; Pa.; O.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Va.; W.Va.; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Ida.; Wy.; Uta.; S.C.; Ga.; Ala.; Miss.; D.C. 503.

Unless it be duly renewed in the manner originally provided: N.J., Pa., O., Mich., Wis., Io., Minn., Kan., Neb., Md., Va., W.Va., N.C., Tenn., Ark., Tex., Ida., Wy., S.C., Ga., Ala., Miss., D.C.

NOTE. — <sup>a</sup> In these states it will be deemed general only as to business conducted after the alteration.

§ 5352. **Limitations.** But one or more new special partners may be taken in upon actually paying in an additional amount of capital, an additional certificate being duly filed by the general partners, stating such facts: N.Y. 2,4,1,12.

So, in Pennsylvania, the capital may be increased either by taking in new special partners or by new subscription from old partners. such increase being made in pursuance of the consent of the partners, as expressed in the original articles of partnership or any subsequent instrument, and a certificate of such increase being duly acknowledged, certified, and recorded; but no neglect in recording the certificate of any such increase of capital, or of the sale or transfer of interest of any special partner, shall operate a dissolution or make the special partners liable as general partners: Pa. *Limited Partnership*, 14-15.

§ 5353. **The Death of a Partner.** general or special, will also cause a dissolution of the partnership: N.Y. 2,4,1,12; Ill. 84,13; D.C. 517.

So, the insolvency of a general partner or of the partnership : D.C.

The insolvency of a special partner does not, in Pennsylvania, cause a dissolution of the partnership, but his interest may be sold by his assignees: Pa. *ib.* 30.

Unless the articles of partnership specify that in such case the partnership shall be carried on by the survivors, in which case it may be so continued with the assent of the deceased partner's representatives : N.Y., Ill.

But such death does not cause a dissolution, unless the articles so provide: Fla. 159,20. So, in two others, if a special partner die, his administrators may continue his interest, or sell it : N.Y.; Pa. *ib.* 31. And the partnership is not thereby dissolved, unless it is so provided in the agreement : Pa.

If it be provided that death shall not work a dissolution, and the general partners surviving continue the business, the heirs and executors of such deceased partner stand in the relation of special partners, unless otherwise provided in the articles or agreed between them : Ill. 84,14.

**§ 5354. Sale of Partnership Interest.** Any special partner, or his legal representatives, if deceased, may sell his interest in the partnership without working a dissolution thereof or rendering the partnership general; and the purchaser thereupon becomes a special partner with the same rights of an original special partner : N.Y.; N.J. *Partnership*, 26; Pa. *ib.* 28; Mich. 2361; Kan. 74,13.

But a notice of such sale must be filed or recorded and published with the original record : N.Y.; N.J.; Pa.; Mich. 2361-2; Kan.

And such partner making such sale must have the written assent of the other partners : Pa., Kan. This consent may be given in advance in the original certificate of partnership or other like instrument : Pa. *ib.* 29. A sale of a part interest or share may be made in the same way : Pa.

The general partners or either of them may purchase a part or the whole of the interest of one or more special partners : Pa.

A special partner may devise his interest : Pa. *ib.* 31.

The interest of a general partner may be sold in the same way : Mich.

The liability of the original partners remains unchanged, except as between each other, until the certificate is filed and published as hereinbefore : Mich. 2363.

A general partner in a limited partnership, with the written consent of his partners, by deed acknowledged and recorded, or will, may sell, assign, or bequeath his interest in the partnership : Pa. *ib.* 27. So, his executor or administrator may do so : Pa. And a corresponding alteration must be made in the name of the firm : Pa.

**§ 5355. Voluntary Dissolution.** No dissolution of a partnership by the acts of the parties can take place previous to the time specified in the certificate of its formation or renewal until a notice of such dissolution (1) is filed and recorded in the clerk's office or registry in which the original certificate was recorded : N.H. 118,10; Mass. 75,10; Me. 33,9; Vt. 3698; R.I. 135,13; N.Y. 2,4,1,24; N.J. *ib.* 24; Pa. *ib.* 26; O. 3159; Ind. 6044; Ill. 84,12; Mich. 2359; Wis. 1723; Io. 2170; Minn. 30,21; Kan. 74,20; Neb. 1,65,24; Md. 33,21; Del. 64,8; Va. 142,11; W.Va. 145,11; N.C. 3108; Tenn. 2421; Mo. 3411; Ark. 4846; Tex. 3464; Cal. 7509; Ore. 43,9; Nev. 479; Col. 2526; Wash. 2378; Dak. Civ. C. 1473; Ida. *ib.* 24; Mon. G. L. 953; Wy. *ib.* 24; Uta. *ib.* 21; S.C. 1324; Ga. 1943; Ala. 2087; Miss. 1020; Fla. 159,19; D.C. 517.

(2) And such notice must, in most states, be duly published, (α) as in § 5346, respectively : Mass.; Me.; Vt.; R.I.; Ind.; Ill.; Mich.; Kan.; Del.; Va.; W.Va.; Ky. 82,11; Mo.; Ore.; Nev.; Col.; Wash.; Dak.; Ida.; Wy.; Uta.; Ga.; D.C.; (β) "once a week for four weeks:" N.H., N.Y., N.J., Pa., O., Wis., Io., Minn., Neb., Md., N.C., Ark., Tex., Ga., Fla.; (γ) for three weeks: Mon., Ala.; (δ) for three months: S.C.; (ε) for thirty days: Miss.

**§ 5356. Capital.** No part of the sum contributed by any special partner to the capital stock shall, in nearly all, be withdrawn by him or paid or trans-



ferred to him in the shape of dividends, profits, or otherwise at any time during the continuance of the partnership: N.H. 118,7; Mass. 75,8; Me. 33,7; Vt. 3696; R.I. 135,9; Ct. 18,8,7; N.Y. 2,4,1,15; N.J. *Partnership*, 15; Pa. *Limited Partnership*, 17; O. 3151; Ind. 6040; Ill. 84,18; Mich. 2355; Wis. 1714; Io. 2161; Minn. 30,15; Kan. 74,15; Neb. 1,65,15; Md. 33,13; Del. 64,5; Va. 142,8; W.Va. 145,8; N.C. 3102; Ky. 82,8; Tenn. 2413; Ark. 4837; Tex. 3456; Cal. 7493; Ore. 43,7; Nev. 475; Col. 2524; Wash. 2376; Dak. Civ. C. 1463; Ida. *ib.* 14; Mon. G. L. 949; Wy. *ib.* 14; Uta. *ib.* 15; S.C. 1329; Ga. 1934; Ala. 2078; Miss. 1015; Fla. 159,11; D.C. 508.

But any partner may annually receive lawful interest on the sum so contributed by him if the payment thereof does not reduce the original capital: N.H.; N.Y.; N.J.; Pa.; O.; Ill.; Io.; Md.; N.C.; Tenn.; Ark.; Tex.; Cal. 7494; Wash.; Dak. Civ. C. 1464; Ida. *ib.* 15; Wy. *ib.* 15; S.C.; Ga.; Ala.; Miss.; Fla.; D.C.

So, in others; and it may not exceed twelve per cent: Wis., Neb., Uta.; so, ten per cent: Ct. 1875,67.

And after this, if there are profits actually earned, he may receive his proportion: N.Y., N.J., Pa., O., Ill., Wis., Io., Neb., Md., N.C., Tenn., Ark., Tex., Cal., Dak., Ida., Wy., Uta., S.C., Ga., Ala., Miss., Fla., D.C.

In Missouri, "if the whole or any part of the capital advanced by a special partner be by him withdrawn, or if he fail actually to contribute towards the capital as agreed, he is liable as a general partner:" Mo. 3408.

**Penalty.** If it shall appear that by payments of interest or profits to the special partner the original capital has been reduced, the partner receiving it (1) will be liable for such an amount as will make good his share of the capital (with interest, except in North Carolina, Tennessee, Mississippi, Georgia, and Florida): Mass.; Me.; Vt.; R.I.; N.Y. 2,4,1,16; N.J. *ib.* 16; Pa. *ib.* 18; O. 3152; Ind.; Ill.; Mich.; Wis. 1715; Io. 2162; Minn. 30,15; Kan. 74,15; Neb. 1,65,16; Md. 33,14; Del.; Va. 142,8; W.Va. 145,8; N.C. 3103; Ky.; Tenn. 2414; Ark. 4838; Tex. 3457; Ore. 43,7; Nev. 475; Col. 2524; Wash.; Mon. G. L. 949; Uta. *ib.* 16; Ga. 1935; Ala. 2079; Miss.; Fla. 159,12; D.C. 509; (2) he will be liable as a general partner: N.H.; Cal. 7495; Dak. Civ. C. 1465; Ida. *ib.* 16; Wy. *ib.* 16.

§ 5357. **Suits** in relation to the business of the partnership may generally be brought and conducted by and against the general partners in the same manner as if there were no special partners: N.H. 118,11; Mass. 75,9; Me. 33,8; Vt. 3697; R.I. 135,12; Ct. 18,8,8; N.Y. 2,4,1,14; N.J. *Partnership*, 14; Pa. *Limited Partnership*, 16; O. 3161; Ind. 6043; Ill. 84,17; Mich. 2358; Wis. 1718; Io. 2160; Minn. 30,14; Kan. 74,19; Neb. 1,65,14; Md. 33,19; Del. 64,7; Va. 142,12; W.Va. 145,12; N.C. 3101; Ky. 82,12; Tenn. 2412; Mo. 3412; Ark. 4836; Tex. 3455; Cal. 7492; Ore. 43,8; Nev. 478; Col. 2525; Wash. 2377; Dak. Civ. C. 1462; Ida. *ib.* 13; Mon. G. L. 952; Wy. *ib.* 13; Uta. *ib.* 14; S.C. 1316 and 1330; Ga. 1933; Ala. 2077; Miss. 1021; Fla. 159,10; D.C. 505 and 513.

Except (1) when by the provisions of this article such special partners are to be deemed general: N.H., Mass., Me., Vt., R.I., Ct., O., Ind., Ill., Mich., Minn., Md., Del., Va., W.Va., Ky., Mo., Ore., Nev., Col., Wash., Mon., S.C., Ga., Miss., Fla., D.C.

In such case, in most states, the joinder of such special partner is optional: N.H., Mass., Me., Vt., R.I., O., Ind., Ill., Mich., Minn., Md., Del., Va., W.Va., Ky., Mo., Nev., Col., Mon., S.C., Ga., Miss., Fla., D.C.

So, (2) when they are held responsible under § 5356 for sums withdrawn: N.H., Mass., Vt., R.I., Ind., Ill., Mich., Minn., Md., Del., Ore., Nev., Col., Wash., Mon., Ga.

But in Mississippi, suits in relation to partnership transactions may also be brought against all the partners, general or special, without discrimination; and the latter may plead separately: Miss. 1022. Or any special partner may be sued separately: Miss. See also in Part IV.

**§ 5358. Firm Name.** In most states, the names of the general partners only may be inserted in the firm name: Mass. 75,3; Me. 33,6; Vt. 3695; R.I. 135,8; Ct. 18,8,3; N.Y. 2,4,1,13; N.J. *Partnership*, 13; Pa. *Limited Partnership*, 34; O. 3150, Amt.; Ind. 6039; Ill. 8,4,16; Mich. 2354; Wis. 1713; Io. 2159; Minn. 30,13; Kan. 74,14; Neb. 1,65,13; Md. 33,11; Del. 6,4,4; Va. 142,7; W.Va. 145,7; N.C. 3100; Ky. 82,7; Tenn. 2411; Mo. 3407; Ark. 4835; Tex. 3454; Ore. 43,6; Nev. 474; Col. 2523; Wash. 2375; Dak. Civ. C. 1458; Ida. *ib.* 25; Mon. G. L. 948; Wy. *ib.* 25; Uta. *ib.* 13; S.C. 1315; Ga. 1932; Ala. 2076; Miss. 1013; Fla. 159,9; D.C. 504.

Without the addition of the word "Company" or any other general term: Mass., Me., Vt., N.J., Pa., Io., Kan., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Ore., Wash., Dak., S.C., Ga., Ala., Miss., Fla.

But if there are more than three general partners, all their names need not be inserted: Mass., Vt. So, in others, if there are two or more general partners, the name of one or more only need be inserted: Ct.; N.Y.; Pa. *ib.* 35; O.; Wis.; Minn.; Md.

And the words "and Company" may be added: N.Y., Pa., O., Mich., Wis., Minn., Md., D.C.

If the surname of a special partner be the same as that of a general partner, such surname may be used without rendering him liable as a general partner under § 5359: Mass.; Pa. *ib.* 36.

A firm of general partners that have transacted business under one firm name for more than five years may organize a special partnership to continue the same business, containing any of the same or additional partners, and adopt the firm name before used, publication being duly made under § 5360: O. 3150.

The name of a special partner may not be used unless the word "limited" be added to the firm name: Cal. 7510; Ida.; Wy. So, the word "limited" must be attached to the style and signature of the firm in all business transactions: Md. 33,12; 1880,203; Fla. 159,2.

And if this be done, such limited partner may take part in the business without on that account being deemed a general partner: Md. Any limited partnership may use the firm name of any former general or limited partnership when a majority of the partners, general or special, in such former partnership or of the survivors are members of the new one, or when such majority consents to the use of such firm name in writing, upon publishing and recording a certificate with the county clerk: N.Y. 1868,256.

**§ 5359. Penalty.** (For citations, see § 5358.) If the name of a special partner be used in the firm (with his privity: N.H., Mass., Me., Vt., R.I., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Md., Del., Va., W.Va., N.C., Tenn., Ark., Tex., Ore., Nev., Wash., Ida., S.C., Ala., Fla., D.C.; with his consent: N.H., Mass., Me., Vt., R.I., Ind., Mich., Kan., Del., Ky., Mo., Ore., Nev., Col., Wash., Ida., Mon., Miss.) he is deemed a general partner: N.H. 118,6; Mass.; Me.; Vt.; R.I.; Ct.; N.Y.; N.J.; Pa. *ib.* 34; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md. 33,12; 1880,203; Del.; Va. 142,7; W.Va. 145,7; N.C.; Ky.; Tenn.; Mo.; Ark.; Tex.; Ore. 43,6; Nev. 474; Col. 2523; Wash. 2375; Mon. G. L. 948; Uta. *ib.* 13; S.C.; Ga. 1932; Ala.; Miss.; Fla.; D.C. 506.

**§ 5360. Publication.** In several states the partnership are required to post in some conspicuous place a sign bearing the full names of all the partners: N.Y.

2,4,1,13; Pa. *Limited Partnership*, 35; O. 3150, Amt.; Wis.; Minn.; Ky. 82,13; Mo. 3413; Dak. Civ. C. 1458; S.C.<sup>a</sup> 1326 and 1328.

And distinguishing which are limited partners: Pa., Wis., Ky., Dak. With the words "limited partners:" Me.

And in default thereof no action shall be dismissed by reason of the pleadings not being correct as to the names and number of the partners: N.Y., O., S.C. See also in Part IV.

And there is also a penalty for failing to do so: S.C. See in Part V. There is also a penalty for so posting "Co." or "Company" when such is not the fact: S.C. 1327.

In default of such notice, the special partners are liable as general partners: Ky., Mo.

In suits against a partnership, the general partners whose names are used in the firm are the only necessary parties defendant; and a judgment or decree recovered against them has the same legal effect as if against all the general partners, and execution may issue accordingly: Minn. 66,42; Md. 33,11. See, for other states, in Part IV.

NOTE. — <sup>a</sup> This section does not apply, in these states, to special partners.

**§ 5361. Of Partnership In Commendam.** Partnership *in commendam* is formed by a contract by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more.

He who makes this contract is called, with respect to those to whom he makes the advance of capital, a partner *in commendam*. Every species of partnership may receive such partners. It is therefore a modification of which the several kinds of partnerships are susceptible rather than a separate division of partnerships.

The proportion of profits to be received by the partner *in commendam* may be regulated by the covenant of the parties, as may also, with respect to each other, the proportion of losses and expenses to be borne by each of the partners; but as respects third persons, the whole sum furnished or agreed to be furnished by such partner is liable for the debts of the partnership.

In no case, except as is hereinafter expressly provided, shall the partner who has no other interest in the concern than that of partner *in commendam* be liable to pay any sum beyond that which he has agreed to furnish by his contract. If it has been paid and lost in the business of the partnership, he is exonerated from any other payment. If only part be unpaid, he is liable for that amount and no more to the creditors of the partnership.

The partner *in commendam* cannot be called upon by the partnership or its creditors to refund any dividend he may have received of net profits (fairly made during the solvency of the partners, and *bona fide*) at a time stipulated in the articles of partnership.

The partner *in commendam* cannot bind the other partner by any act of his; he is not considered as a partner further than is specially provided in this section.

Partnership *in commendam* must be made in writing, and must be recorded in the manner hereinafter directed, or otherwise the partner *in commendam* will be considered as a common partner in the concern, and will be subject to all the responsibilities towards third persons that would attach to any of the other partners in the business for which he made his advance.

The contract must express the amount furnished, or agreed to be furnished, by the partner *in commendam*, the proportion of profits he is to receive and of the expenses and losses he is to bear. It must state whether it has been received, and whether in goods, money, or how otherwise, and if not received, it must contain a stipulation to pay or deliver it. It must be signed by the parties in the presence of one or more witnesses, and shall be recorded in full by the officer authorized to record mortgages in the place where the principal business of the partnership is carried on. If it be a commercial partnership, and consists of several houses or establishments in different parts of the State, such recording shall be made in each of such places.

The record mentioned in the preceding paragraph shall be made in six days from the time of the execution of the contract in the place where the principal establishment is situated, and if there are more than one, then allowing one day for every two leagues' distance between such principal establishment and the others.



The officer authorized to record mortgages shall keep a separate book for the purpose of recording acts of partnership, which shall be at all office hours open for the inspection of any person who may choose to consult the same. When the act is under private signature, the record shall be only made on the acknowledgment of the act before a recorder, a notary, or the person authorized to make the record, or by a proof of the execution made in the same manner by one of the subscribing witnesses.

The business of the partnership, to which the partner *in commendam* has contributed his advance, must not be carried on in the name of such partner, or in his name jointly with others, or by him or by his agency as agent, or attorney for the other partners, but by those to whom he has made the advance, and in their name or firm; and if the advance *in commendam* has been made to one person only, such person must carry on the business in his sole name, and must not make the addition "*and company*," or adopt any firm name that may cause it to be understood that he has any partners.

And if the partner *in commendam* shall take any part in the business of the partnership or permit his name to be used in the firm, or knowingly permit any single person to whom he has made the advance to add any words to his name or firm that may imply that he has other partners besides the partner *in commendam* when in fact he has none, such partner *in commendam* shall be liable to all the responsibilities of a general partner in the business for which he has made the advance.

If the person to whom the partner *in commendam* has made the advance shall without his consent use his name in the firm, or if, not having any other partner, he shall adopt or use any such addition as is expressed in the last preceding paragraph, the partner *in commendam* may immediately withdraw the sum he has advanced, and, on giving notice in two of the public newspapers, shall be freed from all responsibility, either to the partners or to third persons, from the time of such notice.

The partner *in commendam* cannot withdraw the stock he has furnished at a time when those to whom he has advanced it are in failing circumstances, or when there is a reasonable apprehension that they will become insolvent: La. 2839-2851.

**Of Commercial Partnerships.** All the provisions of this chapter are also applicable to commercial partnerships, except as otherwise provided for: La. 2852.

## **Art. 537. Rights and Liabilities of the Partners in Limited Partnerships.**

§ 5370. **General Principles.** In all cases not otherwise provided for in this and the preceding article, the members of a limited partnership are subject to all the liabilities and entitled to all the rights of general partners: Mass. 75,12; Me. 33, 10; Vt. 3699; R.I. 135,14; Ind. 6045; Mich. 2360; Kan. 74,21; Del. 64,9; Cal. 7500; Ore. 43,10; Nev. 480; Wash. 2379; Dak. Civ. C. 1467; Ida. *ib.* 18; Mon. G. L. 954; Wy. *ib.* 18.

§ 5371. **Account.** General partners are, in most states, liable to account to each other and to special partners for the management of the concern, both at law and equity, as partners in ordinary partnerships: Me. 33,10; N.Y. 2,41,18; N.J. *ib.* 18; Pa. *ib.* 20; O. 3154; Ill. 84,20; Wis. 1717; Io. 2164; Minn. 30,22; Kan. 74,17; Neb. 1,65,18; Md. 33,22; 72,93; N.C. 3105; Tenn. 2416; Ark. 4840; Tex. 3459; Uta. *ib.* 18; S.C. 1318; Ga. 1937; Ala. 2081; Miss. 1017; Fla. 159,14; D.C. 518.

So, a special partner is entitled to the same remedies to enforce such accounts that a general partner is entitled to: Miss.

§ 5372. **Liability.** Special partners are not, in many states, except as in §§ 5347,5359,5360,5374,5376, personally liable for any debts of the partnership: N.H.; Vt.; R.I.; O.; Ind.; Ill.; Del.; Va.; W.Va.; Ky.; Tenn.; Mo.; Ore.; Nev. 469; Wash.; Mon. So, in most others, they are not liable for the debts of the

partnership beyond the sum so contributed by them as capital (§ 5341) : Mass. ; Me. ; Ct. ; N.Y. ; N.J. ; Pa. ; O. ; Mich. ; Wis. ; Io. ; Minn. ; Kan. ; Neb. ; Md. ; N.C. ; Ark. ; Tex. 3443 ; Cal. 7501 ; Col. 2515 ; Dak. Civ. C. 1468 ; Ida. *ib.* 19 ; Wy. *ib.* 19 ; Uta. ; S.C. ; Ga. ; Ala. ; Miss. 1023 ; Fla. ; D.C. 491. For citations, see § 5371.

Special partners contributing capital are not liable for debts previously contracted by the general partners : Pa. *Limited Partnership*, 17 ; Ga. 1934.

§ 5373. **Fraud.** Every partner guilty of fraud in partnership affairs is liable (1) civilly to the person injured to the extent of his damage : N.Y. 2,4,1,19 ; N.J. *ib.* 19 ; Pa. *ib.* 21 ; O. 3155 ; Ill. 84,21 ; Wis. 1724 ; Io. 2165 ; Kan. 74,18 ; Neb. 1,65,19 ; Md. 72,93 ; N.C. 3106 ; Tenn. 2417 ; Ark. 4841 ; Tex. 3459 ; S.C. 1319 ; Ga. 1938 ; Ala. 2082 ; Fla. 159,15.

(2) And also, in many, to an indictment as for a misdemeanor : N.Y. ; N.J. ; Pa. 1885,38 and 49 ; O. 7077 ; Ill. ; Wis. ; Io. ; Minn. 30,23 ; Kan. ; Neb. ; Md. ; N.C. ; Tenn. ; Ark. ; Cal. 13358 ; Dak. Civ. C. 424 ; S.C. ; Ga. ; Ala. ; Fla. See also Part V.

§ 5374. **Sales in Contemplation of Insolvency.** Every sale, assignment, or transfer (A) of any of the property or effects of such limited partnership, made by it when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or of such insolvent partner over other creditors of such partnership ; and every judgment confessed, lien given, or security given by such partnership under like circumstances and with like intent, is void as against the creditors of such partnership : N.Y. 2,4,1,20 ; N.J. *ib.* 20 ; Pa. *ib.* 22 ; O. 3156 ; Ill. 84,22 ; Wis. 1719 ; Io. 2166 ; Minn. 30,17 ; Neb. 1,65,20 ; Md. 33,15 ; Va. 142,10 ; W.Va. 145,10 ; Ky. 82,10 ; Tenn. 2418 ; Mo. 3410 ; Ark. 4842 ; Tex. 3460 ; Cal. 7496 ; Dak. Civ. C. 1466 ; Ida. *ib.* 17 ; Wy. *ib.* 17 ; S.C. 1320 ; Ga. 1939 ; Ala. 2083 ; Fla. 159,16 ; D.C. 510.

So, (B) every sale, etc., of the property, etc., of a general or special (except in Florida and District of Columbia) partner in like circumstances, made with intent of giving any creditor of his own or of the partnership such preference, or any judgment confessed, lien created, or security so given, is void as above : N.Y. *ib.* 21 ; N.J. *ib.* 21 ; Pa. *ib.* 23 ; Ill. ; Wis. 1720 ; Io. 2167 ; Minn. 30,18 ; Neb. 1,65,21 ; Md. *ib.* 16 ; Va. ; W.Va. ; Ky. ; Tenn. ; Mo. ; Ark. 4843 ; Tex. 3461 ; Cal. ; Dak. ; Ida. ; Wy. ; S.C. 1321 ; Ga. 1940 ; Ala. 2084 ; Fla. ; D.C.

**Penalty.** Any special partner violating the respective provisions of § 5374, or concurring in any such violation by the partnership or an individual partner is, in most states, liable as a general partner : N.Y. 2,4,1,22 ; N.J. *ib.* 22 ; Pa. *ib.* 24 ; O. 3157 ; Wis. 1721 ; Io. 2168 ; Minn. 30,19 ; Neb. 1,65,22 ; Md. 33,17 ; Tenn. 2419 ; Ark. 4844 ; Tex. 3462 ; Ida. *ib.* 19 ; Wy. *ib.* 19 ; S.C. 1322 ; Ga. 1941 ; Ala. 2085 ; Fla. 159,17 ; D.C. 511.

§ 5375. **Powers of Special Partners.** In most states, the laws prescribe that the general partners only shall be authorized to transact business for the partnership : N.H. 118,6 ; Me. 33,6 ; R.I. 135,8 ; N.Y. 2,4,1,3 ; N.J. *Partnership*, 3 and 25 ; Pa. *Limited Partnership*, 3 ; O. 3153 ; Ind. 6039 ; Ill. 84,3 ; Mich. 2343 ; Wis. 1716 ; Io. 2149 ; Minn. 30,3 ; Kan. 74,3 and 16 ; Neb. 1,65,3 ; Md. 33,12 ; Va. 142,7 ; W.Va. 145,7 ; N.C. 3104 ; Ky. 82,2 ; Tenn. 2400 ; Mo. 3407 ; Ark. 4824 ; Tex. 3444 ; Cal. 7489 ; Nev. 474 ; Col. 2516 ; Dak. Civ. C. 1459 ;

Ida. *ib.* 10; Wy. *ib.* 10; Uta. *ib.* 3; S.C. 1305; Ga. 1922; Ala. 2065; Miss. 1014; Fla. 159,13; D.C. 507.

Nor, in many, can a special partner be employed for that purpose as attorney or agent, or otherwise: N.Y. *ib.* 17; N.J. *ib.* 17; Pa. *ib.* 19; O.; Ill. 84,19; Wis.; Io. 2163; Minn. 30,16; Kan.; Neb. 1,65,17; N.C.; Ky.; Tenn. 2415; Mo.; Ark. 4839; S.C.; Ga. 1936; Ala.; Miss. 1016.

No special partner is generally authorized to sign for the partnership, or to bind it: N.Y., N.J., Pa., Ill., Mich., Wis., Io., Minn., Kan., Neb., Ky., Tenn., Ark., Tex., Col., Uta., S.C., Ga., Ala., Miss.

In Florida, "the copartners shall be authorized to transact the business of the concern and sign for the partnership to bind the same and its assets except in cases where the articles of copartnership provide that any one or more members only who shall be designated by name be authorized to sign the firm name:" Fla. 159,1. And the articles of partnership may provide that any one or more members of the firm or his or their legal representatives having power of attorney shall be the only persons authorized to sign the firm name; and in such case if any other partner contract debts for the firm without their knowledge, it is felony: Fla. 159,2.

§ 5376. **Penalty.** A special partner interfering contrary to the provisions of § 5375 is generally to be deemed a general partner: N.Y.; N.J.; Pa. *ib.* 19; O.; Ind.; Ill.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Va.; W.Va.; N.C.; Ky. 82,7; Tenn.; Mo.; Ark.; Tex. 7501; Nev.; Col. 2523; Dak. Civ. C. 1468; Ida. *ib.* 19; Wy. *ib.* 19; Uta. *ib.* 19; S.C. 1317; Ga.; Ala. 2080; Miss.; Fla.; D.C.

So, in several, if a special partner make any contract respecting partnership concerns with any person except general partners, (1) he is deemed a general partner: N.H. 118,6; R.I. 135,8; Ind. 6039; Mich. 2354; Del. 64,4; Va.; W.Va.; Cal.; Nev. 474; Dak.; Mon. G. L. 948. (2) But in others he is deemed a general partner only as to such contract: Me. 33,6; Vt. 3695; Ore. 43,6; Wash. 2375.

He is not so held if he notify the other party that he is acting only as special partner: Vt.; or if he acted and was recognized as such: Ore., Wash.

When a special partner has unintentionally done any act contrary to the foregoing provisions, he is liable as a general partner to any creditor of the firm who has been actually misled thereby to his prejudice: Cal. 7502; Dak. Civ. C. 1469; Ida. *ib.* 20; Wy. *ib.* 20.

§ 5377. **Limitations.** But a special partner may, in most states, from time to time examine the concern and advise as to its management: N.Y. 2,4,1,17; N.J. *ib.* 17 and 25; Pa. *ib.* 19; O. 3153; Ill. 84,19; Mich. 2364; Wis.; Io. 2163; Minn. 30,16; Kan. 74,16; Neb. 1,65,17; Md. 33,12; Va. 142,7; W.Va. 145,7; N.C. 3104; Ky. 82,7; Tenn. 2415; Mo. 3407; Ark. 4839; Tex. 3458; Cal. 7490; Dak. Civ. C. 1460; Ida. *ib.* 11; Wy. *ib.* 11; Uta. *ib.* 17; S.C. 1317; Ga. 1936; Ala. 2080; Miss. 1016; Fla. 159,13; D.C. 507.

He may sometimes act as attorney-at-law: N.C., S.C., Ga., Ala., Miss.

He may be constituted agent by the general partners for negotiating sales, purchases, and transacting other business, upon disclosing his agency to the other party: O. So, in several, he may act as attorney in fact under a power: Ill., Tenn., Fla.

It seems he may transact any business with the express assent of all the general partners: Ill., Tenn.

He may loan or advance money to the partnership, pay money for it, take and hold the notes, drafts, bonds, and acceptances of it as security therefor, use and lend his name and credit as security for the partnership in any business thereof, and have the same rights and remedies in this respect as any other creditor might have: N.Y.; N.J.



*ib.* 25; Mich.; Minn.; Cal. 7491; Dak. Civ. C. 1461; Ida. *ib.* 12; Wy. *ib.* 12. But see § 5379.

He may negotiate sales, purchases, and other business for the partnership; but such shall not be binding upon it until approved by a general partner: N.Y., N.J., Minn.

He may lease lands, etc., to the general partners for partnership purposes; N.Y. 1872,114.

§ 5378. **Suits by Special Partners.** No special partner can under any circumstances be considered as a creditor, nor allowed to claim as such: Ct.<sup>a</sup> 18,8,7.

The special partners may sue the firm or be sued by it, for debts contracted with it, in the same manner as if they were not partners: Va. 142,12; W.Va. 145,12.

NOTE. — <sup>a</sup> *i. e.*, as to his capital: 35 Ct. 463.

§ 5379. **Insolvency.** In case of the insolvency of a partnership, no special partner shall be allowed to claim as a creditor until the claims of all others are satisfied: N.H. 118,12; R.I. 135,11; N.Y. 2,4,1,23; N.J. *ib.* 23; Pa. *ib.* 25; O. 3158; Ill. 84,23; Wis. 1722; Io. 2169; Minn. 30,20; Neb. 1,65,23; Md. 33,18; Va. 142,9; W.Va. 145,9; N.C. 3107; Ky. 82,9; Tenn. 2420, Mo. 3409; Ark. 4845; Tex. 3463; Cal. 7491; Dak. Civ. C. 1461; Ida. *ib.* 12; Wy. *ib.* 12; Uta. *ib.* 20; S.C. 1323; Ga. 1942; Ala. 2086; Miss. 1024; Fla. 159,18; D.C. 512. See § 5378.

§ 5380. **Assignments.** No general assignment by a limited partnership in case of insolvency is, in several states, valid unless it provide for a distribution of the partnership property among all the creditors in proportion to the amount of their several legal claims: R.I. 135,10; Ind. 6041; Mich. 2356; Del. 64,6; Nev. 476; Ida. *ib.* 9; Mon. G. L. 950; Miss. 1025.

Except that the claims of the United States, arising from bonds or duties, are first to be paid or secured: R.I., Mich.

The assent of creditors to such assignment is presumed unless within sixty days after notice thereof they dissent expressly or by some act clearly implying such dissent: Ind. 6042; Mich. 2357; Nev. 477; Ida. *ib.* 10; Mon. G. L. 951; Miss. 1026.

No such assignment is valid unless notice thereof be given in some newspaper published in the county where is the principal place of business within fourteen days thereafter: Ind., Mich., Nev., Ida., Mon., Miss.

## TITLE II. — NATURAL RELATIONS.

### CHAPTER I. — OF PERSONS.

#### Art. 600. Citizens.

§ 6000. **General Provisions.** Persons are either natural or artificial. The latter are the creatures of the law, and, except so far as the law *forbids* it, subject to be changed, modified, or destroyed at the will of their creator; they are called corporations: Ga. 1651.

Natural persons are distinguished according to their rights or status into (1) citizens, (2) residents not citizens, (3) aliens, (4) persons of color: Ga. 1652.

§ 6001. **Who are Citizens.** (See U. S. C. 14,1.) (A) All citizens of the United States resident in the state are, in a few states, declared citizens of the state: Vt. 61; Ky. 14,1,1; Cal. 51; Ga. 44,5017. (B) All persons born in the State and residing within it are such citizens: Vt.; Ct. 2,1,1; Va. 4,1; Cal.

(C) All persons who have become citizens under the constitution and laws : Vt. So, all aliens naturalized under United States laws and resident in the state are citizens : Va. 4,1. (D) All persons born without the State to citizens of the State who are temporarily absent therefrom : Ct. So, if the father, or, if he be dead, the mother, is a citizen : Va. *Except* children of transient aliens : Cal. ; and of alien public ministers and consuls : Cal. (E) All persons being in or coming into and locating in the State with intent to remain and reside permanently as citizens : Ct., Va. *Except* aliens : Ct., Va. ; paupers : Ct. ; fugitives from justice : Ct.

§ 6002. **Expatriation.** Allegiance (see Glossary) may be renounced by a change of residence : Ct. 2,1,1 ; Va. 4,2 ; Ky. 14,2,1 ; Cal. 56 ; Ga. 46.

The person must also renounce by deed or declaration in court, and depart with intention in good faith to remain absent from the State : Va., Ky., Ga.

When any citizen of the State resides elsewhere, and in good faith becomes a citizen of some other state or country, he is not deemed a citizen of the State : Va. 4,3 ; Ky. 14,2,2.

But no such acts of expatriation have any effect if done while the State or the United States is at war with a foreign power : Va. 4,4 ; Ky. 14,2,3 ; Ga.

The declaration or avowal of such intention, accompanied by actual removal, is held to be a renunciation of citizenship : Ga. But until citizenship elsewhere is thus acquired the person continues a citizen of the State and the United States : Ga. 47.

§ 6003. **Renaturalization.** A person once expatriated who has acquired citizenship in a foreign country, and his descendants going with him for purpose of residence, can be citizens of the home state again only in the manner and under the rules which apply to other foreigners : Ga. 48.

§ 6004. **General Rights.** Among the rights of citizens are the enjoyment of personal security, of personal liberty, private property and the disposition thereof, the elective franchise, the right to hold office unless disqualified by the constitution and laws, to appeal to the courts, to testify as a witness, to perform any civil function, and to keep and bear arms (compare Art. 1) : Ga. 1654.

All citizens are entitled to exercise all their rights as such, unless specially prohibited by law : Ga. 1655.

§ 6005. **Persons Unborn,** but conceived, are deemed existing persons so far as necessary for their interests in the event of their subsequent birth : Cal. 5029 ; Dak. Civ. C. 12.

Children born dead are considered as if they had never been born or conceived.

Children in the mother's womb are considered, in whatever relates to themselves, as if they were already born ; thus the inheritances which devolve to them before their birth, and which may belong to them, are kept for them, and curators are assigned to take care of their estates for their benefit.

Posthumous children are those who are born after the death of their father : La. 28-30.

## Art. 601. Aliens and Residents.

§ 6010. **Definitions.** Aliens are the subjects of foreign governments not naturalized under the laws of the United States : Ga. 1660.

Any person whose father or mother at the time of his birth was a citizen, though born out of the United States, may take and hold real and personal estate by devise, descent, or purchase : Ky. 14,2,3.

§ 6011. **Denizens.** Citizens of other states in the State have the same rights and duties as a citizen not an elector : Cal. 60 ; Ga. 1659.

So as to rights in the courts : Vt. 690 ; Mo. 3119 ; Ga.<sup>a</sup> 1662.

**Jurisdiction of Persons.** It is declared, in Georgia, that the jurisdiction of the State and its laws extends to all citizens of the State, all denizens, and all temporary sojourners within its limits : Ga. 21.

So, in Louisiana, the law is obligatory upon all inhabitants of the State indiscriminately. The foreigner while residing in the State and his property within its limits are subject to the laws of the State: La. 9.

NOTE. — <sup>a</sup> But only so long as the like privilege is extended to citizens of the State by the state of such person's residence.

§ 6012. **General Rights of Aliens.** The laws of Texas provide (A) that an alien shall have in the State the same rights as are or may be accorded to United States citizens by the laws of the nation to which the alien belongs or by treaty: Tex. 9.

(B) Every person while in the State is subject to its jurisdiction and entitled to its protection: Ct. 2,1,1; Cal. 54. See also § 6011.

(C) Aliens the subjects of governments at peace with the United States are entitled to all the rights of citizens of other states resident in the State: Ga. 1661.

(D) So, as to suits in the courts, so long as the like privilege is extended, etc.: Ga. 1662. Aliens never have the rights of franchise and office-holding. See in Part III., *Elections*. They are not generally bound to militia or jury duty.

§ 6013. **Rights of Aliens as to Property.** (Compare §§ 102,1104.) (A) In most of the states, there is a general provision that aliens, being natural persons, resident or not, may take and hold real and personal property by purchase, descent, or devise, and dispose of, sell, devise, or transmit by descent or intestate distribution the same, in like manner, in all respects as a native citizen: Mass. 126,1; Me. 73,2; R.I. 172,6; Pa. *Aliens*, 10,11; 1-2 and 15; O. 4173; Ind. 2967; Ill. 6,1-2; Mich. 5775; Wis. 2200; Io. 1908; Minn. 75,41; Neb. 1,73,54; N.C. 7; Tenn. 2804; Mo. 325; Ark. 233; Cal.<sup>a</sup> 5671,6404; Ore. 17,35; Nev.<sup>b</sup> 1879,43,1; Col. 61; Wash. 2419; Dak. Civ. C. 170,794; S.C. 1768,1847; Ala. 2860; Miss. 1230; Fla. 92,7 and 14; N.M. 2746.

(B) But so, in other states, only alien *friends*:<sup>c</sup> N.J. *Aliens*, 1; Pa. *ib.* 7 and 9; Md. 45,8; Va. 4,18; W.Va. 3,1-2; 1882,56; Ga. 1661.

And so, in Pennsylvania, "nothing herein is to prevent the sequestration of any real or personal estate of an alien during a war between the United States and the state of which he is a subject or a citizen:" Pa. *ib.* 3.

(C) And so, in a few others, only alien *residents*: N.H. 135,16; Ct. 2,1,4; Ind. 2915.

So, also, in Connecticut, Frenchmen, whether resident or not, so long as France accords United States citizens corresponding rights.

**Exceptions.** But in several, aliens non-resident may hold real estate for the purpose, if actually so used, (1) of mining: Ct. 2,1,5; Ariz. 1885,31; (2) of quarrying: Ct.; (3) for manufacturing, commercial, agricultural, or grazing purposes; but not more than 320 acres: Ariz.

**Special Cases.** In New York, there are many other laws in force giving similar privileges to aliens under special circumstances; see N.Y. 1798,72; 1802,49; 1804,109; 1805,25; 1807,123; 1808,175; 1819,25; 1830,171; 1843,47; 1845,115; 1857,576; 1868,513. And in many states, there are statutes validating conveyances made to and descents from aliens before a certain date.

And any claim of the State to such alien's estate, by escheat or otherwise, is discharged: N.H. 135,17.

And specially, aliens may, in several, receive and enforce liens, by mortgage or otherwise, on real estate in the State: N.J.<sup>d</sup> *ib.* 4-5; Ga. 1663.

So, in New York; but only as to mortgages on real estate sold by him and taken for the purchase-money: N.Y. 2,1,1,19.

Aliens who become citizens before process of escheat is actually commenced, and their heirs, purchasers, or devisees, if they die seized before such process, such heirs, etc., being citizens, may hold lands purchased or acquired by them free of escheat: Ky. 14,3,2.



(D) In others still, an alien resident, having made declaration according to law of his intention to become a citizen, may take, inherit, hold, or convey real estate, and upon his decease it will descend as if he were a citizen: N.Y. 2,1,1,15-16; 1845,115,7 and 9-10; Pa. *ib.* 4-6,8; Ind. 1885,51; Del. 81,1; Tex. 10.

But such privileges only last for six years after such declaration: N.Y. And such alien has no power to lease land: N.Y. And if the widow or kindred of such person or any of them do not reside within the United States, they cannot inherit such estate, and the effect is as if they were dead: Del. In New York, if such alien die within such six years, his heirs take by descent as if he were a citizen: N.Y. *ib.* 18.

In two states, aliens may take and hold any property, real and personal, in the state by devise or descent from any alien or citizen in the same manner in which citizens of the United States may do within such alien's country: Ky. 14,3; Feb. 23,1874; Tex. 1658.

NOTES. — <sup>a</sup> A non-resident alien must, however, appear and make claim within five years. <sup>b</sup> *Except* subjects of China. <sup>c</sup> *i. e.*, the subjects of a country at peace with the United States. <sup>d</sup> Of alien friends only.

§ 6014. **As to Personalty.** An alien friend may take and hold personal property, except chattels real, and, if resident, may hold lands for residence or business for a term not exceeding twenty-one years: Ky. 14,2,4.

§ 6015. **Successions.** (A) In many states, by the general provisions of § 6013, aliens succeed as if they were citizens.

So, in several states, specially, alien heirs may take real estate to the exclusion of more remote native heirs, or of the state by escheat: Me. 73,2; N.Y.<sup>a</sup> 1845,115,4; Mon. Prob. C. 553; Ala. 2862.

So, the alienage of descendants does not invalidate their title to real estate descending to them: N.J.<sup>b</sup> *Aliens*, 3; Del.<sup>c</sup> 81,1; W.Va. 3,1; Tenn. 2805-6; Col. 1044; Wy. 42,6; Uta. 1884,44,2,20; Fla. 92,14; N.M. 2746.

In two states, any alien to whom land may descend or be devised has nine years (in Kentucky, eight) in which he may either become a citizen and take possession, or else sell the same before the land shall be forfeited or escheat: Ky. 14,2,5; Tex. 1658.

But no non-resident alien can take by succession unless he appears and makes claim within five years of the intestate's death: Mon. Prob. C. 553; Uta.

But in Tennessee, when any resident dies possessed of real or personal property, and the next of kin are aliens, it descends (1) to the brothers and sisters of the whole blood and their issue, (2) to the father and mother equally, (3) in equal moieties to the nearest heirs of the father and mother in equal degree equally: Tenn. 2807.

**Descent around Aliens.** In Alabama, it is enacted that when any person dies leaving relatives, citizens of the United States, capable of inheriting estate, who, by the rule of the common law, cannot inherit because there are other and nearer kindred who are aliens or otherwise incapable of holding land in the State, the estate shall descend to such of the first-mentioned relatives as would be entitled, were there no other relatives whatever: Ala. 2260 (but see C. Ala., Art. 1,36, § 102 of this book).

In Georgia, when the heirs or devisees of land are incapable of holding title to lands, the legal representative of the estate is to sell the lands and pay over the proceeds to such devisees or next of kin: Ga. 2670.

**Successions to Personalty.** (A) In many states, by the general provisions in §§ 6013,6014, aliens take like citizens.

And so, specially, in a few, alien next of kin (or the husband or widow) may take personalty by distribution, to the exclusion of more remote native heirs or of the State ("as if they were citizens:" Del., Va.): Me. 73,2; Ill. 6,2; Del. 81,5; Va. 119,10; W.Va. 66,9; Ala. 2862; Fla. 92,14.

(B) Aliens inherit their distributive share of personal estate as if they were citizens : Va. 119,10 ; W.Va. 1882,94,9 ; Ky. 31,11 ; Tenn. 2805. But see § 6016.

NOTES. — <sup>a</sup> But if such heir be a male of age, he will not take unless he be a citizen of the United States, or unless he file a declaration of intention as before : N.Y. <sup>b</sup> Of alien *friends* only ; see § 6013, note <sup>c</sup>. <sup>c</sup> Of alien residents only ; see § 6013.

§ 6016. **Alienism of Ancestors, etc.** By the laws of most of the states, no title to real estate shall be invalid on account of the alienage of a former owner : Mass. 126,1 ; N.Y. 2,1,1,9 ; 1868,513,1 ; 1872,141,1 ; 358,1 ; 1875,361,1 ; 1877, 111,1-2 ; Pa. *Aliens*, 12-18 ; *Escheats*, 32 ; Ind. 2918 ; Mich. 5776 ; Wis. 2201 ; Io. 1909 ; Minn. 75,41 ; Ore. 17,36 ; S.C. 1847,1768.

So, in many, specially of descent, when a title to real estate is claimed by descent by a person capable at the time of inheriting, it shall be no bar that the father, mother, or other ancestor through whom the descent is derived was an alien : N.Y. 2,2,22 ; N.J. *Aliens*, 3 ; *Descent*, 12 ; O. 4173 ; Del. 81,4 ; Va. 119,4 ; W.Va. 66,4 ; Ky. 31,4 ; Mo. 2168 ; Ark. 2527 ; Tex. 1658 ; Cal. 6404 ; Dak. Civ. C. 794 ; Mon. Prob. C. 553 ; Uta. 1884,44,2,20 ; S.C. ; Fla. 92,8.

So, all purchasers of land made by aliens before the acts passed in § 6013 are as valid as if made thereafter : N.J. *Aliens*, 2.

§ 6017. **Wives of Aliens, etc.** (A) The widow of any alien, whether she be alien or not, is, in many states, entitled to dower in his land as in ordinary cases : N.Y. 1845,115,3 ; 2,1,3,2 ; Ill. 41,2 (or husband) ; Ark. 2572. So, a woman being an alien shall not on that account be barred of her dower or intestate interest (but any woman residing out of this state shall be entitled to dower only of land of her husband, being in this state, of which he died seized : Mich., Wis., Neb.) : Ind. 2507 ; Mich. 5753 ; Wis. 2160 ; Neb. 1,23,20 ; Ore. 17,21.

So, of the wife of any resident alien (or Frenchman, in Connecticut) (§ 6013), and she may also take by devise or inheritance : Ct. 2,1,4 ; N.Y. 1845,115,2.

So, also, she is entitled to the estate in lieu of dower or intestate share : N.Y. 1845, 115,7 ; Io.<sup>a</sup> 2442 ; Ark. 233.

So, in others, to her share of the personal estate : Io. ; Ark. 234.

(B) And in several, any alien woman marrying a citizen is entitled to dower as if she were a citizen : N.Y. 1845,115,3 ; N.J. *Dower*, 1 ; Ky. 14,1,3 ; S.C. 1848.

And she may take by descent, devise, or purchase, real or personal estate, although an alien : Ky.

And a woman citizen marrying an alien and residing abroad, her real property descends to her lawful descendants as in ordinary cases : N.Y. 1872,120,1 ; Ind. 2916. And she may hold, convey, purchase, and inherit real estate : Ind.

And she may convey or devise such estate according to the laws of the State : Mo. 326.

The widow of a citizen of the United States who was an alien when she married him is entitled to dower : Me. 103,5.

A woman being an alien resident may take by marriage contract : N.Y. 1845,115,8.

NOTE. — <sup>a</sup> Except as against a purchaser from the decedent : Io.

§ 6018. **Devises of Real Property** to aliens not authorized to hold real estate are void ; and the interest devised descends to the heirs, or, if none, to the residuary devisee : N.Y. 2,6,1,4.

§ 6019. **Foreign Corporations** may generally bring suit in the courts of the State under the corporate name. See Parts III. and IV.

**Art. 603. Domicile.**

§ 6030. **Definitions.** Every person has, in law, a residence; in determining it, the following rules are observed, viz.: (A) (1) it is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose; (2) there can only be one residence; (3) a residence cannot be lost until another is gained; (4) the residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child; (5) the residence of the husband is the residence of the wife; (6) the residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian; (7) the residence can be changed only by the union of act and intent: Cal. 52. (B) The town in which the family of a person resides, if he has one, is the place of his residence: Vt. 63; Ga. 1690; if he has none, the place where he generally lodges: Ga.

If a person resides indifferently in two places, he may elect which shall be his domicile: Ga. 1691. The domicile of a married woman is that of her husband, except in case of voluntary separation, or of a pending application for divorce, in which case it is determined as if she were sole: Ga. 1692. A minor's domicile is that of his father (or master or employer if apprenticed, or of his own choice if emancipated); or guardian, if the father be dead; or mother, if no guardian; or employer, or of his own choice: Ga. 1693. Lunatics, etc., have the domicile of their guardian: Ga. 1694.

Domicile may be changed by an actual change of residence coupled with an avowed intention of remaining: Ga. 1695.

A person not *sui juris* cannot by his own act change his domicile; nor can a guardian change the domicile of his ward by change of his own or otherwise so as to alter the rules of succession or inheritance of third persons: Ga. 1696.

§ 6031. **Civil Law.** The domicile of each citizen is in the parish wherein he has his principal establishment.

The principal establishment is that in which he makes his habitual residence; if he resides alternately in several places, and nearly as much in one as in another, and has not declared his intention in the manner hereafter prescribed, any one of the said places where he resides may be considered as his principal establishment, at the option of the persons whose interests are thereby affected.

A married woman has no other domicile than that of her husband; the domicile of a minor not emancipated is that of his father, mother, or tutor; a person of full age, under interdiction, has his domicile with his curator.

Persons who have attained the age of majority, and who labor constantly with, or serve others, have the same domicile as those with whom they labor or serve, provided they reside with them.

A change of domicile from one parish to another is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there.

This intention is proved by an express declaration of it before the recorders of the parishes from which and to which he shall intend to remove.

This declaration is made in writing, is signed by the party making it, and registered by the recorder.

In case this declaration is not made, the proof of this intention shall depend upon circumstances.

A citizen accepting a temporary and precarious office, or one from which he may be removed at pleasure, retains his ancient domicile, if he has not evinced a contrary intention.

An acceptance of an office conferred for life or during good behavior, implies an immediate transfer of the domicile of the officer to the parish in which he is required to exercise his functions.

But public officers, who perform duties throughout the State or in a district composed of several parishes, preserve the domicile they had before their appointment, unless they manifest a contrary intention: La. 38-45.

Residence once acquired shall not be forfeited by absence on business of the State or of the United States, but a voluntary absence of two years from the State, or the acquisition of residence in any other state of this Union, or elsewhere, shall forfeit a residence within this state: La. 46; D. 1202.



**Art. 605. Race Distinctions.**

§ 6050. **Persons of Color.** (See Glossary, *Color*.) This phrase is, in several states, defined to include (1) all persons having an eighth or more negro or African blood : Ga. 45 ; Fla. 72,7. So, one fourth or more : Va. 103,2. See also § 6112.

(2) All persons descended from a negro ancestor, male or female, to the third generation inclusive, although one ancestor of each generation were white : Ala. 2 ; Tenn. 3291.

§ 6051. **Marriage.** All marriages of colored persons are valid (1) if made before 1867 by a person having authority (§ 6130) : Md. 51,9-10.

All marriage laws apply to colored persons as well as white : Fla. 149,6.

(2) When negroes have been married *de facto* before 1865 (or 1866 : W.Va., Ark., Ga., Fla., or while in slavery : Tenn.) ; they are deemed husband and wife, and their children legitimate, although there was never any marriage ceremony : Va. 103,4 ; 104,13 ; W.Va. 121,8 ; 1882,58 ; Tenn. 3285 ; 3303 ; Mo. 2173 ; Ark. 4609 ; Tex. 2846 (1870) ; S.C. 2030-1 (1872) ; Ga. 1667 ; Fla. 149,7 (1866) , D.C. 724-5 (1866).

The colored persons so *de facto* married must, however, make proof and record thereof before a justice of the peace : Md. 51,10.

(3) When persons of color, formerly held as slaves, have cohabited as husband and wife, they are required to appear before a justice of the peace and be married ; they may then give the names of their children ; and such names, and the fact of marriage, are thereupon to be recorded : Mo. 3275-7.

(4) But in Texas, such persons, both of whom were precluded by the laws of bondage from marriage, who continued to live together until the death of one of them, or were so living together on Aug. 15, 1870, are considered legally married without any ceremony : Tex. 2846.

So, persons formerly slaves " who have complied with the provisions of 1866, c. 40, § 5," N.C. laws, are deemed to have been lawfully married : N.C. 1842.

(5) Indians contracting marriages according to the Indian custom, and cohabiting as husband and wife, are lawfully married : Dak. Civ. C. 42.

§ 6052. **Legitimacy.** So, in Missouri, all children of one mother who was a slave at their birth are declared lawful brothers and sisters for the purposes of descent, etc. (Art. 310) : Mo. 2173.

Every colored child born before March 9, 1866, is the legitimate child of its mother ; and of his father, if the parents were living together as husband and wife, or in what was regarded as a state of wedlock : Ga. 1669.

See also § 6051. The children of such marriages as are there mentioned are, of course, legitimate.

§ 6053. **Slavery.** (See Art. 3). " Neither slavery nor involuntary servitude shall exist in the state : " Va. 103,1. *Except* (1) as a punishment for crime ; (2) lawful imprisonment : Va. All acts relating to slaves and slavery are repealed : Va.

§ 6054. **Civil Rights.** There are laws in most states providing that no citizen of the state shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of the accommodations of (1) inns, hotels, restaurants, common carriers, or conveyances : Mass. 1885, 316 ; R.I. 1885,508 ; N.Y. 1873,186,1 ; 1881,400,1 ; N.J. 1884,219,1 ; O. 1884, p. 15 and p. 90 ; Ind. 1885,47 ; Ill. 1885, p. 64 ; Mich. 1885,130 ; Io. 1884,105 ; Minn. 1885,224 ; Ark. 521,523 ; Col. 1885, p. 132 ; S.C. 2604 ; Ga. 4586 ; Fla. 19,2 ; (2) theatres or other places of amusement : Mass. ; R.I. ; N.Y. ; N.J. ; O. ; Ind. ; Ill. ; Mich. ; Io. ; Minn. ; Ark. 527 ; Col. ; S.C. 2605 ; Fla. ; (3) public schools, etc. : Ark. 529 ; Fla. 19,2 ; (4) public meetings : Mass.

(5) Saloons or liquor shops: Ark. 525; (6) cemetery associations: N.Y.; (7) he may not, under penalty, be deprived of "any rights, privileges, or immunities secured by the Constitution and laws of the state and the United States:" Ct. 1884,86.

Every discrimination against any citizen on account of color by the use of the word "white" in any law or ordinance is repealed: N. Y. *ib.* 3; Fla. 19,4.

So, specially, (1) all laws in respect to crimes and punishments apply to negroes and Indians as well as whites (see Part V.): Va. 103,3. So, (2) all laws concerning witnesses and evidence (see Part IV.): Va. 103,5; W.Va. 1882,160; 85,24; Ky. 37,28; D.C. 879; (3) laws concerning jurors: R.I.; N.J. *ib.* 3; O. *ib.* 3; Ind. *ib.* 3; Mich.; see in Part IV. (4) Negroes have the same rights upon railroads as whites, and may not be placed in special cars, compartments, etc.: Pa. *Railroads*, 104; S.C. 1337; (5) negroes, etc., have the same rights in the courts: S.C. 2168; (6) and generally the same political and civil rights: Fla. 19,1. For other states, see in Parts I. and V.

There are frequently provisions for separate schools for colored children. See in Part III.

§ 6055. **Property.** Gifts and conveyances made to slaves and followed by ten years' possession before March 9, 1870, are declared valid: N.C. 1278.

§ 6056. **Labor.** In two states, no Chinaman or Mongolian can be employed in public works or in or about state or city buildings or institutions or grounds: Ore. 1878, p. 9; Nev. 1879,73,1-2; and no right of way or charter or other privilege for the construction of any public works by any railroad or other corporation can be granted except on the express condition that they shall employ no such Chinamen, etc.; any violation of this works a forfeiture of the charter: Nev. *ib.* 3; and in Nevada, the immigration of [Chinamen] bound by contract to labor for a term of years is forbidden; no such person can collect and no person or corporation can pay them wages, under penalty for misdemeanor: Nev. 1879,99; see also § 5286.

No person or parties engaged in a business or calling which requires a license or charter, under state, municipal, or federal authority, shall discriminate between persons on account of race or color who make lawful application for the benefit of such business, etc.: S.C. 1369.

§ 6057. **Descent.** In Florida, when upon the death of a person of color there are persons in being who would inherit his real or personal property under the laws of descent but for the legal incapacity of such persons of color to contract marriage in a state of slavery, and the estate would otherwise escheat, all right and interest of the State is vested in and waived in favor of those persons who would have inherited if the said parties had been competent to contract marriage: Fla. 92,15. And the fact that such parties have failed to obtain a license or be married according to the forms of law shall in no case affect the operation of this section, provided the parties were known as husband and wife: Fla. 92,16.

So, persons inherit who were formerly slaves, although slaves at the death of the intestate: Mo. 2172.

§ 6058. **Indians, resident in the State, have the same rights and duties as other persons, except (1) they cannot vote nor hold office: Dak. Civ. C. 26; (2) they cannot, as a general thing, grant, lease, or incumber Indian lands: Ct. 2,2,4; N.Y. 1813,29; 2,1,1,11-12; Dak. But they may hold and convey other lands: N.Y. 1843,87,4; they have the same right to sue, etc., in the courts, as other persons: Mich. 7309.**

## **Art. 606. Men and Women.**

§ 6060. **Disabilities of Women.** Females are not entitled to the privilege of the elective franchise, nor can they hold any civil office or perform any civil functions unless specially authorized by law, nor are they required to discharge any military, jury, police, patrol, or road duty: Ga. 1656.

Laws, on account of the difference of sexes, have established between men and women essential differences with respect to their civil, social, and political rights.

Men are capable of all kinds of engagements and functions, unless disqualified by reasons and causes applying to particular individuals. Women cannot be appointed to any public office, nor perform any civil functions, except those which the law specially declares them capable of exercising.

Widows and unmarried women of age may bind themselves as sureties or indorsers for other persons in the same manner and with the same validity as men who are of full age: La. 24-25.

§ 6061. **Capabilities of Women.** In Illinois, there is a law that no person shall be debarred or precluded from any occupation, employment, or profession (except military) on account of sex: Ill. 48,3.

So, in many states, women may practise law: O. 565. See also in Part III., *Attorneys*.

§ 6062. **Office-Holding.** But § 6061 does not extend or modify the right of women to hold office: Ill. 48,3.

Certain offices, such as recorder of deeds, etc., may, in many states, be held by women.

§ 6063. **Other Limitations.** So, the provisions of § 6061 do not enable or require women (1) to serve on juries: Ill. 48,4. (2) Or to labor in the streets: Ill.

§ 6064. **Schools.** Many states have statutes providing that any school office must have the same salary when held by a woman as by a man; see in Part III. And many others, that women may hold any office under the school law: Ind. 4540; Cal. 841; 1873-4,356. See in Part III.

## CHAPTER II. — MARRIAGE.

### Art. 610. General Principles.

§ 6100. **Note.** Throughout this chapter the reader should remember that the law treated of is that now existing only.

§ 6101. **Civil Contract.** Marriage, so far as its validity in law is concerned, is declared, in many states, to be a civil contract, to which the consent of parties, capable in law of contracting, shall be essential: N.Y. 2,8,1,1; Ind. 5324; Mich. 6210; Wis. 2328; Io. 2185; Minn. 61,1; Kan. 61,1; Neb. 1,52,1; Mo. 3264; Ark. 4590; Cal. 5055; Ore. 34,1; Nev. 195; Col. 2247; Wash. 2380; Dak. Civ. C. 34; Ida. 1876-7, p. 24, § 1; Mon. G. L. 854; Wy. 81,1; La. 86; N.M. 978; Ariz. 1891.

So, in Georgia, to constitute a valid marriage there must be (1) parties able to contract; (2) an actual contract; (3) consummation according to law: Ga. 1698.

So, in others, consent alone is not sufficient without a solemnization or mutual assumption of marital rights, duties, or obligations: Cal., Dak., Ida.

Consent and subsequent consummation may be manifested in any form and proved under the general rules of evidence: Cal. 5057; Dak. Civ. C. 35; Ida. *ib.* 3.

The consent to a marriage must be one commencing instantly, and not to an agreement to marry afterwards: Dak. Civ. C. 37.

But the general provisions of the code relating to contracts, and the capacity of persons to enter into them, have no application to the contract of marriage: Dak. Civ. C. 43.

**Louisiana Law.** The laws prescribe, —

1. The manner of contracting and celebrating marriages.
2. The legal effects and consequences of marriage.
3. The manner in which marriages may be dissolved: La. 87.



Such marriages only are recognized by law as are contracted and solemnized according to the rules which it prescribes : La. 88.

Marriage is a contract intended in its origin to endure until the death of one of the contracting parties ; yet this contract may be dissolved before the decease of either of the married persons for causes determined by law : La. 89.

As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties, at the time of making them, were, —

1. Willing to contract.

2. Able to contract.

3. Did contract pursuant to the forms and solemnities prescribed by law : La. 90.

No marriage is valid to which the parties have not freely consented.

Consent is not free, —

1. When given to a ravisher, unless it has been given by the party ravished after she has been restored to the enjoyment of liberty.

2. When it is extorted by violence.

3. When there is a mistake respecting the person whom one of the parties intended to marry : La. 91.

**§ 6102. Marriages Encouraged.** By the laws of two states, all marriages ("not forbidden by the law of God : " Pa.) are to be encouraged : Pa. *Marriage*, 1 ; Ga. 1697.

**§ 6103. Restraint of Marriage.** Every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise, is invalid and void. Prohibiting marriage to a particular person or persons, or before a certain reasonable age, or other prudential provision, looking only to the interest of the person to be benefited, and not in general restraint of marriage, will be allowed and held valid : Ga. 1697.

**§ 6104. Contracts to Marry.** Neither party to such a contract is bound by a promise made in ignorance of the other's want of personal chastity ; and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein : Cal. 5062 ; Dak. Civ. C. 44.

**§ 6105. Of the Dissolution of Marriage.** The bond of matrimony is dissolved, —

1. By the death of the husband or wife.

2. By a divorce legally obtained.

3. Whenever the marriage is declared null and void for one of the causes mentioned in the fourth chapter of this title (Art. 615), or when another marriage is contracted, on account of absence, when authorized by law.

Separation from bed and board does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again ; but it puts an end to their conjugal cohabitation, and to the common concerns which existed between them : La. 136.

**§ 6106. Re-marriage.** The wife cannot marry again until ten months after the dissolution of the preceding marriage : La. 137.

## **Art. 611. Of the Parties.**

**§ 6110. Age of Consent.** (1) In several states, there being nothing said, the age of consent remains as at common law, — fourteen in the male, twelve in the female ; and it is so expressed in N.H. 180,14 ; Va. 105,3 ; W.Va. 69,2 ; Ky. 52,1,2 ; La. 92. (2) But in others, the laws declare the age to be sixteen in the male, fourteen in the female : Io. 2186 ; N.C. 1083,1809 ; Tex. 2839. (3) Seventeen in the male, fourteen in the female : Ill. 89,3 ; Ark. 4591 ; Ga. 1699 ; Ala. 2672. (4) Eighteen in the male, fifteen in the female : Wis. 2329 ; Minn. 61,2 ; Cal. 5056 ; Ore. 34,1 ; Dak. Civ. C. 36 ; N.M. 993. (5) Eighteen in the male, sixteen in the female : O. 6384 ; Ind. 5324 ; Mich. 6209 ; Neb. 1,52,2 ; Nev. 196 ; Ida. *ib.* 2 ; Wy. 81,2. (6) Twenty-one in the

male, eighteen in the female : Wash. 2380 ; Mon. G. L. 854. (7) Twenty-one in the male, fourteen in the female : N.Y. Civ. C. 1742.

But males under twenty-one, and females under eighteen, must first obtain the consent of their fathers, mothers, or guardians : Nev. See also § 6122. So of females under sixteen : Md. 72,111 ; S.C. 2585.

And it seems the marriages of minors above the age of consent, but not of age, are not valid unless assented to in writing by the parent, guardian, etc. (§ 6122) : Nev. 196.

But it seems marriages under the age of consent may be made if the parent, etc., consent, in some states ; see §§ 6122,6134.

If any female between twelve and fourteen marry without the consent of her father, or guardian, or mother, the court may commit her estate to a receiver, who shall hold it during coverture, (1) and after the termination thereof deliver it to the possession of such female and her heirs other than the husband : Va. 104,12 ; or, (2) at her majority deliver it to her as her sole and separate property : W.Va. 121,12.

§ 6111. **Prohibited Degrees.** No man, and conversely, no woman, *mutatis mutandis*, may marry, in most states, (1) his lineal ancestor or descendant, or his brother, sister, of the half or whole blood : N.H. 180,1-2 ; Mass. 145,1-2 ; Me. 59,1 ; Vt. 2306-7 ; R.I. 163,1-2 ; Ct. 14,1,1 ; N.Y. 2,8,1,3 ; N.J. *Marriages*, 1 ; Pa. *Crimes*, 54 ; O. 6384 ; Ind. 5324 ; Ill. 89,1 ; Mich. 6211-2 ; Wis. 2330 ; Io. 4030 ; Minn. 61,3 ; Kan. 61,2 ; Neb. 1,52,3 ; Md. 51,1-2 ; Del. 74,1 ; Va. 104, 9-10 ; W.Va. 121,9-10 ; N.C. 1810-1 ; Ky. 52,1,1 ; Tenn. 3290 ; Mo. 3265 ; Ark. 4592 ; Tex. P. C. 330-1 ; Cal. 5059 ; Ore. 34,2 ; Nev. 196 ; Col. 2248 ; Wash. 949 ; Dak. Civ. C. 38 ; Ida. *ib.* 5 ; Mon. G. L. 855 ; Wy. 35,111 ; 1882,40,1 ; S.C. 2026 ; Ala. 2670-1 ; Miss. 1145-6 ; La. 94,95 ; N.M. 992 ; Ariz. 1892.

(2) Nor can there be a marriage between a man and his niece, or a woman and her nephew, by blood, and conversely : N.H., Mass., Me., Vt., R.I., Ct., N.J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md.,<sup>a</sup> Del., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., Wash., Dak., Ida., Mon., Wy., S.C., Ala., Miss., N.M., Ariz.

(3) Nor, in two states, can a man marry the daughter of his brother's or sister's child, or a woman the son of her brother's or sister's child : Del., Ky.

(4) Nor, in several, can a man marry his first cousin by blood : N.H., O., Ind., Kan., Ark., Nev., Wash., Dak., Mon., Wy. (5) So, in four, no marriage can be contracted "by parties nearer of kin than first cousins," computing by the rule of the civil law ; whether of the half or whole blood : Wis., Minn., N.C., Ore.

(6) So, not by persons nearer of kin than second cousins : O., Ind., Nev., Wash., Mon. (7) So, "not within the Levitical degrees : " Ga. 4533. And so, probably, in Florida : Fla. 59,8.

These prohibited degrees of consanguinity apply whether either person or his parent be legitimate or not : N.Y., Ill., Kan., Neb., Ky., Mo., Ark., Cal., Col., Dak., Ida., Wy., Ala., La., N.M., Ariz.

But Jews may contract valid marriages, though so related, within the degrees allowed by their religion : R.I. 163,4.

**Affinity.** A man may not, in many states, marry (1) his father's widow, nor a woman her mother's husband ; and inversely, a man may not marry his wife's daughter, nor a woman her husband's son : N.H. ; Mass. ; Me. ; Vt. ; R.I. ; Ct. ; N.J. ; Pa. ; Mich. ; Io. ; Md. ; Del. ; Va. ; W.Va. ; Ky. ; Tenn. ; Tex. ; Wash. ; S.C. ; Ga. 1700 ; Ala. ; Miss.

A man may not marry (2) his grandfather's widow, nor a woman her grandmother's husband ; and inversely, a man may not marry his wife's granddaughter, etc. : Mass., Me., Vt., R.I., N.J., Pa., Mich., Io., Md., Del., Va., W.Va., Ky., Tenn., Tex., S.C., Ga., Ala.

A man may not marry (3) his son's widow, nor a woman her daughter's husband; nor, inversely, a woman her husband's father, etc., or a man his mother-in-law: N.H., Mass., Me., Vt., R.I., N.J., Pa., Mich., Io., Md., Del., Va., W.Va., Ky., Tenn., Wash., S.C., Ga., Ala. Nor (4) his grandson's widow, nor a woman her granddaughter's husband, and inversely: N.H., Mass., Me., Vt., R.I., N.J., Mich., Md., Del., Ky., Tenn., Wash., S.C.

In two states, a man cannot marry his wife's step-daughter, nor a woman her husband's step-son: Va., W.Va. In the same, a woman cannot marry her niece's husband; but the provision is not, except in West Virginia, extended to the case of a man marrying his nephew's widow: Va., W.Va. A man may not marry his uncle's widow: Ala.

In all these cases of affinity the prohibition continues, notwithstanding the dissolution by death or divorce of the marriage on which such relationship was founded, unless the marriage was originally void (§ 6112); Mass. 145,3; Vt. 2308; Va. 104,11; W.Va. 121,11; Ky.

"All other impediments on account of relationship or affinity are abolished:" La. 96.

NOTE. — <sup>a</sup> Since 1860 only: Md. 51,3.

§ 6112. **Marriages Void.** (A) All marriages contracted contrary to the provisions of § 6111 are void *ab initio*: N.H.<sup>a</sup> 182,1; 180,3; Mass.<sup>a</sup> 145,7; Me.<sup>d</sup> 60,1; Vt. 2346; R.I. 163,3; Ct. 14,1,1; N.Y. 2,8,1,3; Pa.<sup>d</sup> *Divorce*, 2; Ind. 1024; Ill. 89,1; Mich.<sup>a,k</sup> 6223; 1883,24; Wis.<sup>a</sup> 2349; Io. 2201; Minn.<sup>a</sup> 61,3; 62,1; Kan. 61,2; Neb. 1,25,1; Md. 51,1; Del. 74,1; N.C. 1810; Ky. 52,1,1; Mo. 3265; Ark. 4592; Cal. 5059; Ore.<sup>a</sup> Civ. C. 486; Nev. 211; Col. 2248; Wash. 949; Dak. Civ. C. 38; Ida. *ib.* 5; Mon. G. L. 855; Wy. 35,111; 1882,40,1; Ga. 1699,4533; Ala.<sup>b</sup> 2670; 2673; Miss. 1146; N.M.<sup>b</sup> 992,997; Ariz. 1892,1902. And so it would seem to be implied in all states.

(B) So, in nearly all, all marriages contracted while either party has a former wife or husband living, not duly divorced according to the state law: N.H.; <sup>a,c</sup> Mass. 145,4 and 7; Me. 59,3; 60,1; Vt. 2309 and 2346; R.I. 163,5; N.Y. 2,8,1,5; N.J. *Divorce*, 2; Pa. *Divorce*, 11; O.; Ind.; Mich.<sup>a</sup> 6213,6223; Wis.<sup>a</sup> 2330,2349; Io.; Minn.; Neb. 1,52,3; Md.; Del. 75,2; Va. 105,1; N.C.; Ky. 52,1,2; Tenn. 3293; Mo. 3266; Ark. 4595; Cal. 5061; Ore.<sup>a</sup> 34,2; Nev.; Col. 2250; Wash.; Dak. Civ. C. 40; Ida. *ib.* 6; Mon.; Wy.; S.C. 2029; Ga.; Miss. 1156; Fla. 93,5; La. 93; Ariz.

*Except* that, in a few states, if either party was five years absent, and unheard of (or reported, and believed by such person, to be dead: Cal., Dak.), and the other party married again during the lifetime of such absentee, the marriage is only void from the time a decree of court is pronounced to that effect: N.Y. *ib.* 6; Minn. 62,1; Cal.; Dak.; Ida. See also § 6116.

But, in Iowa, a marriage between persons either of whom has a former husband or wife living becomes valid if after such former husband's or wife's death the parties cohabit together: Io. 2201.

(C) So, in several states, all marriages contracted while either party is under the age of consent (see § 6110): <sup>f</sup> Minn. 61,2; N.C.; <sup>e</sup> Ky.; Ark.; Tex. 2839; Wy. *ib.* 2; N.M.<sup>b</sup> 997; Ariz. 1903.

So it would be implied in all states, except as below and in § 6113 provided. See also Art. 615.

But so only when the parties separate during such nonage, and do not cohabit afterwards: <sup>f</sup> Mass. 145,8; Mich. 6224; Va. 105,3; Wy.; N.M.; Ariz.

(D) So, in many states, all marriages where one of the parties is at the time insane or an idiot: <sup>e</sup> Mass.<sup>d</sup> 145,5; Me. 59,2; 60,1; R.I.; Ind. 5325; Ill. 89,2; Mich.<sup>a,k</sup> 6214; Wis.; Neb.; Va.; <sup>a,b</sup> N.C.; <sup>e</sup> Ky.; Wy.; S.C. 2026; Ga. 1899; Ariz.



(E) Or, in several, when either is physically incapable (*i. e.*, impotent):<sup>f</sup> N.J. *Divorce*, 4; Va.,<sup>a, b</sup> N.C.;<sup>e</sup> Ky.; Tex.<sup>h</sup> 2860; Ga.

A void marriage, by the meaning of the word, is of course to be deemed void in any action or collateral proceeding where it may come in question; and this is expressly enacted in some: Vt. 2346; Ind.; Mich.; Minn.; Va.; N.C.; Ore. Civ. C. 488. See, however, note <sup>b</sup>.

(F) So, in many states, all marriages between a white (1) and a negro or mulatto (see § 6050): Ind.; Md.<sup>j</sup> 72,106; Del. 74,1; Va. 105,1; N.C. 1084,1284; Ky.; Tenn. 3291; Ark. 4593; Cal. 5060; Nev.<sup>j</sup> 2472; Col.<sup>i</sup> 2248; S.C. 2032; Fla. 149,8-9; Ariz. 1893.

(2) "And a negro:" Mo. 3265; (3) "and an African or descendant of Africans:" Tex. 2843; Ga. 1708; (4) "and a person having one fourth of negro blood:" Neb.; Ore.<sup>a</sup> 34,2; Miss. 1147; Fla.; (5) or, in others, one eighth: Ind. 2136,5325; Mo. 1540; Fla. 59,13; (6) to the third generation, inclusive: Md. 1884,264; N.C.; Tenn.; Ala. 4189; (7) and an Indian: N.C., Nev.,<sup>j</sup> S.C., Ariz.; (8) and a Chinese or Mongolian: Nev.,<sup>j</sup> Ariz; (9) so also all marriages between a white and a person having one fourth Chinese or Kanaka blood: Ore. Crim. C. 689; (10) or one half Indian blood: Ore. But in Michigan, all marriages between a white person and one wholly or partially of African descent are valid in all respects: Mich. 1883,23, § 1. So, probably, in other states where the laws are silent.

Clerks are forbidden to issue licenses for marriages between a white person and a Mongolian: Cal. 5069, Amt.

In many cases, marriages between negroes or such persons are made a penal offence; but *quære* whether they would be void. See note <sup>j</sup> and in Part V.

(G) So, in a few states, all marriages become void without a decree where either party is sentenced to imprisonment for life (and confined under it, in Maine): Me. 60,1; N.Y.; Mich. 6227; Wis. 2355; Ariz. 1906. And no pardon granted shall restore such party to his conjugal rights: N.Y. *ib.* 7; Mich.; Wis.; Ariz. In such case, the wife has dower as if he were dead: Wis. 2373.

(H) So, in several, all marriages when the consent of either party was obtained by force or fraud, if they separate, and do not voluntarily cohabit together afterwards:<sup>f</sup> Mich. 6224; Ga. 1701-2; Wy.; Ariz.

Drunkenness, brought about by art or contrivance to induce assent, is held fraud: Ga.

The other causes of nullity existing by the ancient laws are abolished: La. 115.

NOTES. — <sup>a</sup> But they are so void only if solemnized in the State; see, however, § 6114. <sup>b</sup> They are void only from the time a decree is pronounced to that effect, or either party is convicted for incest; compare § 6113 and note <sup>d</sup> below. <sup>c</sup> Void only when the party knew such former husband or wife to be alive. <sup>d</sup> But the validity of such a marriage cannot be questioned in a collateral issue, and it can only be annulled in proceedings under § 6150, instituted in the lifetime of both parties: Mass. 145,9; Me.; Pa.; compare note <sup>b</sup>. [It is difficult, then, to see how, in the two notes <sup>d</sup> and <sup>e</sup>, such a marriage can be termed "void."] And so, in others, <sup>e</sup> no such marriage, followed by cohabitation and birth of issue, can be declared void after the death of either of the parties. <sup>f</sup> But compare § 6151. <sup>g</sup> But compare §§ 6156,6202. <sup>h</sup> Such impotency being natural or incurable. <sup>i</sup> "But inhabitants of that part of the State acquired from Mexico may marry according to the custom of that country." <sup>j</sup> Such marriage is a misdemeanor in the parties; it does not, however, appear that it is void. <sup>k</sup> But compare § 6115.

§ 6113. **Marriages Voidable.**<sup>a</sup> And in the following cases marriages may upon petition or suit (Art. 615) be decreed null and void from the beginning: (A) In several, all marriages contracted within the prohibited degrees contrary to the provisions of § 6111:<sup>c</sup> Va.<sup>b</sup> 105,1; 1879,252; W.Va.<sup>b</sup> 69,1.

(B) In many, when either party had not at the time of marriage attained the age of consent<sup>k</sup> (§ 6110):<sup>c</sup> Vt.<sup>b</sup> 2349; N.Y.<sup>b</sup> 2,8,1,4; Ind.<sup>b</sup> 1025; Mich. 6254; Wis.<sup>b</sup> 2350; Io.<sup>g</sup> 2186; Minn.<sup>b</sup> 62,2; Kan. 80,648; Neb. 1,25,2; W.Va.;<sup>b</sup> Ky.<sup>n</sup> 52,

1,5; Ark.<sup>b</sup> 4594; Cal.<sup>k</sup> 5082; Ore.<sup>b,j</sup> Civ. C. 487; 34,3; Nev.<sup>b</sup> 212; Wash.<sup>g</sup> 2381; Dak.<sup>k</sup> Civ. C. 54; Ida.<sup>g</sup> *ib.* 4; Wy. *ib.* 26; N.M. 993; Ariz. 1933.

But not, in many of these, if the parties have voluntarily cohabited as husband and wife after attaining such age: Vt. 2350; N.Y. Civ. C. 1742-3; Mich.; Wis. 2353; Minn. 62,4; Kan.; Neb.; Ky.; Cal.; Ore. Civ. C. 489; Nev. 213; Dak.; Wy.; Ariz.

(C) In many, also, where either party was insane or an idiot:<sup>c</sup> Vt.<sup>b,e</sup> 2351, 2352, 2356; N.Y.;<sup>b</sup> Ind.;<sup>b</sup> Mich. 6255; Wis.<sup>b</sup> 2330, 2350; Io.; Minn.<sup>b</sup> 62,2; Kan. 80,648; Neb. 1,25,34; Del. 75,2; Va.;<sup>b</sup> W.Va.;<sup>b</sup> Ark.;<sup>b</sup> Cal.; Ore.;<sup>b,j</sup> Nev.;<sup>b</sup> Wash.;<sup>g</sup> Dak.; Ida.;<sup>g</sup> Wy. *ib.* 27; Ariz. 1934.

But not in case of lunacy after the lunatic's restoration to reason, if the parties have since cohabited as husband and wife: Vt.; Mich. 6256; Wis. 2353; Minn. 62,4; Kan.; Neb.; Cal.; Ore.; Nev. 213; Dak.; Wy.; Ariz.

(D) Or, in many, physically incapable (*i. e.* impotent): Vt.<sup>g</sup> 2349; N.Y.;<sup>b</sup> Mich. 6259; Va.;<sup>b</sup> W.Va.;<sup>b</sup> Ark.;<sup>b</sup> Tex.<sup>b</sup> 2860; Cal.<sup>m</sup> 5058; Dak.<sup>m</sup> Civ. C. 39 and 54; Ida.<sup>g</sup>

(E) Or where, in many others, the consent of either party was obtained by force or fraud: Vt. 2357; N.Y.<sup>b,j,g</sup> 1882,66; Civ. C. 1750; Wis.;<sup>b</sup> Minn.;<sup>b</sup> Neb.; Ky. 52,1,5; Ark.;<sup>b</sup> Cal.; Ore.;<sup>b,j</sup> Nev.;<sup>b</sup> Wash.;<sup>g</sup> Dak.; Ida.;<sup>g</sup> S.C. 2028; La.<sup>g</sup> 110; Ariz.<sup>c</sup> 1936.

So, where there has been a mistake in the person: La.<sup>g</sup>

But not, in several, if at any time before suit (and after the discovery of the fraud: Ore.) the parties have voluntarily cohabited as husband and wife: Vt.; N.Y.; Mich. 6257; Wis.; Minn. 62,4; Neb.; Cal.; Ore.; Nev.; Dak.; La. 111; Ariz. Not, in any case, where the marriage has been consummated: S.C.

(F) All marriages between a white person and a negro are so voidable (§ 6050): W.Va.<sup>b</sup>

(G) All marriages where either party had a former husband or wife still living: W.Va.<sup>b</sup> So, a marriage may be annulled because the former husband or wife of either party was living at the time, such former marriage being then in force: Cal., Dak.

(H) The marriage of minors contracted without the consent of the father and mother cannot for that cause be annulled, if it is otherwise contracted with the formalities prescribed by law; but such want of consent shall be a good cause for the father and mother to disinherit their children thus married, if they think proper: La. 112.

NOTES. — <sup>a</sup> See § 6150. <sup>b</sup> They are so declared void only from the time the decree is pronounced; see § 6112, note <sup>b</sup>. <sup>c</sup> Such marriages must be either void or voidable in all states, except as in §§ 6150, 6151 specified. <sup>d</sup> See § 6112, note <sup>c</sup>. <sup>e</sup> For lunacy it may be brought at any time during the continuance of the lunacy, or after the lunatic's death, the other party being alive. <sup>f</sup> Only on decree under Art. 615, rendered in the lifetime of at least one of the parties. <sup>g</sup> On application of the party injured only; see also § 6150. <sup>h</sup> The suit must be brought within two years of marriage. <sup>i</sup> Within six months after the party arrive at the age of consent. <sup>j</sup> On application of the party laboring under the disability, etc.; see § 6151. <sup>k</sup> And, in the noted states, when also such marriage was contracted without the consent of the parent or guardian. <sup>l</sup> Such marriage, being *void* by § 6112, there would seem little use for making it thus *voidable*. <sup>m</sup> Such impotency continuing, and appearing to be incurable. <sup>n</sup> Such age is, for purposes of this section, sixteen in the male and fourteen in the female, if the parent, guardian, etc., have not consented to the marriage. It seems marriages under the age of consent required in § 6110 are absolutely void.

§ 6114. **Marriages out of the State.** (A) Marriages prohibited for miscegenation are void as in § 6112, A, although solemnized out of the State: Miss. 1147. So, of bigamous marriages (§ 6112, B): Col. 2250. So, of all marriages which would be void if made in the State, and which are made by parties intending at the time to reside in the State: Ga. 1710.

Parties residing in the State cannot evade any of the provisions of its laws as to marriage by going into another state for its solemnization: Ga.

(B) But in others, such incestuous (Mass., Me., Va., W.Va.), bigamous (Mass., Me., W.Va.), marriages, or marriages where one party is insane, etc. (§ 6112, D) (Mass.,

Me., W.Va.), or other voidable marriage (W.Va.) are (1) voidable by decree of court when both parties were resident in the State, and went with the intention of returning, and in order to evade the marriage laws, to another state or country, where the marriage was solemnized, and then did in fact return to the home State: Mass.<sup>a</sup> 145,10; Va. 105,2; W.Va. 69,3. (2) In Maine, they are absolutely void: Me. 59,9.

(c) And in many states, except as above, all marriages contracted out of the State are valid if valid in the state or country where solemnized: Kan. 61,9; Neb. 1,52,17; Ky. 52,1,6; Ark.<sup>b</sup> 4596; Cal. 5063; Col. 2250; Dak. Civ. C. 44; Ida. *ib.* 7; Wy. 81,17; N.M. 986; Ariz. 1895.

NOTES. — <sup>a</sup> In the noted states, they are “deemed void.” <sup>b</sup> Provided the parties actually resided in such state or country at the time.

§ 6115. **The Issue (A)** of a marriage voidable are, nevertheless, legitimate if born or begotten before the decree annulling it: Ind. 1025; Kan. 80,648; Va. 119,7; W.Va. 66,7; Mo. 2171.

So, specially, of marriages where either party is under the lawful age: Nev. 196.

(B) So, in many states, of (except as below) the issue of a marriage so-called void: O. 4175; Ind. 1026; Mich. 6223; Wis. 2274; Minn. 61,17; Va.; W.Va.; Ky. 52,1,3; Ark. 2526; Tex. 1656; Cal. 5084,6387; Nev. 795; Dak. Civ. C. 780; Ida. Prob. C. 316; Mon. Prob. C. 536; Ga. 1726,1702; Ala. 2673; La.<sup>a</sup> 117; N.M. 997.

And the issue of a marriage declared void on account of (1) insanity or idiocy are deemed the lawful issue of the parent who was capable of contracting the marriage: Mass. 145,13; Me.; Vt. 2355; N.Y. Civ. C. 1749; Io.; Mich. 6250; Neb. 1,25,29; Wy. *ib.* 23; La. 118; Ariz. 1929; (2) So, when for nonage: Mass., Me., Mich., Io., Neb., Wy., La., Ariz.; (3) where one of the parties is an idiot or lunatic the issue is legitimate as to both: Del., Ky.; (4) So, when for consanguinity or affinity of the parties: N.J. Div. 3.

(5) So, the issue of marriages annulled for bigamy (§ 6113,6) or insanity, begotten before the decree, are legitimate: Cal. 5084; Dak. Civ. C. 56.

(c) Otherwise, it would seem that the issue of a void marriage must be illegitimate; and the laws so enact, —

(1) When the marriage is void for cause of relationship: N.H. 180,3; Mass. 145,12; Me. 60,19; Vt. 2348; R.I. 163,3; Io. 2234; Neb. 1,25,31; Del. 75,11; Ky.;<sup>c</sup> Wy. *ib.* 25; Ariz. 1931; (2) or miscegenation: Me., Neb., Del., N.C.,<sup>b</sup> Ky., Ariz.; (3) or bigamy (but see § 6116): R.I. 163,5; N.J. *Divorce*, 2; Ind.; Mich.; Del.; Miss. 1156; Fla. 93,5; (4) or lunacy: R.I.; (5) or impotency: Io.

The marriage which has been declared null produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.

If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage: La. 117,118.

NOTES. — <sup>a</sup> “If the parties acted in good faith; otherwise, the children are legitimate only of such party as acted in good faith.” <sup>b</sup> And such issue cannot be legitimated (Art. 632). <sup>c</sup> Only illegitimate when such marriage is decreed void in the lifetime of the parties.

§ 6116. **Enoch Arden Case. (A)** In several states, when one party to a marriage marries again on the false rumor of another's death, when such other has been absent two years, he or she is not liable to the pains of adultery or bigamy, but the one not twice married may on his or her return elect to have his former wife or husband restored, or his own marriage dissolved: Pa. *Divorce*, 21; Tenn. 3319. See also in Part V. (B) And in many others, if the second marriage was made in good faith and with reasonable belief of the former husband or wife's death, the issue of it are the legitimate children of the parent not pre-



viously married : Mass. 145,14 ; Me. 60,20 ; N.Y. Civ. C. 1745 ; Ind. 1027 ; Mich. 6251 ; Io. 2235 ; Neb. 1,25,30 ; Del. 75,11 ; Ky. 52,1,4 ; Wy. *ib.* 24 ; Ariz. 1930 ; D.C. 741-2.

And it seems they are, if begotten before the discovery of such disability by the innocent party, the legitimate children of *both* the parties : Ind., Ky.

(In New York and Indiana it is declared sufficient if *either party* acted in good faith.) (C) In all cases where a husband abandons his wife, or a wife her husband, and resides out of the State for five years without being known to such person to be living during that time, his or her death is presumed and a subsequent marriage entered into by such wife or husband is valid as if such husband or wife were dead : N.Y. 2,8,1,6 ; Tenn. 3293 ; Ark. 4597. (D) So, if either husband or wife has been absent seven years together, the other, not knowing such party to be living, may marry without being subject to indictment for bigamy : Md. 72,102 ; W.Va. 45,2 ; 1882,163 ; Mo. 1534 ; S.C. 2029. So, five years : Ala. 4186. So, three years : Miss. 59,5. And such person abandoning the other forfeits all claim to the real or personal estate of the other ; and, if he be a man, the wife has her dower and intestate share in personalty as if he were dead : Md. See in Part V., for other states. See also § 6112, B.

(E) Ten years of absence, without any news of the absentee, is a sufficient cause for the husband or wife of such absentee to contract another marriage, after having been authorized to do so by the judge, on due proof that such absence without any news had continued the time required as aforesaid. And if after the said marriage the husband or wife who was absent, happens to return, he or she shall be free of his or her first contract, and at liberty to contract another marriage, and the marriage entered into by the husband or wife during and on account of the absence shall remain firm and valid : La. 80.

## Art. 612. Form of Marriage.

§ 6120. **Preliminaries: Bans or Notice of Intention.** Throughout this article, and articles 613 and 614, it will be understood that the provisions are directory merely, unless the contrary is expressed, and marriages, although informal, will be nevertheless valid, except as otherwise implied in § 6138 and elsewhere. The last article (611) treats of the cases where marriages are invalid. Transgressions of the following articles usually merely render the offender, clerk, priest, or officer, liable to a fine or penalty ; or the parties to a misdemeanor : Mass. 145,25 ; Me. 59,5 and 6 ; 13-14 and 18 ; Vt. 2316,2318 ; R.I. 163,13-14 ; Ct. 14,1,2 ; N.J. *Marriage*, 4 ; Pa. *Marriage*, 1 ; 1885,115,5 ; O. 6390,6392 ; Ind. 2149,5332-3 ; Ill. 38,102½ ; 89,13-16 ; Mich. 6218-9 ; Io. 2192,2195 ; Minn. 61,12-4 ; Kan. 61,4 and 7 ; Neb. 1,52,13 ; Md. 72,105, 107-110 ; Va. 192,4-5 ; 1878,311,7,4-5 ; W.Va. 1882,123,4-5 ; N.C. 1816-7 ; Ky. 52, 1,14-7 ; Tenn. 3300-2 ; Mo. 3269 ; 1545 ; 3269-3270 ; 1881, p. 162,4 ; Ark. 4601 ; 4616-4620 ; Cal. 5068 ; Ore. Crim. C. 687-8 ; Nev. 203-5 ; Col. 2253,2259,2263 ; Wash. 924,2387,2394-5 ; Dak. Civ. C. 45 ; Ida. 1876-7, p. 25,8,15,17,18 ; Mon. G.L. 860-1 ; Wy. 81,13 ; Ga. 1706 ; Ala. 2681 ; 1881,34 ; 2682,4429-4431 ; Miss. 1148,1154 ; Fla. 149,4 ; La. D. 2206 ; N.M. 982-3,987,994 ; Ariz. 1897-1901. See note.

In most states, persons intending to be married must before their marriage apply for a license or cause notice of their intention to be entered (recorded) (1) in the office of the clerk of the city or town in which they respectively dwell, or, if they do not dwell in the State, in the town where the marriage is solemnized : " N.H. 180,4 ; Mass. " 145, 16 ; Me. 59,4 ; R.I. 163,9.

So, (2) with the registrar or clerk of the town where the marriage is to be made in all cases : Ct. 14,1,2. With the clerk of the county or superior court of the county where the marriage is to take place : Ill. 89,6 ; Io. 2187 ; Del. 9,13 ; Ark. 4610 ; Tex. 2840 ; Cal. 5069 ; Wy. 81,4.

(3) With the clerk of the county ( $\alpha$ ) where the woman resides : Minn. 61,7 ; Ore. 34,12 ; ( $\beta$ ) or where either of the parties resides : Ky. 52,1,10 ; Nev. 198 ; or, if she be not resident in the State, ( $\gamma$ ) of the county where the marriage is to take place : Minn. ; or ( $\delta$ ) from any county clerk in the State : Nev. ; Col. 2251.

So, (4) with the recorder of deeds of the county where the marriage takes place : N.C. 1813 ; Mo. 1881, p. 161, § 2.

(5) With the ordinary, or register of probate of the county where the woman resides : Ga. 1703. (6) With the auditor of the county where the marriage takes place : Wash. 2390.

(7) With the clerk of the Circuit Court, etc., of the county where the bride resides : Ind. 5327 ; Minn. 61,7 ; Md. 51,7 ; 1882,357,1 ; Va. 104,1 ; 1880,279 ; W.Va. 121,1 ; Tenn. 3296 ; Miss. 1148 ; Fla. 149,2. (8) With the probate judge of the county where the bride resides : O. 6389 ; Kan. 61,5 ; Ga. 1703 ; Ala. 2677. (9) With the clerk of the town where the groom resides, or where the bride resides if he be not resident in the State ; or, if neither reside in the State, from the clerk of the town where the marriage is solemnized : Vt. 2311. (10) " The parents or guardians, if they conveniently can, shall be first consulted with, and the parties' clearness of all engagements signified by a certificate from some credible person where they have lived or do live, produced to such religious society to which they relate, or to some justice of the peace of the county in which they live, and by their affixing their intentions of marriage at the court house or meeting-house door in each respective county where the parties reside, one month before the solemnization, which publication shall first be brought before one or more justices of the peace in such counties, and by them dated and subscribed : " Pa. *Marriage*, 1. But by a new law, no person may be joined in marriage until a license be obtained from the clerk of the Orphans' Court in the county where the marriage is solemnized : Pa. 1885,115,1. (11) With the probate judge of the county where the marriage takes place : Neb. 1,52,4. (12) With a justice of the peace, in the parish of Orleans ; elsewhere with the clerks of the District Courts, in the parish where one at least, of the parties resides : La. 99,100 ; D. 2202. (13) With the clerk of the Supreme Court : D.C. 720.

The clerk or judge is to make record of the application, and of the facts as to age, capacity, etc. : Vt. 2313 ; Io. 2190 ; Minn. 61,8 ; Kan. 61,6 ; Neb. 1,52,6 ; Md. 30,1 ; 1882,357 ; W.Va. 121,14 ; Ore. 34,15 ; Wy. 81,6. And so in other states.

He is to record all licenses issued by him : Vt. 2312 ; Va. 104,2 ; W.Va. ; Mo. 1881, p. 162,5 ; Tex. 2842 ; Ala. 2679.

**Bans**, when required, there being no license (§ 6121), must have been published in some church within the hundred (or county, except in Delaware) of the bride's residence, (1) on two Sundays, immediately after divine service, and no objection made : O. 6389 ; Del. 74,2 ; (2) on three Sundays, by some minister residing in the county : Md. 51,5. It seems bans are still recognized by the laws of one other state : Ga. 1704.

The church in which bans are read must, in Maryland, be duly recorded as such in the office of a clerk of court, or the bans are not good : Md. 51,6-7.

NOTE. — <sup>a</sup> Failure to comply with this provision will, it seems, render the marriage void unless consummated with a full belief on the part of the parties or either of them that they have been lawfully married ; § 6133. So, probably in the other states.

§ 6121. **License.** In most of the states, the clerk, etc., issues a license upon notice of intention or application being filed according to § 6120 : N.H. 180,5 ; Mass. 145,17 ; Me. 59,5 ; Ct. ; Pa. ; O. ; Ind. ; Ill. 89,7 ; Io. 2187 ; Minn. 61,8 ; Kan. 61,5 ; Neb. ; N.C. ; Ky. ; Tenn. ; Mo. ; Ark. 4611 ; Tex. 2840 ; Cal. ; Ore. 34,12 ; Nev. 198 ; Col. 2251 ; Wash. ; Ga. ; Fla. ; La. D. 2204. So, it is implied, in the other states.

This certificate is generally a license for any person authorized to perform marriages to join in marriage the parties, (1) *in said town* : Ct. ; (2) *in said county* : Pa., La. ; in any town or county where authorized : Vt. 2311 ; Ind. ; Kan. ; W.Va. 121,14 ; Mo. ; Ark. 4612 ; Tex. ; Ore. ; Col. ; Wash. ; Miss. 1148 ; Ala. ; and so, it seems, in other states ; see § 6130, note <sup>b</sup>.

§ 6122. **Age of Parties.** (Compare also § 6134.) In most states, the clerk or magistrate, etc., is forbidden to issue a certificate (1) to a male under twenty-one or a female under eighteen : Mass. 145,18 ; Me. 59,5 ; Vt. 2314 ; O.<sup>a,c</sup> 6384, 6390 ; 1885, p. 202 ; Ind. 5328 ; Ill. 89,7 and 13 ; Minn.<sup>a,c,d</sup> 61,8 ; Neb.<sup>c</sup> 1,52,5 ; Mo.<sup>c</sup> 1881, p. 162,2-3 ; Ark. 4614 ; 1885,123 ; Tex. 2841 ; Cal.<sup>a</sup> 5069, Amt. ; Wy. 81,5 ; Ala.<sup>a,c</sup> 2678 ; Miss.<sup>c</sup> 1148 ; La. ; or (2) if either party be under twenty-one : R.I. 163,9 ; Ct. ; Pa.<sup>a,d</sup> 1885,115,3 ; Va.<sup>a,b,c</sup> 104,3 ; W.Va. 121,2 ; N.C. 1814 ; Ky.<sup>a,b,c</sup> 52,1,11 ; Fla.<sup>a</sup> 149,2 ; La. 97. Except ( $\alpha$ ) upon the written or personal application or consent of the parent, relative, master, or guardian of such person ; (but if there be none in the State, such application need not in Massachusetts, Maine, or Oregon<sup>e</sup> be required) ; or ( $\beta$ ) with the written consent of the parent or guardian : R.I. ; Ct. ; Io.<sup>d</sup> 2188,2191 ; Ore. 34,13 ; Nev.<sup>a,c</sup> 198 ; Wash. 2391 ; Wy.<sup>c</sup> Ga. 1705.

So, in Pennsylvania, "no justice can sign the publication (§ 6120) nor any person publish the bans of any persons under twenty-one unless consent of the parents or guardians be proved by a certificate, if they can be had or consulted with : " Pa. *ib.* 4.

The clerk may (or must, in a few) require of any person applying for such certificate an affidavit or other evidence setting forth the age of the parties : Mass. 145,19 ; Pa. ; Va. 104,15 ; Ark. ; Cal. ; Miss. ; La. 98.

Such affidavit must always be filed, signed by a person other than the parties : Ind. 5329 ; Ore. 34,14 ; Col. 2253 ; Wash. 2392.

So, in several, he may examine the party, or any witness, under oath : Ill. 89,8 ; Io. 2189 ; W.Va. 121,14 ; Cal. ; Nev. 198 ; Wy. 81,6 ; Ga.

He may examine him as to any subject relating to the legality of the marriage : Pa. ; O. 6390 ; 1885, p. 202 ; Minn. 61,8 ; Kan. 61,8 ; N.C. 1814 ; Cal. ; Nev. ; Col. 2253-4.

No marriage license can be issued unless the parties are of the age of consent : Io. ; Neb. 1,51,7 ; Ore. ; Col. ; Wy. 81,7 ; compare § 6110. Nor if either party is legally incompetent to marry : O., Io., Neb., Wy. So, of course, in all states.

In a few, the party applying must give the clerk a bond, signed by one person besides himself, conditioned that the parties have a lawful right to a license : Del. 9,16 ; Ky. 52,1,11 (if unknown to the clerk) : Tenn. 3297 ; Ark. 4613 ; Ala. ; Miss. 1148 ; La. 101.

NOTES. — <sup>a</sup> Unless such party has been married before. <sup>b</sup> Of the father or guardian, or if none, of the mother. <sup>c</sup> The application if written must be attested. <sup>d</sup> Such consent must be acknowledged approved, and recorded with the clerk. <sup>e</sup> When the woman has lived six months in the county.

§ 6123. **Caveats.** In Rhode Island, any person having a lawful objection to the marriage may state the same in writing to the minister, etc., whereupon he shall not proceed until the objection is removed : R.I. 163,11.

So, in Maine, any person believing two parties about to contract a marriage unlawfully may file a caution in the office of the town clerk where their notice (§ 6120) should be filed ; in which case the clerk must withhold a certificate, until there is a hearing before two justices of the peace : Me. 59,8.

In case of an opposition to the marriage, if it be supported by the oath of the party making it, and by reason sufficient in the opinion of the judge to authorize a suspension of the marriage, it shall be notified to the parties, and a day shall be assigned for a hearing thereon.

The time fixed for the hearing of the parties and the decision on the opposition, shall not exceed ten days, from the day on which the opposition shall have been made.

Any person may make opposition to a marriage, but if the opposition be overruled, the party making it shall pay costs : La. 106-8.

§ 6124. **Marriages without License.** When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman ; and a certificate is issued to the parties by such clergyman, and recorded by him on the records of the church ; no other record need be made : Cal. 5079, Amt.



§ 6125. **Curative Acts.** All marriages heretofore (1881) solemnized in the State by any minister or clergyman duly accredited and acting as such, are declared legal: Ark. 4602.

There are similar acts in many states; but it has been impossible to include them in this work, as they are frequently not included in the state revisions. See also Tenn. 3304-5; Mo. 2844-5; Ark. 1885,110.

"All marriages heretofore solemnized" within the State by court commissioners are valid from the time of solemnization: Wis. 2339.

All marriages solemnized in Colorado by any president or judge of a mining district or justice of the peace or clergyman prior to March 10, 1864, are declared confirmed and made legal: Col. 2265.

## Art. 613. Marriage Ceremonies.

§ 6130. **Who may Solemnize.** (A) Any minister, priest, or preacher of the Gospel may, in all the states, solemnize a marriage; but (1) he must, in most states, be ordained according to the usage of his denomination (or, in some others, "licensed": Ct., Tex., Col.): N.H. 180,9; Mass. 145,22; Me. 59,11; Vt. 2310; R.I. 163,6; Ct. 14,1,5; N.J. *Marriage*, 2; 1882,143; Appendix, *Marriage*, 1; O. 6385; Ill. 89,4; Mich. 6215; Wis. 2331; Io. 2193; Minn. 61,4; Neb. 1,52,8; Md. 51,4; Del. 74,2; N.C. 1812; Ky. 52,1,8; Tenn. 3294; Mo. 3267; Ark. 4599; Tex. 2838; Nev. 197; Col. 2255; Wy. 81,8; Ala. 2674; Miss. 1150; Fla. 149,1; N.M. 977; Ariz. 1896; D.C. 718. In others, (2) he must be licensed<sup>a</sup> to marry: Me. 59,12; O. 6386-7; Wis. 2332; Minn.<sup>a</sup> 61,5; Kan. 61,10; Del. V. 16,381,11; Va. 104,4; W.Va. 121,3; 1882,108; Ky. 52,1,9; Ark. 4600,4606-8; Nev.; Ala.; D.C.

And in several, (3) he must be resident in the State: N.H.; Mass.; Vt.; R.I.; O.; Ind. 5326; Mich.; Ore. 34,4; Wash. 2382; 1883, p. 43; Mon. G. L. 856. Or must be laboring steadily in the State as a minister or missionary: Vt., Mich.

In other states, no such conditions are required: N.Y. 2,8,1,8; Cal. 5070, Amt.; Dak. Civ. C. 45; Ida. *ib.* 10; Ga. 1703; La. 102.

So, in Rhode Island, any "elder" of any religious denomination, resident as above, may solemnize marriages. Any minister publicly ordained according to the customs of any society professing to meet, and incorporated, for religious purposes, holding stated or regular services: R.I. 163,7.

(B) Any justice of the peace: N.H.; Mass.; Me.; Vt.,<sup>b</sup> Ct.; N.Y.; N.J.; O.<sup>b</sup> 583; Ind.<sup>b</sup> Ill.; Mich.;<sup>b</sup> Wis.;<sup>b</sup> Io.;<sup>b</sup> Minn.;<sup>b</sup> Kan.; Neb.; N.C.; Ky.;<sup>b</sup> Tenn.; Mo.; Ark.; Tex.; Cal.; Nev.;<sup>b</sup> Col.; Wash.;<sup>b</sup> Dak.; Ida.; Mon.;<sup>b</sup> Wy.; Ga.; Ala.;<sup>b</sup> Miss.<sup>b</sup> Fla.; La.<sup>b</sup> 103; D. 2207,2208; Ariz.

Any recorder: N.J. 1882,143. "Any judicial officer, within his jurisdiction:" Ore. Any notary public: Fla. "Any civil magistrate:" N.M.

(C) Any mayor: N.Y., N.J., Io.,<sup>b</sup> Del., Dak. Any recorder of a city: N.Y., N.J.; or county supervisor: Miss.<sup>b</sup> Any alderman: N.Y. The state governor: Ark., Ida., Ariz.

(D) Any judge of a superior court: N.J., Io., Tex., Cal., Nev.,<sup>b</sup> Wash., Ida., Ala., Miss., Fla., La.; of a supreme court: R.I., Io., Cal., Dak., Ida., Ala., Miss.; of a probate court: Mo. 1176; Wash.; Dak.; Ida.; Ala.;<sup>b</sup> of any court of record: N.Y., Ind.,<sup>b</sup> Ill., Wis., Minn., Ark., Mon.; of a county or parish court: N.Y., Ky., Mo., Tex., Fla., La.; of a city court: Ala. Any police justice: N.J. "Any judge," simply: Ct., Kan., Neb., Tenn., Mo., Col., Wy., Ga., Ariz. Any court commissioner: Wis.;<sup>b</sup> or chancellor: Ala., Miss.<sup>b</sup>

(D) In Virginia, any person may be licensed to solemnize marriages by the County Court, on giving \$1,500 bond: Va. 104,5.

(E) In two, any superintendent of a deaf and dumb institution may solemnize a marriage: Ill.; Minn. 1885,38.

(F) Wardens of the town of New Shoreham: R.I. 163,8.

(G) The parties, after obtaining a certificate from the clerk of the Orphan's Court, may join themselves in marriage before two witnesses, and must make a return, with the certificates of such witnesses, to the court, as in § 6141 : Pa. 1885,115,1.

Failure to comply with this section does not, generally, render the marriage void (see §§ 6120,6137) ; but in Kentucky, any marriage is void which is not contracted in the presence of an authorized person or society : Ky. 52,1,2.

NOTES. — <sup>a</sup> A minister will be so licensed on giving proof of his ordination and a bond : Va., W.Va., Ky. In Wisconsin, Minnesota, Arkansas, Nevada, he must file a copy of his credentials of ordination, or other proof of such official character, with the clerk of the Circuit Court (or the recorder of deeds : Del., Ark. ; or the judge of probate : O.) of some county in the State, who shall record the same and give a certificate thereof. And (in Wisconsin, Minnesota, Arkansas) the place where such credentials are recorded must be indorsed upon the certificate of marriage and recorded with it. In the District of Columbia, he is licensed by the clerk of the Supreme Court : D.C. 719. In one other, he is commissioned by the governor : Me. <sup>b</sup> Only in the county or district where such officer is appointed.

§ 6131. **Place.** In Massachusetts, every marriage must be solemnized in the town where one of the parties, or where the person solemnizing it, resides : Mass. 145,22. Compare § 6121.

§ 6132. **Manner.** When the marriage is by a minister or priest, (1) no particular form is required : Ark. 4603. (2) It may be according to the forms and customs of his church : N.Y. ; Ark. ; D.C. 718. So, in many states, in any case, except that the parties must solemnly declare, in the presence of the magistrate or minister (and witnesses, in states where necessary), that they take each other as husband or wife : N.Y. 2,8,1,9 ; Pa. *Marriage*, 1 ; Mich. 6217 ; Wis. 2335 ; Minn. 61,9 ; Neb. 1,52,9 ; N.C. 1812 ; Tenn. 3295 ; Cal. 5071 ; Ore. 34,5 ; Nev. 199 ; Wash. 2383 ; Dak. Civ. C. 46 ; Ida. *ib.* 10 ; Wy. 81,9.

When by a magistrate, "such form as the magistrate, etc., deem most appropriate : " Ark. In one state, in any case, the parties fully, seriously, and plainly express their consent to take each other presently as husband and wife, in the presence of each other and the minister, etc. ; and the latter must consequently declare them man and wife : N.C. 1812.

The person solemnizing must always require a license, etc., according to § 6120 : N.H. 180,8 ; Mass. ; Me. 59,5 ; Vt. 2311 ; R.I. 163,12 ; Ct. 14,1,2 ; Pa. *ib.* 6 ; 1885,115 ; O. 6389 ; Ill. 89,15 ; Io. 2192 ; Kan. 61,4 ; Neb. 1,52,4 ; Md.<sup>a</sup> 51,5 and 10 ; Del.<sup>a</sup> 74,2 ; Va. 104,7 ; W.Va. 121,6 ; N.C. 1813,1817 ; Ky. 52,1,9,10 ; Tenn. 3296 ; Mo. 1881, p. 161, § 1 ; Cal. 5072 ; Ore. ; Nev. 1881,75 ; Col. 2256 ; Ala. 2677 ; Miss. 1150 ; Fla. 149,2 ; La. 104 ; D. 2204 ; D.C. 720. So, by implication, in other states. For citations, see also § 6121.

He must be assured of the identity of the parties : Dak. Civ. C. 47 ; Ida. *ib.* 9. And of their names and residence : Dak., Ida. So, of all facts stated in the license : Cal.

He may examine the parties under oath as to such facts : Cal.

He may not marry parties either of whom is drunk : Pa. *ib.* 8.

No marriage can be contracted or celebrated by procuration : La. 109.

NOTE. — <sup>a</sup> Unless there have been bans.

§ 6133. **Witnesses.**<sup>a</sup> There must, in several states, be two witnesses : R.I. 163,15 ; Mich. 6217 ; Wis. 2335 ; Minn. 61,9 ; Neb. ; Ore. ; Nev. 199 ; Wash. ; Ida. 1876-7, p. 24, § 12 ; Wy.

In others, one witness : N.Y. 2,8,1,9 ; Dak. Civ. C. 46. In one, three witnesses, who must sign the act of return (§ 6141) : La. D. 2205. In Pennsylvania, there must be twelve witnesses : Pa. *Marriage*, 1.

NOTE. — <sup>a</sup> Compare also §§ 6142,6145.

§ 6134. **Age.** (Compare also § 6122.) (A) The laws of a few states make it the duty of the minister or magistrate to inquire and ascertain the Christian names and sur-

names of parties, their residence, and that they are of sufficient age to be capable by law of contracting marriage (and the names and residence of the witness, or of two witnesses, if there be two, in New York and Dakota) : R.I. 85,3-4 ; N.Y. 2,8,1,10 ; Dak. Civ. C. 47 ; *Ida. ib.* 9.

For such purposes he may examine the parties on oath : N.Y. *ib.* 11 ; N.J. *Marriage*, 3 ; *Ida. ib.* 11.

He may require the parties to sign a certificate : R.I., N.Y.

(B) So, in several, he must, before solemnizing a marriage, examine at least one of the parties on oath as to the legality of such intended marriage ; and in no case shall he solemnize a marriage unless satisfied from such examination that there is no legal impediment thereto : <sup>a</sup> Mich. 6216 ; Wis. 2333 ; Minn. 61,6.

Or, in others, he is to require evidence from other persons of the above facts : N.M. 980.

(C) In many states, no minister or magistrate shall solemnize a marriage when he has reasonable cause to suppose the male to be under the age of twenty-one, or the female under eighteen (or eighteen and sixteen respectively, in Idaho and Arizona ; twenty-one and sixteen, in Maryland, or the female fourteen, in New York) ; except with the consent of the parent or guardian having the custody of the minor, if there is any such parent, etc., in the State competent to act : <sup>a</sup> Mass. 145,6 ; Me. 59,5 ; N.Y. Civ. C. 1742 ; N.J. *Marriage*, 3 ; O. 6385,6393 ; Wis. 2334 ; Md. 72,111 ; Del. 74,3 ; Mo. 3268 ; Col. 2257 ; *Ida.* ; N.M. 979,993 ; Ariz. 1897.

But such consent is not necessary when the minor has been married before : Wis., *Ida.*

He may require the oath of the parties that they are of lawful age : N.J.

And must be satisfied that the parties have a legal right to marry (see B, above) : R.I. 163, 13 ; N.Y. 2,8,1,12 ; O. ; *Ida.* ; N.M. 980.

Such consent must be evidenced either by the parent or guardian being present or by a written certificate, witnessed by one person, taken by any person authorized to solemnize a marriage : N.J. *Marriage*, 3 ; O. ; Mo. ; N.M. 979.

So, in Wisconsin, if such consent is in writing, it must be signed by the parent or guardian, and attested by two witnesses, one of whom shall appear and make oath that he saw such parent or guardian execute the same : Wis.

If there be no parent or guardian in the State, he may dispense with such consent : Col.

NOTE. — <sup>a</sup> See § 6122 for similar provisions.

§ 6135. **Quakers and Sects.** (A) In many states, a marriage among the Friends is valid if performed according to their customs : N.H. 180,7 ; Mass. 145,23 and 27 ; Me. 59,10 ; R.I. 163,10 and 16 ; N.Y. 2,8,1,19 ; Ind. 5326 ; Ill. 89,4 ; Mich. 6221 ; Wis. 2338 ; Minn. 61,16 ; Kan. 61,10 ; Md. 51,4 ; N.C. 1812 ; Nev. 210 ; Ala. 2676 ; Miss. 1153.

So, in several, a marriage among Jews : R.I. ; N.Y. ; Ga. 1707.

Among German Baptists : Ind.

(B) So, in many, marriages between parties belonging to any religious society may be solemnized by the person and in the manner practised in such society : O. 6385 ; Ill. 38,102½ ; 89,5 ; Mich. ; Io. 2198 ; Neb. 1,52,15 ; Va. 104,6 ; W.Va. 121,5 ; Ky. 52,1,8 ; Mo. 3272 ; Ark. 4604 ; Ore. 34,11 ; Wash. 2382 ; Wy. 81, 15 ; Ga. ; Ala. 2675 ; Miss. 1151.

(C) So, in others, the marriage may be made according to the usages of any religious society to which one of the parties may belong : N.J. *Marriage*, 2 ; App. *ib.* 1 ; Del. 74,2. So, in a few others ; and it does not seem necessary that the parties, or either of them, should belong to such society : Ct. 14,1,5 ; N.M. 984.

But where any mode is thus pursued which dispenses with the services of a clergyman or magistrate, (1) the husband must make the return prescribed by § 6141 : Io. 2199.

(2) The clerk or proper officer of such religious society must make record or return according to §§ 6140-1 : Me. ; R.I. 85,4 ; 163,10 ; N.J. *ib.* 7 ; Mich. 859 ; Minn. ; Neb. Md. 51,5 ; Va. 104,15 ; Mo. ; Ark. 4605 ; Ore. ; Wash. 2389 ; Wy. ; Ala. ; Miss. 1149 ; N.M.



(3) "The parties to the marriage must sign and deliver to the town clerk the certificate required by § 6120 : " R.I. 163,17.

"*Provided*, that this law (§§ 6120,6132-3,6141) shall not extend to any who shall marry or be married in the religious society to which they belong, so as notice be given by either of the parties to the parents or guardians one month before the marriage : " Pa. *Marriage*, 2. And no license can dispense with the notice so required to parents or guardians : Pa. *ib.* 3.

§ 6136. "**Scotch" Marriages.** In New Hampshire, persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such for three years and until the decease of one of them, shall thereafter be deemed to have been legally married : N.H. 180,16 ; and compare § 6144.

§ 6137. **Informal Marriages.** (A) If the marriage, being lawful in other respects, is consummated with a full belief on the part of the parties or either of them that they have been lawfully married, (1) no marriage solemnized before a justice of the peace or minister (or in the Society of Friends according to their usage) shall be deemed void on account of the want of authority of such person : N.H. ; Mass. ; Me. ; Vt. 2319 ; Ind. 5330 ; Mich. 6220 ; Wis. 2337 ; Minn. 61,15 ; Neb. 1,52,14 ; Del. 74,2 ; Va. 104,7 ; W.Va. 121,6 ; Ore. 34,10 ; Nev. 206 ; Wash. 2388 ; Ida. *ib.* 19 ; Mon. G. L. 862 ; Wy. 81,14 ; Ga. 1709 ; or (2) by any omission or informality in entering the intention of marriage (§ 6120) : N.H. 180,13 ; Mass. 145,27 ; Me. 59,17.

No marriage is void on account of the incapacity of the person solemnizing it : Ind. 5326.

If by any person professing to be a minister or magistrate, etc., it is valid as above : Mich. ; Wis. ; Ky. 52,1,7 ; Ore. ; Nev.

Nor shall such objection specified above be heard from one who has fraudulently induced the other to believe the marriage legal : Ga.

Marriages solemnized with the consent of the parties in any other form than those prescribed are generally valid. See § 6120.

(B) Persons married without the solemnization above in this article provided for must jointly make a declaration of marriage, showing (1) the names, ages, and residence of the parties ; (2) the fact of marriage ; (3) the time of the marriage ; (4) that the marriage has not been solemnized : Cal. 5075 ; Dak. Civ. C. 46 ; La. D. 2174.

If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, substantially showing (1) the names, ages, and residence of the parties ; (2) the fact of marriage ; (3) that no record of such marriage is known to exist. Such declaration must be subscribed by the parties, and attested by at least three witnesses : Cal. 5076 ; Dak.

Declarations of marriages must be acknowledged and recorded like grants of real property : Cal. 5077 ; Dak.

If either party to any marriage denies the same or refuses to join in a declaration thereof, the other has an action to have the validity of the marriage declared : Cal. 5078 ; Dak.

§ 6138. **Foreign Marriages.** Marriages solemnized in a foreign country by a consul or diplomatic agent of the United States are valid : Mass. 145,28. Compare § 6114.

## Art. 614. Record of Marriages.

§ 6140. **By the Person Solemnizing.** In most states, the person solemnizing a marriage is to enter the facts and day of the marriage (1) in a book or record : N.H. 181,1 ; Mass. 145,24 ; Me. 59,15 ; R.I. 85,3 ; N.Y. 2,8,1,10 ; 1847,152 ; 1853,75 ; N.J. *Marriages*, 5-6 ; Mich. 859 ; Wis. 1022 ; Minn. 61,11 ; 1883,68 ; Del. 74,5 ; Va. 104,15 ; Mo. 3270 ; Cal. 3074, Amt. ; Nev. 201 ; Col. 2258 ; Dak. Civ. C. 48 ; Ida. *ib.* 12 ; Mon. G. L. 857 ; N.M. 981 ; (2) upon the license : Ct. 14,1,3 ; Pa. 1885,115,1 ; Kan. 61,10 ; Neb. 1,52,8 ; Md. 1882,357,2 ; W.Va. 121,14 ;

N.C. 1816; Tenn. 3298; Mo. 1881, p. 162; Ark. 4612; Tex. 2842; Col. 2252; Ala. 2680; Fla. 149,3; Ariz. 1898.

The person solemnizing may keep the license: Ore. 34,15; Wash. 2393.

§ 6141. **Return.** By the laws of nearly all the states, the person solemnizing a marriage (or, in Arkansas, the person obtaining the license: § 6121) is required to make a written return (of the license, or record, or copy of the record) of such marriage to the town clerks (1) of the towns where the marriage was made and where the parties resided: N.H. 181,2; 1883,70; Mass. 145,24; N.Y. 2,8,1,14; N.J. *Marriage*, 6; 1882,239,1 and 7. In the District of Columbia, the minister must appear in person in the clerk's office of the Supreme Court, and certify to the marriage: D.C. 720. (2) In most states, to the town (or county) clerk where the marriage was solemnized: Me. 59, 15; N.J. *Marriages*, 5; Ind. 5331; Ill. 89,9-10; Io. 2196; Minn. 61,11; 1883,68; Va. 104,15; Ore. 34,7; Col. 2258; Dak. Civ. C. 50. (3) To the county clerk, etc., issuing the license: Vt. 2315; Ct. 14,1,3; Pa. 1885,115,4; O. 6391, Amt.; Io. 2196; Minn.; Kan.; Md. 1882,357,4; W.Va.; Ky.; N.C. 1816; Tenn.; Ark. 4612,4615; Tex. 2842; Col. 2252; Wy. 81,11; Ala. 2680; Miss. 1149; Fla. 149,3; La. 105; D. 2205; or, if no license, to the county clerk where the marriage was solemnized: Col. 2258; Wy. (4) To the recorder of deeds of the county where the marriage was solemnized: Wis. 1022; Del. 74,5; N.C. 1818; Mo. 3269; Cal. 5074; Nev. 201; Dak.; Ida. *ib.* 12; Mon. G. L. 857; Ariz. 1898. (5) To the district court clerk of the county where the marriage was solemnized: N.J. *ib.* 6; Minn.

(6) To the probate judge, or register, or ordinary issuing the license: Kan. 60,6; Neb. 1,52,8 and 11; Wash. 2385; Ga. 1703. (7) To the clerk of the probate court of the county where the marriage was solemnized: Pa. 1885,115,1; N.M. 981. (8) The town clerk returns to the clerk of courts for his county a transcript of all records of marriages made on his books during the year, and by such clerk it is accordingly recorded: Me. 59,19. (9) The certificate of their marriage, under the hands of the parties, and witnesses at least twelve, and one of them a justice of the peace, shall be brought to the register of the county where they are married, and by him recorded: Pa. *Marriage*, 1. [There are also frequent provisions for the return of all marriages to the Secretary of State or some similar officer.]

And by such town or county clerk or recorder, etc., the marriage is accordingly recorded: Vt. 2551; N.J. *ib.* 9; Pa.; O.; Ind.; Ill. 89,11; Wis. 1026; Io. 2197; Minn.; Kan.; Neb. 1,52,12; Del. V. 16,381,2; Va. 104,17; W.Va. 121,15; N.C.; Ky. 52,1,13; Mo. 3271; Ark. 4619; Tex.; Ore. 34,8; Nev. 202; Col. 2260-1; Wash. 2386; Dak.; Ida. *ib.* 13; Mon. G. L. 859; Wy. 81,12; Ga.; Ala.; Miss.; Fla.; N.M. 983; Ariz. 1899.

§ 6142. **Certificate.** (A) In several states, the magistrate or minister who has solemnized a marriage must give to each of the parties, if requested, a certificate thereof, specifying therein the names and residence of the parties and (except in Iowa) of at least two of the witnesses present, and the time and place of such marriage: N.Y. 2,8,1,13; Mich. 859; Wis. 2336; Io. 2194; Minn. 61,10; Neb. 1,52,10; Ore. 34,6; Nev. 200; Wash. 2384; Dak. Civ. C. 49; Ida. *ib.* 14; Wy. 81,10.

And also stating therein that he had examined on oath one or both of the parties, and found no legal impediment to their marriage: N.Y., Wis.; and where the consent of the parent or guardian is necessary, stating that the same was duly given: Wis.; and also that the parties were personally known to him, or satisfactorily proved by the oath of a person known to him to be the persons described in the certificate: N.Y., Dak.; that he had ascertained that they were of sufficient age to contract marriage: Dak.; the date of the license and by whom issued: Wash.

(B) The persons solemnizing a marriage must make, sign, and indorse upon or attach to the license a certificate showing (1) the fact, time, and place of solemnization,

and (2) the names and places of residence of one or more witnesses to the ceremony (and at their request must furnish either party with a copy : Cal.) : N.C. 1815 ; Ky. 52, 1,12 ; Cal. 5073-4.

(C) The clerk issuing the license returns it, certified as having been recorded, to the party, after he has returned it (§ 6141) : Ark. 4619.

(D) The person solemnizing makes a certificate (as in B above), and returns it as in § 6141 : N.C. ; Ky. ; Mon. G. L. 858 ; La. D. 2205.

(E) This certificate may be returned by any party to the clerk of the city or town where the marriage took place or where either party resides, within six months of the marriage, and must by him be recorded : N.Y. 2,8,1,14. If the marriage was solemnized by a minister, a certificate to his identity must be appended, made by some magistrate of the county where he resides : N.Y. *ib.* 15.

(F) The person solemnizing gives a duplicate certificate to the one returned, as in § 6141, to the parties : Pa. 1885,115,1.

§ 6143. **Return of Marriages out of State.** When parties living in the State are married out of it, and return to reside in the State, they are required to file a certificate of the marriage, including the facts required to be stated in the notice aforesaid (§ 6120), with the clerk of the county or town where either of them lived : N.H. 180, 6 ; Mass. 145,21 ; Me. 59,7 ; Va. 104,18 ; W.Va. 121,16.

It must be verified by the affidavit of one witness present at the ceremony : Va., W.Va.

§ 6144. **Evidence.** (See also in Part IV.) In most states, the record of a marriage made and kept as above in this article prescribed by the person before whom the marriage has been solemnized, or by the clerk or register in a city or town, as prescribed in Art. 613, or a copy of such record duly certified, shall be received in all courts and places as presumptive evidence of such marriage : N.H. 180,12 ; 181,7 ; 1883,70,10 ; Mass. 145,29 ; Me. 59,16 ; Vt. 2317 ; N.Y. *ib.* 17 ; N.J. *Marriages*, 10 ; Pa. 1885,115,6 ; Ind. 5331 ; Ill. 89,12 ; Mich. 6222 ; Wis. 4160 ; Io. 2197 ; Minn. 73,97 ; Kan. 61,11 ; Neb. 1,52,16 ; Md. 30,8 ; 1882,357,5 ; Del. V. 16,381,10 ; Mo. 2326 ; Nev. 207 ; Col. 2262 ; Dak. Civ. C. 53 ; Ida. *ib.* 20 ; Mon. G. L. 863 ; Wy. 81,16 ; Ala. 2680 ; Miss. 1149,1152 ; N.M. 985 ; Ariz. 1900 ; D.C. 723.

So, in several, of the marriage certificate : Mich., Minn., Neb., Nev., Ida.

So, the license, duly returned as above, is *prima facie* evidence of the facts therein stated : Ct. 14,1,4. So, the record, or a copy of certificate of it, from a foreign consul, etc. (§ 6139) : Mass. 145,30.

When the fact of marriage is sought to be proved, evidence of the admission of such fact by the adverse party (N.H., Mass., Minn., Mon.), or of general repute (N.H., Mass., O., Minn.), or of cohabitation as married persons (N.H., Mass., O., Minn., Kan., Cal., Mon.), or any other circumstantial or presumptive evidence from which the fact may be inferred (Mass., Minn., Mon.), is competent : N.H.<sup>a</sup> 181,17 ; 182,8 ; Mass. 145,31 ; O.<sup>a</sup> 5698 ; Minn. 73,99 ; Kan. 33,8 ; 80,650 ; Cal. 11963(30).

A marriage occurring in a foreign state or country may be proved by the acknowledgment of the parties, their cohabitation, and other circumstantial testimony : Ill.<sup>a</sup> 40,11 ; Col.<sup>a</sup> 1097 ; Mon. G. L. 511.

Any marriage may be proved by evidence of cohabitation and reputation : N.H.<sup>b</sup> 180,17 ; Kan. ; or of acknowledgment : N.H.<sup>b</sup>

Where there is no record, it may be proved by the evidence of two witnesses who were present : Fla. 149,5.

In actions for *crim. con.*, indictments for adultery, bigamy, etc., there must be proof of a marriage in fact : N.H. 180,18.

NOTES. — <sup>a</sup> In divorce or civil actions only. <sup>b</sup> Except actions for *crim. con.*



**Art. 615. Suits to Annul and Affirm.**

§ 6150. **When Brought.** A libel to annul the marriage may be brought (**A**) in most states whenever the marriage is voidable <sup>a</sup> under § 6113: Ind. 1025; Wis. 2348,2350; Io. 2231; Minn. 62,3; Neb. 1,25,3; Del. 75,2; Va. 105,4; W.Va. 69,4; Tex. 2860; Cal. 5082; Ore. Civ. C. 489; Nev. 214; Dak. Civ. C. 54; S.C. 2028.

And also, in most states, (**B**) whenever it is void <sup>a</sup> under § 6112: Ct. 1877,14; Mich. 6225; Wis.; Io.; Minn.; Kan.; Neb.; Md. 51,8; Del.; Va.; W.Va.; N.C. 1283; Tex.; Cal. 5080, Amt.; Ore. Civ. C. 488; Nev.; Wy. 1882,40,3; S.C.; Ala. 2673; La. 113; N.M. 997; Ariz. 1904.

So, specially, (1) for nonage (§ 6110), by the party so under age or his parent, guardian, or next friend: Vt. 2350; N.Y. Civ. C. 1742-3; Ind.; Mich. 6254; Io. 2186; Neb. 1,25,33; Ky.<sup>b</sup> 52,1,5; Cal. 5083; Dak. Civ. C. 55; Wy. *ib.* 26; N.M.; Ariz. 1933. See § 6151(1) and (5).

A marriage may also be annulled (1) by the woman if it took place without the consent of her father, guardian, etc., she being under fourteen at the time, and there having been no consummation or ratification since: N.Y. Civ. C. 1742; (2) by either party, when the former wife or husband of one of the parties was living and such former marriage still in force: N.Y. Civ. C. 1743.

And (2) for idiocy (§ 6112, D.), by any relative or a next friend: Vt. 2351, 2353; N.Y.; Ind.; Mich. 6255; Io.; Neb. 1,25,34; Wy. *ib.* 27; Ariz. 1934.

And (3) for lunacy (§ 6112, D), by any relative or a next friend of the lunatic: Vt. 2352; 2353; Ind.; Mich.; Io.; Neb.; Wy.; or, in many, by the lunatic himself, after restoration to reason (see § 6113): Vt. 2354; Mich. 6256; Wis. 2353; Neb. 1,25,35; Wy. *ib.* 28; Ariz. 1935. See also § 6151(6).

And (4) for force or fraud, by the party injured, his parent, relative, or guardian: Vt. 2357; 1882,66; N.Y. Civ. C. 1750; La. 110; Ariz. 1936. See also § 6151(7).

So, where there has been a mistake in the person by the party laboring under the mistake: La.

And (5) for impotence, by the other party: Vt. 2359; N.Y.; Mich. 6259; Io. 2231; Neb. 1,25,37; Ariz. 1938.

So, in many, (**C**) whenever the validity of the marriage is doubted (whether as void or voidable); N.H. 182,2; Mass. 145,11; Me. 60,18; Vt. 2347; Mich.; Wis. 2351; Io. 2233; Minn.; Neb.; Del. 75,3; W.Va.; Ky. 52,1,20; Nev.; Wash. 2001; Wy.; Ariz.

Every marriage contracted under the other incapacities or nullities enumerated in §§ 6112, 6113 may be impeached either by the married persons themselves or by any person interested or by the Attorney General: La. 113.

NOTES. — <sup>a</sup> The state statutes rarely draw the distinction properly between *void* marriages (those which are absolutely void *ab initio* at all times and as between any parties) and voidable marriages (those which can be annulled by the parties, etc., but which may be valid until thus annulled). See § 6112-3. It is obvious that a suit must necessarily be allowed to annul voidable marriages, whether expressly provided by statute or not, from the nature of the case; but in void marriages such a suit, being unnecessary, may not always be provided. Throughout this chapter the author has sought to express the law as it is, without regard to the conflicting terminology of the several statutes. <sup>b</sup> See § 6113, 2, and note <sup>n</sup>.

§ 6151. **By Whom.** Generally such libel to annul may be brought by either party, his guardian, etc. (and see § 6150): N.H.; Mass.; Me.; Vt.; Mich.; Wis.; Io. 2232; Minn. 62,3; Neb.; Md.; Del. 75,3; Va.; W.Va.; N.C.; Ky.; Wy.; Ariz. For citations, see § 6150.

But not, for cause (1) of nonage (§ 6112 C), by the party of the age of consent at the time: Vt. 2150; N.Y. Civ. C. 1744; Pa. *Divorce*, 11; Ind. 1025; Mich. 6254;

Wis. 2354; Minn. 62,5; Kan.; Neb. 1,25,33; Va.; Ky.; Cal. 5083; Ore. Civ. C. 489; Dak. Civ. C. 55; Wy. 1882,40,26; Ariz. 1933.

Nor for cause (2) of idiocy or lunacy by the other party, if he knew of such insanity at the time: Ind., Wis., Minn.

In several, (3) not by the other party in any case: Kan., Ore. Compare § 6150.

(4) Not for cause of impotence by the party impotent: Wy. *ib.* 30. (5) For bigamy, it may be brought by either party during the life of the other, or by the former husband or wife: N.Y. Civ. C. 1745; Dak.; La. 116. (6) For idiocy or lunacy, (§ 6113,3) by the party injured, or a relation or guardian, at any time before the death of either: Cal., Dak. Or, for idiocy only, by any relative of the idiot who has an interest to avoid the marriage, during the lifetime of either party: N.Y. Civ. C. 1746,1748. Or, for lunacy only, by any such relative at any time during the continuance of the lunacy or after the death of the lunatic in that condition and during the life of the other party: N.Y. *ib.* 1747. (7) For force or fraud (§ 6113,4) by the injured party within four years after discovering the fraud, or four years after the marriage, if obtained by force: Cal.; Dak.; La. 114. Not for cause of force or fraud, by the guilty party: Ore.

§ 6152. **Where Brought.** Such suit to annul (or affirm) a marriage may be brought notwithstanding the marriage was solemnized out of the State, if the libellant had his domicile in the State at the time, and also has it there when the libel is filed: Mass. 145,11.

They are brought in the same court in which libels for divorce are heard: Ct.; Ind.; Wis. 2348; Io. 2232; Del. 75,2; and so probably, in other states.

So, in several, in the superior court of the county where the parties, or one of them, reside: Mich. 6225; Minn. 62,3; Neb. 1,25,3; Md. 51,8; Wy. *ib.* 3; S.C. 2028. Or in the Court of Chancery: Ky. 52,1,5; Wy.

§ 6153. **Effect.** In such suit, the marriage will be declared void or affirmed by the court: N.H., Mass., Me., Vt., Mich., Minn., Neb., Md., Va., W.Va., Ariz. For citations, see § 6150.

And the decree is conclusive upon all persons: N.H., Mass., Mich., Wy.

But the decree does not affect the rights of the respondent unless he was personally notified, or answered: Me.

The judgment of nullity is conclusive only upon the parties to the action and those claiming under them: Vt. 2361; N.Y. Civ. C. 1754; Cal. 5086; Dak. Civ. C. 58.

And if pronounced during the lifetime of the parties, it is conclusive in all courts and proceedings: Vt., N.Y.

The parties are deemed single: Vt. 2391.

They may marry again: Vt.

A marriage once declared valid in such suit cannot afterwards be questioned for the same cause, directly or collaterally: Ore. Civ. C. 488.

A marriage is always *presumed* valid, until the contrary be proved: W.Va. 69,4.

§ 6154. **Children, Alimony, etc.** In these suits the court has generally the same power that it has in suits for divorce to decree for the care, custody, and maintenance of minor children of the parties (§§ 6244,6245): N.H. 182,11; Mass. 145,15; Ct. 1877,14; Wis. 2362; Io. 2232.

In case either party entered into such marriage in good faith, supposing the other capable, the court may decree to the innocent party compensation as in cases of divorce: Io. 2236.

The court awards the custody of children of a marriage annulled (1) for fraud or force to the innocent parent; and may also provide for their education and maintenance out of the property of the guilty party: Vt. 2358; N.Y. Civ. C. 1751; Mich. 6258; Neb. 1,25,36; Cal. 5085; Dak. Civ. C. 57; Wy. *ib.* 29; Ariz. 1937. So (2) when annulled for bigamy: N.Y. Civ. C. 1745.

§ 6155. **Trial.** In two states, no marriage can be declared void solely on the declarations or confessions of the parties; but the court shall require other satisfactory

evidence of the facts on which the allegation of nullity is founded : Vt. 2360 ; N.Y. Civ. C. 1753 ; and compare § 6225.

A jury trial may be demanded, except when the cause alleged is impotence : N.Y. ; Mich. 6622.

§ 6156. **Limitation of Time.** Suit to annul (A) for impotency must be brought (1) within two years of the marriage : Vt. ; N.Y. Civ. C. 1752 ; Mich. ; Neb. ; Wy. For citations, see § 6150. (2) Within four years thereafter : Cal., Dak.

(B) For want of legal age, it must be brought within four years after arriving at the age of consent : Cal., Dak. Within six months, thereafter : Io.

(C) For force or fraud, it may be maintained at any time, during the life of the other party, by the parent or guardian of the injured party or his interested relative : N.Y. See § 6151(7).

§ 6157. **Suits to Affirm Marriages** in similar cases are provided for in many states, when the validity of the marriage is denied or doubted by either party, to be brought by the other ; and a decree affirming the marriage is conclusive on all parties concerned : Mass. ; Vt. 2320 ; Mich. 6226 ; Wis. 2352 ; Io. 2233 ; Neb. 1,25,4 ; Del. 75,3 ; Va. 105,5 ; W.Va. 69,4 ; Ky. ; Ore. Civ. C. 490 ; Wy. 1882,40,4 ; S.C. 2027 ; Ariz. 1905. See also § 6150 for citations.

§ 6158. **Effect on Property.** Generally, upon a decree annulling a marriage, the consequences as to property follow as in case of divorce, see § 6247. But the laws of Wisconsin specially provide that upon such decree, the court may make provision for restoring to the wife the whole or such part as it deem just of any estate which the husband may have received from her, or the value thereof : Wis. 2371. It may compel him to disclose what estate he may have received, and how he disposed of it : Wis.

### CHAPTER III. — DIVORCE.

#### Art. 620. **Absolute Divorce. — (A) Causes.**

§ 6200. **Note.** By absolute divorce is meant a divorce which puts the parties back in the position of single persons (except so far as their rights to property, re-marriage, etc., may be affected) without necessarily rendering their issue illegitimate, or the marriage invalid while it lasted. For cases of *annulling* marriage, see Art. 615.

For citations to this article, see generally in § 6201. Absolute divorce is in most states termed divorce *a vinculo*, or *from the bond of marriage* : Mass., Me., Vt., R.I., N.J., Pa., Mich., Wis., Io., Minn., Neb., Md., Del., Va., W.Va., N.C., Ky., Tenn., Mo., Ark., Tex., Nev., Ida., Wy., Ala., Miss., Fla., Ariz., D.C. ; in one other, *total* divorce : Ga. 1711 ; or *dissolution of the marriage* : Ore. Civ. C. 491 ; Uta. ; or *divorce* (simply, there being generally, in these states, no limited divorce) : O. ; Ind. ; Ill. 40,1 ; Cal. 5090 ; Col. ; Wash. ; Dak. Civ. C. 59 ; Mon. ; Fla. 93,3.

South Carolina and New Mexico have no divorce laws ; though marriages may in a few cases be annulled under Art. 615.

Throughout this chapter, the sign \* means that the provision so noted applies also to cases of limited divorce ; † that it applies also to cases of dissolution of marriage under Art. 615 ; ‡ that it applies also to cases of separate maintenance under Art. 635.

§ 6201. **Causes.** An absolute divorce may be decreed in favor of the innocent or injured party, for the following causes : (1) in all states having divorce laws, for adultery of either party committed subsequent to the marriage (see



§ 6202, in detail) : N.H. 182,3 ; Mass. 146,1 ; Me. 60,2 ; Vt. 2362 ; R.I. 167,2 ; Ct. 14,3,1 ; 1878,71 ; N.Y. Civ. C. 1756 ; N.J. *Divorce*, 3 ; Pa. *Divorce*, 1 ; O. 5689 ; Ind. 1032 ; Ill. 40,1 ; Mich. 6228 ; Wis. 2356 ; Io. 2223,4 ; Minn. 62,6 ; Kan. 80,639 ; Neb. 1,25,6 ; Md. 51,12 ; Del. 75,1 ; Va. 105,6 ; W.Va. 69,5 ; N.C.<sup>a</sup> 1285 ; Ky.<sup>a</sup> 52,3,1 ; Tenn. 3306 ; Mo. 2174 ; Ark. 2556 ; Tex.<sup>a</sup> 2861 ; Cal. 5092 ; Ore. Civ. C. 491 ; Nev. 1875,22 ; Col. 1093 ; Wash. 2000 ; Dak. Civ. C. 60 ; Ida. 1874-5, p. 639,4 ; Mon. G. L. 507 ; Wy. 1882,40,5 ; Uta. 1151-2 ; 1878,1 ; Ga. 1712 ; Ala. 2685 ; Miss. 1155 ; Fla. 93,4 and 7 ; La. D. 1190 ; Civ. C. 139 ; Ariz. 1907 ; D.C. 738.

(2) In nearly all, for impotency of either party (§ 6203) : N.H., Mass., Me., R.I., N.J., Pa., O., Ind., Ill., Mich., Wis., Minn., Kan., Neb., Md., Del., Va., W.Va., N.C., Ky.,<sup>b</sup> Tenn., Mo., Ark., Ore., Nev., Col., Wash., Ida., Mon., Wy., Uta., Ga., Ala., Miss., Fla., Ariz., D.C. ; (3) in nearly all for desertion of either party by the other (§ 6204) : N.H. ; Mass. ; Me. ; Vt. ; R.I. ; Ct. ; N.J. ; Pa. ; O. ; Ind. ; Ill. ; Mich. ; Wis. ; Io. ; Minn. ; Kan. ; Neb. ; Md. ; Del. ; Va. ; W.Va. ; Ky. ; Tenn. ; Mo. ; Ark. ; Tex. ; Cal. ; Ore. ; Nev. ; Col. ; Wash. ; Dak. ; Ida. ; Mon. ; Wy. ; Uta. ; Ga. ; Ala. ; Miss. ; Fla. 93,7 ; La. ; Ariz. ; D.C.

(4) In nearly all, for cruelty of either party (§ 6205) : N.H. ; Mass. ; Me. ; Vt. ; R.I. ; Ct. ; Pa. ; O. ; Ind. ; Ill. ; Mich. 6230 ; Wis. ; Io. ; Minn. ; Kan. ; Neb. ; Del. ; Ky. ;<sup>c</sup> Tenn. ; Mo. ; Ark. ; Tex. ; Cal. ; Ore. ; Nev. ; Col. ; Wash. ; Dak. ; Ida. ; Mon. ; Wy. ; Uta. ; Ga. ; Ala. ;<sup>c</sup> Miss. ; Fla. ; La. ; Ariz. ; D.C.

(5) In nearly all, for intoxication habit, in either party (§ 6206) : N.H. ; Mass. ; Me. ; R.I. ; Ct. ; O. ; Ind. ; Ill. ; Mich. ; Wis. ; Io. ; Minn. ; Kan. ; Neb. ; Del. ; Ky. Feb. 4, 1880 ; Tenn. ; Mo. ; Ark. ; Cal. ; Ore. ; Nev. ; Col. ; Wash. ; Dak. ; Ida. ; Mon. ; Wy. ; Uta. ; Ga. 1713 ; Ala. ; Miss. ; Fla. ; La. ; Ariz. ; D.C.

(6) In many, for failure by the husband to support the wife (§ 6207) : N.H., Mass., Me., Vt., R.I., Ind., Mich., Neb., Del.,<sup>d</sup> Tenn., Nev., Col., Wash., Ida., Wy., Uta., Ariz. So, for "wilful neglect:" Cal., Dak.

(7) In nearly all (see also § 6112) for sentence to imprisonment in the State prison, etc., or conviction for a crime, of either party (§ 6208) : N.H., Mass., Vt., R.I., Ct., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Del., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., Wash., Dak., Ida., Mon., Wy., Uta., Ga., Ala., Miss., La., Ariz.

(8) In a few, for disappearance of either party (§ 6209) : N.H., Vt., R.I., Ct.

(9) In several, for various other marital offences (§ 6210) : R.I., Ct., O., Kan.

(10) In a few, when either party joins a religious sect believing marriage unlawful : N.H. ; Mass. 146,2 ; Ky.

(11) In a few, when either party has attempted the life of the other by poison or other means showing malice : Ill., Tenn.

(12) In a few, when the husband has been guilty of such conduct as to constitute him under the statute a vagrant : Mo., Wy.

(13) In many, for any cause rendering the marriage originally void or voidable (§§ 6112,6113) : R.I., Md.

So, specially, (α) because the marriage is incestuous (§ 6111) : N.J. ; Pa. *ib.* 2 ; Ga. ; Miss. ; Fla. ; or (β) bigamous, either party having another wife or husband living : N.J. *Divorce*, 2 ; Pa. *ib.* 1 ; O. ; Ill. ; Kan. ; Tenn. ; Mo. ; Ark. ; Col. ; Mon. ; Miss. 1156 ; Fla. 93,5 ; D.C. ; see § 6116 ; or (γ) when either party was mentally incapable at the time of marriage : Ga. ; Miss. 1157 ; D.C.

Or (δ) when the wife was under the age of fourteen and the marriage was without the consent of her parents or guardian, and has not been voluntarily ratified on her part after she had attained the age of fourteen : Ida. ; Ariz. 1944,1953. (ε) When the

marriage was procured when the wife was under sixteen, or the husband under eighteen, and has not been voluntarily ratified: Del.<sup>d</sup> (§) In several, when the marriage was originally procured by fraud or force: Ct.; Pa. *Divorce*, 7; O.; Kan.; Ky.; Wash.;<sup>e</sup> Ida.; Ga.; Ariz. *Provided*, it has not subsequently been confirmed by acts of the injured party: Pa.

(14) In many (a) when the woman has been guilty of fornication before marriage, and this was unknown to the husband at the time of marriage: <sup>f</sup> Md. So, (β) when she was, unknown to the husband, enceinte by a person not the husband, at the time of marriage: <sup>f</sup> Io.<sup>g</sup> 2224; Kan.; Va.;<sup>e</sup> W.Va.;<sup>e</sup> N.C.; Ky.; Mo.; Tenn.; Wy.; Ga.; Ala. 2686; Miss. Or (γ) was a notorious prostitute: <sup>f</sup> Va.,<sup>e</sup> W.Va.<sup>e</sup> Or, to the wife, when the husband had been a notoriously licentious person, unknown to the wife: W.Va.<sup>e</sup>

(15) In a few, for any cause, or indefinite causes, at the discretion of the court (§ 6213).

(16) In a few, when the parties have voluntarily lived separate for a certain period (§ 6212): Wis.,<sup>b</sup> Ky.<sup>b</sup> (17) In several, when the other party has obtained a divorce in another state, (at the discretion of the court, in Ohio, Michigan, Arizona): O.; Mich.; Fla. 93,8; Ariz.

(18) When either party since the marriage has become incurably insane: Ark.

(19) For concealment by either party from the other of any loathsome disease existing at the time of marriage, or for contracting such afterwards: Ky.

In New Hampshire, no divorce will be granted for any cause, except adultery, which does not exist at the time of the petition: N.H. 182,4; and see, for other states, below in this article.

NOTES. — <sup>a</sup> Of the wife only: see § 6202. <sup>b</sup> On petition of *either* party. <sup>c</sup> On petition of the wife only. <sup>d</sup> Or a limited divorce may be granted, at the discretion of the court. <sup>e</sup> But not when the other party has cohabited with him or her since, after knowledge of such cause for divorce. <sup>f</sup> On petition of the husband only. <sup>g</sup> But not if the husband have an illegitimate child then living, unknown to the wife.

§ 6202. **Adultery.** (A) A divorce for this cause will, in many states, not be decreed when committed by both parties (compare § 6217): Me. 60,2; N.Y. Civ. C. 1758; N.J. *Divorce*, 30; Pa. *Divorce*, 22; Ind. 1033; Ill. 40,10; Minn. 62,9; Del. 75,7; Tenn. 3318; Mo. 2181; Ark. 2564; Tex. 2865; Ore. Civ. C. 404; Col. 1096; Mon. G. L. 510; Ala. 2690; Miss.; Fla. 93,6.

And, in a few, adultery is only a cause of divorce when committed by the wife: N.C., Ky., Tex.; and when she is “taken in adultery:” Tex. But it is cause when committed by the husband if he actually abandon the wife and live in adultery with another woman: N.C., Ky., Tex.

Nor (B) when the complainant consented thereto (compare § 6215): N.J.; Ind.; Ill. 40,10; Mich. 6261; Wis. 2360; Minn. 62,9; Neb. 1,25,39; Va. 105, 11; W.Va. 69,10; Mo.; Ark.; Ore.; Ga. 1715; Ala. 2690; Ariz. 1940. So, in many, not when committed with connivance of the complainant: Pa.; Ind.; Mich.; Wis.; Minn.; Neb.; Va.; W.Va.; Mo.; Tex.<sup>a</sup> 2865; Ore.; Wy. *ib.* 32; Ala.; Miss.; Fla.; Ariz.

Nor when “he exposed her to lewd company, whereby she became ensnared:” Pa., Tenn., Tex.<sup>a</sup> Nor when he allowed her prostitution (and, in Tennessee, received hire for it): Del., Tenn.

No divorce for adultery will, in several, be decreed unless suit was commenced (1) within a year of the discovery thereof; Ore., Wash.; (2) within two years thereafter: Ind.; Cal. 5124; (3) within three years: Wis., Minn., Va., W.Va., Wy.; (4) five years: N.Y., Mich., Neb., Ariz.

Lewd and lascivious behavior on the part of the wife, such as proves her unchaste, is cause for divorce without actual proof of adultery: Ky.<sup>a</sup>

NOTE. — <sup>a</sup> When the husband is the libellant.

§ 6203. **Impotence** is, in most states, cause for divorce only when it existed at the time of marriage and has been continued since: N.H. 182,4; N.J. *Divorce*, 4; Pa. *Divorce*, 1; Ind.; Ill.; Mich. 6228; Neb. 1,25,6; Md.; Del.; Va.; W.Va.; N.C.; Tenn.; Mo.; Ark.; Ore.; Nev. 1875,22; Col. 1093; Ida.; Mon.; Wy.; Uta.; Ga. 1712; Ala.; Ariz.; D.C.

“Such impotency or malformation as prevents sexual intercourse:” Ky., Tenn.

It must be incurable: N.J., Va., W.Va., Ala.

It must be “natural” impotence: Pa., Va., W.Va., Tenn., Ida., Mon., Miss., Fla.

It may be for impotence caused by immoral conduct subsequent to the marriage: Col. 1835, p. 189.

An action for divorce for this cause must be instituted within two years after the marriage: Neb. 1,25,37; Ida. *ib.* 5; Ariz. 1954. And compare § 6156.

§ 6204. **Desertion.** It must be continued for a term of five years (or, in Massachusetts, Maine, Vermont, Connecticut, New Jersey, Ohio, Minnesota, Maryland, Delaware, West Virginia, Texas, Oregon, Georgia, three years; and in Pennsylvania, Indiana, Illinois, Michigan, Iowa, Nebraska, Tennessee, Alabama, Mississippi, Arizona (1907), District of Columbia, two years; in Wisconsin, Kansas, Kentucky, Missouri, Arkansas, California, Nevada, Colorado, Washington, Dakota, Idaho, Montana, Wyoming, Utah, Florida, Arizona (1953), one year) prior to the libel: N.H.; Mass.; Me.; Vt.; R.I.; Ct.; N.J.; Pa.<sup>a</sup> *ib.* 2 and 5; O.; Ind.; Ill.; Mich.; Wis.; Io.; Minn.; Kan.; Neb.; Md.; Del.; Va.; W.Va.; Ky.; Tenn.; Mo.; Ark.; Tex.; Cal. 5107; Ore.; Nev.; Col.; Wash.; Dak.; Ida.; Mon.; Wy.; Uta.; Ga.; Ala.; Miss.; Fla.; La. 1190; Ariz.; D.C.

“With total neglect of duty:” Me., Ct. “With the intention of abandonment:” Tex.

It must be wilful, without reasonable cause: R.I., N.J., Pa., O., Ill., Wis., Io., Minn., Neb., Md., Va., W.Va., Tenn., Mo., Ark., Cal., Ore., Nev., Col., Dak., Ida., Mon., Wy., Uta., Ga., Ala., Miss., Fla., D.C.

And in one state, only when either, without sufficient cause and without the consent of the other, has abandoned him or her, and refused to cohabit for the period above mentioned: N.H. When the husband has abandoned the wife, or turned her out of doors: Tenn.<sup>b</sup> In one state, the court *shall* decree a divorce for five years’ wilful desertion without reasonable cause; and *may* do so for a less period: R.I.

In the libel of the husband, when the wife has willingly absented herself from her husband without his consent for three years together: N.H. Or has gone to reside out of the State, and remained absent and separate from her husband ten years together without his consent, and without returning to claim her marriage rights: N.H.

When either party has abandoned the other and left the State, without intention of returning: Col., Mon.<sup>c</sup>

No divorce can be granted for desertion unless the libellant has been for three years a *bona fide* resident of the State: Ala. 2691. So, two years: Miss. 1163. See § 6222.

When the wife of an alien or citizen of another state, living separate, has resided in the State three years, the husband having left the United States with the intention of becoming a citizen of some foreign country, and not having during that period come into the State and claimed his marital rights, and not having made suitable provision for her support: N.H.

“Wilful desertion” is the voluntary separation of one of the married parties from the other with intent to desert: Cal. 5095; Dak. Civ. C. 60.

Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion: Cal. 5096; Dak.

When one party is induced, by the stratagem or fraud of the other party, to leave the family dwelling-place, or to be absent, and during such absence the offending party departs with in-



tent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other: Cal. 5097; Dak.

Departure or absence of one party from the family dwelling-place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party; but it is desertion by the other party: Cal. 5098; Dak.

Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion: Cal. 5099; Dak.

Absence or separation proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation: Cal. 5100; Dak.

Consent to a separation is a revocable act, and if one of the parties afterwards in good faith seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion: Cal. 5101; Dak.

If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce returns, and offers in good faith to fulfil the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal: Cal. 5102; Dak.

The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion: Cal. 5103; Dak.

But if such place or mode selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him: Cal. 5104; Dak.

Refusal on the part of the wife to remove with her husband to this State without a reasonable cause, and wilfully absenting herself from him for two years, is a cause of divorce: Tenn.

Separation grounded on abandonment by one of the married persons can be admitted only in the case when he or she has withdrawn himself or herself from the common dwelling, without a lawful cause, has constantly refused to return to live with the other, and when such refusal is made appear in the manner hereafter directed.

The absence of the husband or wife, which has had a lawful cause, although it shall appear that the absentee has not been heard of, cannot authorize a demand of separation, except so far as is provided in § 6116: La. 143-4.

No libel for desertion will, in Massachusetts, be defeated by a temporary return of the libellee not made in good faith: Mass. 146,20. But the desertion must continue at the time of the petition: N.H. 182,4.

NOTES. — <sup>a</sup> The party may apply at the end of six months; but no divorce will be decreed until the expiration of the time as above, <sup>b</sup> At the discretion of the court. <sup>c</sup> In case of such abandonment by the husband, only.

§ 6205. **Cruelty.** It must be "extreme cruelty:" N.H.; Mass.; Me.; R.I.; O.; Ill.; Wis.; <sup>a</sup> Kan.; Neb. <sup>a</sup> 1,25,7; Del.; Cal. 5092; Nev.; Col.; Dak. Civ. C. 60; Ida.; Mon.; Wy.; Fla.; Ariz.

And "repeated cruelty:" Ill.

And "extreme cruelty" is defined to be the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage: Cal. 5094; Dak.; Uta.; Ariz.

"Cruel or abusive treatment:" Mass., Me. But it must be so serious as to injure health or endanger reason: N.H.; Ala. <sup>b</sup> 2687; D.C. So cruel as to endanger life: Pa., Io., Ky., <sup>b</sup> Mo., Ark., Ala., <sup>b</sup> D.C. Or when there is reasonable apprehension of such treatment: Ala. <sup>b</sup> "Intolerable severity:" Vt., Ct. Any "cruel treatment" at the discretion of the jury: Ga. 1713. "Cruel and inhuman treatment, (<sup>a</sup>) whether practised by using personal violence or other means:" Ind.; Mich. <sup>a</sup> 6230; Wis.; Minn.; Neb.; <sup>a</sup> Ariz. (<sup>β</sup>) By personal violence only: Miss.

"Cruel treatment, outrages, or excesses so as to render their living together insupportable:" Ky.; <sup>b</sup> Tenn. <sup>a, b</sup> 3307; Mo.; Ark.; Tex.; La. "Cruel and inhuman treatment or personal indignities rendering life burdensome:" Pa., Tenn., Mo., Ore., Wash., Wy.

This cause must continue at the time of the petition: N.H. 182,4. It must last for six months: Ky. <sup>b</sup>

NOTES. — <sup>a</sup> At the discretion of the court. <sup>b</sup> Only on petition of the wife.

§ 6206. **Intoxication.** Gross and confirmed habits of intoxication (continued, in New Hampshire, Ohio, District of Columbia, for three years; in Illinois, Oregon, Idaho, for two years; in Wisconsin, Minnesota, Kentucky, Missouri, Arkansas, California, Colorado, Dakota, Montana, for one year): N.H. 182,3; Mass.; Me.; R.I.; O.; Ill.; Mich.; Wis.; Minn.; Del.; Ky.; Mo.; Ark.; Cal. 5107; Ore. Civ. C. 491; Nev.; Col.; Wash.; Dak.; Ida.; Mon.; Ga. (at the discretion of the jury); D.C.

And it is enough, on the part of the wife, if she be "given" to intoxication, simply: Wis.

Habitual drunkenness: Ct., Ind., Mich., Kan., Neb., Cal., Dak., Wy., Uta., Miss., Fla., La., Ariz.

"Such as renders their living together insupportable:" La.

Habitual drunkenness, to which the party becomes addicted after marriage: Io., Tenn., Ore., Nev., Ala.

And it must be so great as to incapacitate such party from furnishing his or her share to the support of the family: Ky., Nev.

"Habitual intemperance" is such as disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon an innocent party: Cal. 5106; Dak.

§ 6207. **Failure to Support.** This is cause, generally, only in the libel of the wife, and (1) when the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her: Mass.; Me.; Vt.; R.I.; Mich.<sup>a</sup> 6230; Wis.<sup>a</sup> 2358; Neb.<sup>a</sup> 1,25,7; Cal.; Dak.; Ida.; Ariz.

(2) When he has willingly absented himself for three years without making such provision: N.H.

(3) When for the period of one year he fails to provide the common necessities of life, such neglect not being the result of unavoidable poverty: Nev., Col., Wy.

(4) "Neglect or refusal of the husband to make suitable provision for his family:" Ind., Tenn.,<sup>a</sup> Wash.

The neglect must continue three years: Del.; two years: Ind., Ida.: one year: Cal., Nev., Col., Dak., Wy.

So, "wilful neglect" is the neglect of the husband to provide for his wife the common necessities of life (Uta), he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation: Cal. 5105; Dak.; Ariz.

NOTE. — <sup>a</sup> At the discretion of the court.

§ 6208. **Crime.** (See also § 6112.) When either party has been sentenced to confinement at hard labor or imprisonment for life (or, in Massachusetts, five years or more; in Vermont, Michigan,<sup>a</sup> Wisconsin,<sup>a</sup> Nebraska, Arizona, three years; in Pennsylvania, Idaho, Georgia, two years; in Minnesota, for any terms) in the State prison or penitentiary or house of correction:<sup>b</sup> Mass., Vt., Ct., Pa., Mich.,<sup>a</sup> Wis.,<sup>a</sup> Minn., Neb., Ida., Ga.<sup>c</sup> Ariz.

So, in several, when either party has been convicted of a crime (punishable, in New Hampshire, with imprisonment for more than a year), and has been actually imprisoned under such conviction: N.H., O., Tex.

So, in one, "when either party is for crime to be treated as civilly dead:" R.I. 167,1.

When either party (subsequent to the marriage) is sentenced to confinement in the State prison: Minn., Kan., Va., W.Va., Wy., La.

When either party charged with an infamous offence has been indicted, is a fugitive from justice (and has been absent two years, in Virginia): Va., La.

When either party has been convicted of felony or infamous crime:<sup>b</sup> Ind., Ill., Io., Del., Ky., Tenn., Mo., Ark., Ore., Nev., Col., Mon., Ariz.<sup>a</sup>

When either is thus actually imprisoned in the penitentiary : Wash., Miss. So, for two years, upon a conviction for seven years : Ala.

Such conviction must, in several, be after marriage, but for a crime committed at any time : Ind., Wis., Io., Minn., Del. And the conviction may be either in or out of the State : Ind., Del., Ky.

But in others, it is cause for divorce if either party has, prior to the marriage and without the knowledge of the other, been convicted of an infamous crime : Va., W.Va., Mo., Wy.

A divorce is denied, unless the action be commenced within two years after the termination of the period of sentence, or after a pardon : Cal. 5124.

And no pardon granted shall, as a rule, restore such person to his or her conjugal rights : Mass.; Vt.; Mich.; Wis.; Minn. 62,7; Neb.; Del.; Va.; W.Va.; Dak. Civ. C. 41; Wy.; Ariz.

But no suit for divorce can be sustained under this section until twelve months after the conviction; nor then, if the convict have been pardoned : Tex. And no suit can be maintained if the person convicted was convicted upon the testimony of the husband or wife : Tex. The suit must be brought during such imprisonment : Vt., O., Wash.

NOTES. — <sup>a</sup> Such conviction renders, in the noted states, the marriage dissolved without any judgment of divorce or other legal process. <sup>b</sup> On application of the other party. <sup>c</sup> For a crime involving moral turpitude.

§ 6209. **Disappearance.** When either party has been absent three years together and has not been heard of : N.H. 182,3; so, in others, seven years : Vt., Ct.

So, in one, when either party, from absence or otherwise, may be presumed dead : R.I.

A divorce may be decreed for any legal cause, notwithstanding the fact that the libellee has been continuously absent for such a period, and under such circumstances as to raise a presumption of death : Mass. 1884,219.

§ 6210. **Marital Offences.** Thus (1) "for gross misbehavior and wickedness of either party repugnant to and in violation of the marriage contract : " R.I. 167,2; (2) "for cruel and barbarous treatment by the wife : " Pa. *Divorce*, 7; (3) for any infamous crime involving a violation of conjugal duty : Ct.; (4) "for any gross neglect of duty : " O., Kan.; (5) for committing buggery either before or after the marriage : Ala. See also §§ 6204–5.

§ 6211. **Joining Religious Sect.** When either party has separated from the other without his or her consent, and joined with a religious sect or society that professes to believe the relation of husband and wife void or unlawful (and has continued with such sect three years : Mass.), and refused to cohabit with the other : N.H., Mass., Ky.

§ 6212. **Separation.** Whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years next preceding the commencement of the action, at suit of either party : <sup>a</sup> Wis., Ky.

NOTE. — <sup>a</sup> On petition of either party.

§ 6213. **Omnibus Clause.** "For any such misconduct as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation : " Ct.

"When, by reason of his conduct towards her being such as to render it improper for her to live with him, the court are of opinion that it will be discreet and proper to grant the divorce : " Wis. 2358.

"For any other cause deemed by the court sufficient, if satisfied that they can no longer live together : " Wash.

"When the case is within the reason of the law, within the general mischief the law is intended to remedy, or within what it may be presumed the legislature establishing the foregoing causes would have provided against had they foreseen the specific case : " Ariz. 1953.

"For the habitual indulgence of a violent and ungovernable temper : " Fla.

§ 6214. **Collusion.** (See also § 6202.) The laws of many states provide that no divorce shall be granted when it shall appear that the adultery (R.I., N.J.,



Wis., Mo., Ark., Tex., Ore., Ida., Ga., Fla., Ariz.), absence (R.I.), cruelty (R.I., Ore., Ga.), desertion (R.I., Ore., Ga.), intoxication (Ore., Ga.), felony convicted (Ore.), or other cause (Me., R.I., Ill., Mo., Ark., Cal., Col., Dak., Mon., Wy., Ariz.), was committed or occasioned (1) by collusion of the parties with intent to procure a divorce: Me. 60,2; R.I. 167,3; N.J. *Divorce*, 30; Ill. 40,10; Wis. 2360; Mo. 2181; Ark. 2564; Tex. 2865; Cal. 5111; Col. 1096; Dak. Civ. C. 61; Ida. 1874-5, p. 640,4; Mon. G. L. 510; Wy. 1882,40,7; Ga. 1715; Fla. 93,6; Ariz. 1909; or (2) by the procurement of the libellant: N.Y. Civ. C. 1758; Ore. Civ. C. 494; Ariz. 1940.

So, in several, in no case where there is collusion between the parties to procure a divorce: Me. 60,2; Mich. 6232; Neb. 1,25,9; Del. 75,6; Wy. And see § 6225.

*Collusion* is an agreement between husband and wife that one of them shall commit, or appear or be represented in court as having committed, acts constituting a cause of divorce for the purpose of enabling the other to obtain a divorce: Cal. 5114; Dak.

§ 6215. **Connivance.** So, no divorce can be granted for any cause where there was "connivance" between the parties: Cal. 5111; Dak. Civ. C. 61. And *connivance* is defined to be the corrupt consent of one party to the commission of the acts of the other constituting the cause of divorce: Cal. 5112; Dak. Civ. C. 61. Such corrupt consent is manifested by passive permission, with intent to connive at or actively procure the commission of the acts complained of: Cal. 5113; Dak.

So, no divorce can be granted for any act to which the libellant consented: Ill., Mo., Ark. For adultery, see § 6202.

§ 6216. **Condonation.** There can be no divorce for adultery (or, in Oregon and Georgia, for desertion; or, in Oregon and Georgia, for cruelty; or, in Oregon and Georgia, for intoxication; in Oregon and Montana, for a conviction of felony; in California and Dakota, for any cause; in Kentucky, for lewdness), in most states, (1) when the persons voluntarily cohabited after knowledge of the fact: N.Y. Civ. C. 1758; Pa. *Divorce*, 22; Ind. 1033; Mich. 6261; Wis. 2360; Minn. 62,9; Neb. 1,25,39; Del. 75,7; Va. 105,11; W.Va. 69,10; Ky. 52,3,4; Tenu. 3318; Tex. 2865; Ore. Civ. C. 494; Ida. 1874-5, p. 640, § 4; Mon.; Wy. *ib.* 32; Ga. 1715; Ala. 2690; Miss. 1155; Ariz. 1940.

(2) Or when the forgiveness of the injured party is proved by express proof: N.Y.; Mich.; Wis.; Minn.; Neb.; Ore.; Nev. 1875,22; Wy.; Ariz.

(3) When there has been "condonation:" Pa. *Divorce*, 21; Del. 75,7; Cal. 5111; Wash.; Dak. Civ. C. 61.

(4) When there has been reconciliation of the parties: La.\* 152,154.

*Condonation* is the conditional forgiveness of a matrimonial offence constituting a cause of divorce: Cal. 5115; Dak.

The following requirements are necessary to condonation: (1) A knowledge on the part of the condoner of the facts constituting the cause of divorce; (2) reconciliation and remission of the offence by the injured party; (3) restoration of the offending party to all marital rights: Cal. 5116; Dak.

Condonation implies a condition subsequent that the forgiving party must be treated with conjugal kindness: Cal. 5117; Dak.

Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill-treatment which may aggregately constitute the offence, cohabitation or passive endurance or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone: Cal. 5118; Dak.

In such cases, condonation can be made only after the cause of divorce has become complete as to the acts complained of: Cal. 5119; Dak.

A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned and existing at the time of condonation avoids it: Cal. 5120; Dak.

Condonation is revoked and the original cause of divorce revived (1) when the condonee commits acts constituting a like or other cause of divorce; (2) when the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled: Cal. 5121; Dak.

So, "divorces must be denied, upon showing limitation or lapse of time:" Cal. 5111; Dak. Civ. C. 61.

In detail, a divorce is refused (1) "in all other cases (see §§ 6201-6208 for special provisions), when there is an unreasonable lapse of time before the commencement of the action:" Cal. 5124; Dak. Civ. C. 65. See § 6223.

"Unreasonable time" is such delay as establishes the presumption that there has been connivance, collusion, or condonation of the offence, or full acquiescence in the same, with intent to continue the marriage relation. This presumption may be rebutted by showing reasonable grounds for the delay: Cal. 5125-6; Dak.

Except as above, there are no limitations of time for commencing actions for divorce: Cal. 5127; Dak. Civ. C. 66.

The plaintiff is still at liberty to bring a new suit for causes arising since the reconciliation, and therein make use of the former motives to corroborate his new action: La.\* 153.

§ 6217. **Recrimination.** (For the case of *Adultery*, see § 6202.) In a few states, there generally can be no divorce for any cause (1) when the other party was guilty of like conduct: Mich. 6232; Neb. 1,25,9; Wy. 1882,40,7; Ariz. 1909; (2) when there is [successful] "recrimination:" Cal. 5111; Dak. Civ. C. 61.

So, specially, not for cause of (1) cruelty: Ga. 1715; (2) desertion: Ga.; (3) intoxication: Ga.

And in all cases the libellee may plead the conduct of the libellant in defence; and the court (or, in Georgia, the jury), may, on examination of the whole case, refuse a divorce: Tenn.<sup>a</sup> 3324; Ga. 1715.

When the parties appear to be in equal wrong, the court may, in its discretion, refuse a divorce: Kan. 80,643.

Compare also § 6228.

*Recrimination* is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce: Cal. 5122; Dak.

Condonation of a cause of divorce, shown in the answer as a recriminatory defence, is a bar to such defence, unless the condonation be revoked, as provided in § 6206, or two years have elapsed after the condonation and before the accruing or completion of the cause of divorce against which the recrimination is shown: Cal. 5123; Dak.

NOTE. — <sup>a</sup> When the cause alleged is cruelty, or desertion, or failure to support.

## Art. 622. Absolute Divorce. (B) Proceedings.

§ 6220. **Jurisdiction.** By the laws of two states, no divorce can be decreed (except as in § 6222), if the parties have never lived together as husband and wife in the State: Mass. 146,4; Vt. 2363.

A divorce may in all cases be granted where the respondent is a resident of the State, and has been personally served: Io. 2221.

§ 6221. **Cause occurring Abroad.** In several states, no divorce can be decreed for a cause occurring out of the State, unless (1) before such cause the parties had lived together as husband or wife in the State: Mass. 146,4; Me. 60,2; Vt. 2363; or (2) unless one of them (in Maine, New Jersey, Kentucky, and Arkansas, the libellant) lived in the State at the time the cause occurred: Mass.; Me.; Vt.; N.J.<sup>a</sup> *Divorce*, 1; Ky. 52,3,4; Ark. 2562; Mon. G. L. 509; or (3) unless the marriage was solemnized within the State: Me.; N.J.; Ore.<sup>a</sup> Civ. C. 492; or (4) unless such cause was a legal cause for divorce in the state where it occurred: Ky., Ark.; (5) unless the party libel-

lant has resided a certain time in the State: Md. 51,14. So in other states; see § 6222.

NOTE.—<sup>a</sup> And such person libellant must in these states be resident in the State also at the time of filing the bill.

§ 6222. **Residence Limitations.** A divorce may be procured for any cause allowed by law whether it occurred in or out of the State (A) if the libellant (or, in New Hampshire, Connecticut, and Virginia, the libellee also) has in good faith resided in the State for a certain period before filing the libel; thus, (1) five years: Mass. 146,5; (2) three years: Ct. 14,3,4; (3) two years: Vt.<sup>a, b</sup> 2365; Ind. 1031; Md. 51,14; N.C. 1287; Tenn. 3308; Fla. 93,2; D.C.<sup>c</sup> 740; (4) one year: N.H.<sup>d, e</sup> 1883,14; Me. 60,2; Vt. 2367; R.I. 167,15; Pa. *Divorce*, 3,8–10; O. 5690; Ill. 40,2; Mich. 6231; Wis. 2359; Io. 2221; Minn. 62,8; Kan. 80,640; W.Va. 1882,60; Ky. 52,3,4; Civ. C. 423; Mo. 2177; Ark. 2562; Ore.<sup>d, e</sup> Civ. C. 492–3; Col. 1095; Wash. 2002; Mon. G. L. 509; Uta. 1151; 1878,1; Ala.<sup>h</sup> 2693; Miss. 1162; Ariz. 1908; (5) six months: Ind.;<sup>f</sup> Neb. 1,25,8; Tex.<sup>4</sup> 2862; Cal. 5128; Nev.<sup>g</sup> 1875,22; Ida. 1874–5, p. 639,3; Wy. 1882,40,6; N.M. 2282; (6) ninety days: Dak. Civ. C. 67.

(7) Such residence on the part of libellant or libellee as above, if at the time of the libel, is sufficient: N.H.;<sup>d, e</sup> Va. 105,8; W.Va. 69,7; or, if at the time of marriage the parties were resident in the State, three years of such residence is enough: Mass.

(B) In several, it is sufficient (1) if either party resided in the State at the time of the injury complained of: N.J. *Divorce*, 1; Ill.; Mo.; Col. 1095; (2) if the libellant so resided: Ct., Md.

Unless it appears that the libellant has removed into the State for the purpose of obtaining the divorce, in which case it will not be granted: Mass., Io. So, the libellant must be an actual *bona fide* inhabitant of the State at the time of the libel: N.H.;<sup>f</sup> Tex. 2862.

(C) In several, the courts have always jurisdiction when the marriage took place in the State: Me. 60,2; N.Y. Civ. C. 1756; N.J.;<sup>d</sup> Mich.; Wis.;<sup>g</sup> Neb.;<sup>g</sup> Ore.<sup>d</sup> Civ. C. 492; La. 142,1198; or when the parties have cohabited in the State since: Me. So, in a few, only when the libellant has resided in the State since the marriage: Mich., Neb., Ariz.; or when the libellee lives in the State: Io., Nev.

Nor is such residence necessary when the cause is intoxication, cruelty, or such other misconduct as permanently destroys the happiness of the libellant and defeats the purposes of the marriage relation, and the petitioner was domiciled in the State at the marriage, and has returned to the State with the intention of permanently residing there: Ct.

Nor when the cause is adultery committed while the plaintiff was a resident of the State: N.Y.,<sup>d</sup> Wis., Minn. So, if both parties were so resident at the time of the adultery: N.Y.

(D) A divorce may be granted without regard to the residence of the parties, if the injury complained of was committed in the State: N.Y.,<sup>d</sup> Ill., Mo., Nev., Col., Mon. See also § 6226.

So, in case of adultery there committed, if either party is a resident at the time of bringing action: N.J. *Divorce*, 1; or for desertion, if either party has been a resident for three years, there being an oath of good faith annexed to the bill: N.J.

But, in all others, there can be no divorce for any cause unless the libellant, etc., has resided in the State as above; and so, expressly, in Rhode Island.

So, a divorce may be granted for adultery, cruelty, or desertion, if the libellant have resided in the State one year, notwithstanding the parties were domiciled out of the State at the time of the adultery, etc., complained of: Pa. *Divorce*, 6,4,9–10.

(E) A divorce may be granted, on petition by the wife, if the husband have resided in the State for one year next preceding the commencement thereof: Wis.

(F) In actions for divorce, the presumption of law that the domicile of the husband is the domicile of the wife does not apply; after separation each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions: Cal. 5129; Dak. Civ. C. 68. So, in other states.

NOTES.—<sup>a</sup> When the cause is adultery, cruelty, or desertion, and occurred out of the State.

<sup>b</sup> And the libellant must have resided in the county one year. <sup>c</sup> Applies also in limited divorce.



<sup>d</sup> The libellant being an inhabitant of the State. <sup>e</sup> And also the libellee. <sup>f</sup> The libellee having personal service within the State. <sup>g</sup> But, further, the plaintiff must have resided in the State from the time of such marriage to the commencement of the action. <sup>h</sup> The libellee being a non-resident. <sup>i</sup> The libellant must have resided such time in the county where the libel is filed.

§ 6223. **Limitation of Time.** (See also §§ 6156, 6202-3, 6216.) In one state, the libellant must specify that the facts have been known to him or her six months prior to the filing of the bill: N.C. 1287; or, if a woman, the affidavit may state that the husband is about to remove his effects from the State, whereby she may lose her alimony: N.C. But, nevertheless, a woman intending to file a bill for divorce may file affidavit of such intention before such period of time has elapsed after the cause, and may then reside separate, and have her wages for her own use, *provided* the bill be duly filed within thirty days after such time: N.C.

No divorce can be had unless for a cause which existed (1) within five years of the commencement of the suit: Ky. 52,3,4; Ark. 2562; (2) within one year thereof: Ore. Civ. C. 494.

§ 6224. **Service and Proceedings.** (See, generally, in Part IV.) (1) In a few states, the notice or service required is the same as in bills in equity: Md. 51,11. See also below. (2) Service is made personally, either in or out of the State, or by publication, if the libellee cannot be found: Pa. *Divorce*, 12-13; Io. 2221,2618; Minn. 62,12; Neb. 1,25,10; Del. 75,4; Fla. 93,10. (3) Service as in other suits: Ct. 14,3,2; Kan. 80,641; Neb. 1,25,10; W.Va. 69,7; Tenn. 3312; Ala. 2688; Miss. 1164; N.M. 2283; D.C. 735.

If by publication, a copy of the bill must be mailed to the libellee, unless his residence is unknown to the libellant: Ind., Kan., N.M.

(4) Personal service in the State; if the defendant be out of the State (1) by publication: Mass. 146,9; Me. 60,3; Vt. 2370-2; R.I. 167,18-20; N.Y.\* Civ. C. 1774; N.J. *Divorce*, 8-11 and 13; 1878,121; O. 5992-3; Ind. 1035-6; Nev. 216; or (2) by service as in equity cases: Ga. 1717.

There must be actual notice (1) if the libellee's residence is known: Me. 60,4; Tenn. 3314; (2) if the cause of divorce is abandonment: La. D. 1190.

The abandonment with which the husband or wife is charged must be made to appear by three reiterated summonses made to him or her from month to month, directing him or her to return to the place of the matrimonial domicile, and followed by a judgment which has sentenced him or her to comply with such request, together with a notification of the said judgment, given to him or her from month to month for three times successively.

The summons and notification shall be made to him or her at the place of his or her usual residence, if he or she lives in this State, and, if absent, at the place of the residence of the attorney who shall be appointed to him or her by the judge for that purpose, at the suit of the husband or wife praying for separation from bed and board: La. 145.

Such [other] service may be had as the court shall order or prescribe: N.H. 182,5; Mass.; Vt. 2373; R.I. 167,17 and 22; Ct. 14,3,3; N.M.

All libels for divorce must be continued one term, as of course: Vt. 1884,94; Tenn. 3313; and shall not be heard at any time unless the libellee is present, or it be proven that the libellant attempted in good faith to procure his attendance: Vt. So, no divorce can be granted before ninety days after the return day: Ct. 1880,23; unless the libellee appear: Ct. 1885,35; Tenn. So, thirty days: Minn. 62,13; Del. V. 17,631. A divorce may be granted after six weeks from service or first publication: O. 5694.

Parties against whom a divorce has been decreed with no other notice than publication may have the same opened at any time, so far as relates to the custody and support of children; and the decree of divorce itself may be opened within two years; and until such time it shall not be lawful for the party to marry again: Ind. 1030. See, generally, in Part IV.

In no case of default shall the court grant a divorce (1) unless all proper means have been taken to notify the defendant of the suit: Ill. 40,8; (2) and unless the cause of divorce has been fully proven by satisfactory witnesses: Ill.; (3) unless a reasonable time has been allowed the defendant to appear and answer: Minn.

The proceedings in divorce suits (except as herein provided) conform to the general rules of proceedings (1) in chancery: N.J. *Divorce*, 6; Ill. 40,6; Mich. 6234; Io. 2511;

Neb. 1,25,11; Va. 105,9; W.Va. 69,8; Ky. Civ. C. 420; Col. 1094; Mon. G. L. 508; Wy. 1882,40,10; Ala. 2688; Miss. 1161; or (2) in law: Mo. 2175; Nev. 219; Uta. 1151; 1878,1; Ariz. 1911; D.C. 732.

§ 6225. **Evidence.** (A) Either party may, in most states, be a witness in divorce proceedings: Me. 60,2; N.J.<sup>a</sup> 1881,16; Pa.<sup>b</sup> *Evidence*, 23; Ill. 51,5; Mich. 6260; Kan.\*<sup>a</sup> 80,650,651; Neb. 1,25,10; N.C. 1288; Ida. *ib.* 8; Wy. 1882,40,8; Fla. 1885,3582. See also *Evidence*, Part IV.

But the testimony of either party can be taken only in open court: Mich. The answer is not evidence in the cause: Ala. 2689; Miss. 1161.

And neither party is competent as a witness to prove the adultery of the other: Mich.; N.C. 588,1283.

The answer of the respondent is not under oath: N.Y. Civ. C. 1757; N.J. *Divorce*, 6; O.<sup>c</sup> 5697; Ill. 40,6; Mich. 6233; Neb. 1,25,10; Ky.<sup>e</sup> Civ. C. 421; Mo. 2175; Ark.<sup>c</sup> 2560; Tex. 2863; Col. 1094; Wy.; Ala.; Miss.: Ariz.<sup>c</sup> 1910,1958.

But the libellee must answer on oath if the libellant require it: Ind. 1039.

No witness is incompetent by reason of relation or alliance with either party: La. D. 1191.

The bill or libel must be signed or an affidavit made by the petitioner: Me. 60,3; Vt. 2369; R.I. 167,13; Pa. *Divorce*, 12; Kan. 80,641; Del. 75,4.

An oath of good faith must be annexed, made by the libellant: N.J. *Divorce*, 7; Pa.; Io. 2221; Del.; N.C.\* 1287; Tenn.\* 3311; Mo. 2175; Miss.

But, in several, the confession of neither party can be received in evidence: Ill. 40,9; Del. 75,6; Tex.

*Unless* the court or jury is satisfied that such confession was made in sincerity, and without fraud or collusion to enable the complainant to procure a divorce: Ill.; Kan. 80,650.

So, in some, the admissions of neither party can be received to prove adultery: N.C.

So, in others, the admission of a respondent of the facts charged in a bill for divorce when he consents to the application shall not be taken as conclusive proof: Md. 51,16; Wash. 2003; D.C. 737.

So, in Georgia, the confessions of a party to acts of adultery and cruelty should be received with great caution, and, if unsupported by corroborating evidence, and made with a view to be evidence in the cause, should not be deemed sufficient proof: Ga. 1716. So, in others, but as to adultery only: Cal. 12079; Ore. Civ. C. 847.

(B) So, in many, no decree of divorce shall be made (1) solely on the declarations, confessions, or admissions of the parties (or upon the finding of a referee: N.Y. Civ. C. 1229; Cal.; Dak.; Ida.; Uta.; Ariz.), but the court shall require other evidence of the facts alleged: N.Y. Civ. C. 1757; O. 5697; Mich. 6260; Minn. 73,106; Neb. 1,25,38; Ky. 52,3,3; Ark.; Cal. 5130; Dak. Civ. C. 69; Ida.; Wy. *ib.* 31; Uta.; Ala. 2690; Fla.; Ariz. 1939,1957.

No divorce shall be granted (1) without proof: Kan.; N.C. 1288; (2) nor solely upon default of the defendant: N.Y.; N.J. *Divorce*, 12; O. 5695; Ind.; Ill.; N.C.; Ky. Civ. C. 422; Cal.; Dak.; Ida.; Uta. 1154; 1878,1; Ariz. 1957; D.C. 737.

But, in cases where the bill, in ordinary cases of equity, would be taken *pro confesso*, the court on a bill for divorce issues a commission to take testimony *ex parte*, and decides the case upon proof made thereunder: Md. 51,11; Col. 1097; Mon. G. L. 511.

So, the bill is not to be taken *pro confesso*, but, whether the defendant answer or not, the cause shall be heard independently of admissions of either party, in the pleadings or otherwise: Ill. 40,8; Va. 105,9; W.Va. 69,8; Ky. 52,3,3; Tenn. 3317; Ark. 2561; Tex. 2863; Ida.; Ala. 3824; Miss.

So, in others, no divorce can be granted upon the testimony of the plaintiff alone; but all such actions shall be heard in open court upon the testimony of witnesses or depositions, as in other cases: Io. 2222; N.C.

In all cases where the proceedings are *ex parte* the court (1) must require satisfactory evidence of the good conduct of the petitioner, and that he or she is the innocent or injured party : Mo. 2182 ; (2) must see that the grounds are legal and sustained by proof : Ill. ; Ga. 1735.

The records of a conviction of either party for adultery are evidence in an action for divorce brought by the other : Pa. *Divorce*, 20.

Two witnesses, or one and strong corroborating circumstances, are necessary to sustain the charge of adultery or lewdness : Ky. 52,3,3.

NOTES. — <sup>a</sup> When the cause is adultery. <sup>b</sup> When personal service is made upon the libellee, or when he appears. <sup>c</sup> So of all the pleadings.

§ 6226. **Court.** Libels for divorce or annulling a marriage (Art. 615) are heard (1) in the Supreme Court : N.H. 182,5 ; Mass. 146,6 ; Me. 60,2 ; R.I. 167,14–16 ; D.C. 731 ; (2) in the Court of Chancery : N.J. *Divorce*, 1 ; Mich. ; Md. 51,11 ; Ky. 52,3,1 ; Tenn. 3309 ; Ala. 2685 ; (3) in the Superior Court : Ct. 1878,71 ; Pa. *Divorce*, 12 ; O. 5689 ; Ind. 1031 ; Ill. 40,4 ; Mich. ; Wis. 2348 ; Io. 2220 ; Minn. 62,6 ; Kan. 80,639 ; Neb. 1,25,6 ; Del. 75,1 ; N.C. 1282 ; Tenn. ; Mo. 2175 ; Tex. 2860 ; Nev. 1875,22 ; Wash. 2000 ; Dak. Civ. C. 59 ; Ida. *ib.* 1–2 ; Wy. 1882,40,5 ; Ga. 1711 ; Fla. 93,1 ; Ariz. 1941 ; so, in others, but on the equity side, or sitting in equity : Va. 105,8 ; W.Va. 69,7 ; Ark. 2559 ; Col. 1094 ; Mon. G. L. 508 ; (4) in the County Court : Vt. 2368 ; (5) in the Probate Court : Uta. 1150.

And, generally, in the court for the county (1) in which one of the parties lives ; N.H. 182,5 ; Mass. ; Me. ; Vt. 2366 ; Mich. 6228 ; Wis. 2619 ; Io. ; Minn. ; Neb. ; Md. ; Wy. ; (2) in which the libellee lives (if the libellant has left it, the county in which the parties have lived together, in Massachusetts, Tennessee, Nevada) : Mass. ; Va. ; W.Va. ; Nev. ; Ala. 2692 ; Miss. ; (3) or in which the parties last cohabited : Va. ; W.Va. ; Tenn. ; Nev. ; <sup>a</sup> Ala. ; Miss. ; (4) in which the libellant lives : R.I. 167,16 ; Pa. ; O. ; Ill. 40,5 ; Minn. 62,10 ; Kan. 80,54 ; Del. 75,4 ; N.C. 1289 ; Mo. 2175 ; Ark. 2558 ; Nev. ; Wash. 2002 ; Uta. ; Ala. ; <sup>b</sup> Miss. <sup>b</sup> 1164 ; (5) in which the cause of divorce arose : O. , Nev. ; (6) in which the wife usually resides : Ky. 52,3,4.

NOTES. — <sup>a</sup> When the libellant continues to reside in such county. <sup>b</sup> When the libellee is a non-resident.

§ 6227. **Trial.** If the petition for divorce is undefended, (1) it is the duty of the district attorney to resist the petition : Ind. 1038 ; Ky. 52,3,3 ; Wash. 2010. (2) So, in other states, an attorney is appointed by the court to represent the libellee : La. 141 ; D. 1190.

Generally, facts are found by the court, as well as law : Vt. 2368 ; O. 5695 ; Ky. 52,3,10 ; Mo. 2175. And, expressly, no jury shall be empanelled in any action for divorce or alimony : Ky.

But in some, the divorce, is always found by a jury : N.C. 1288. So, if demanded by either party : Tex. 2863. And, in one, by two successive juries : Ga. 1711. In others, matters of fact if contested may be tried by a jury : Me. 60,8 ; N.Y. Civ. C. 1757 ; Pa. *Divorce*, 12 ; Ill. 40,7 ; Minn. 62,14 ; Tenn. 3316 ; Tex. ; Nev. 222 ; Col. 1097 ; Mon. G. L. 511. So, the court may direct an issue to a jury : N.J. *Divorce*, 18. The court refers the facts to a commissioner : Del. 75,4.

All divorces must be sued for in court, and cannot be the subject of arbitration : La. 140.

§ 6228. **Cross Bill.** (Compare also § 6217.) The defendant may in the same action obtain a divorce by filing a cross petition or answer, for any of the causes in Art. 620 mentioned : O. 5702 ; Ind. 1040 ; Io. 2225 ; Kan. 80,642 ; Mo. 2176 ; Wash. 2004 ; Ga. 1718. For cross petitions for alimony, see Art. 628.

In such case, if the judgment or verdict be for the respondent, the libellant cannot dismiss his or her suit without the consent of such respondent : Ga. 1719. The respondent in a libel for divorce may generally recriminate and ask a divorce in his or her favor ; and the court (or jury) may so find, to avoid a cross action : Ga. 1718.



§ 6229. **Form of Decree.** All decrees of divorce are in the first instance to be entered *nisi*, to become absolute after the expiration of six months on application of either party, without further notice, unless the court has otherwise ordered for cause on the application of any party interested: Mass. 146,19; 1882,223; Me. 60,11.

So, the decree of divorce may be deferred by the court, for any specified time not exceeding one year, when there appears a prospect of reconciliation: Uta. 1153. In Maine, a new trial may be granted as to the divorce or alimony, within three years after the judgment, if the parties have neither cohabited nor either of them contracted a new marriage since: Me. 60,4. So, in one other, except for cause of adultery or crime, no divorce can be granted until one year after a judgment for divorce from bed and board has elapsed without a reconciliation: La. D. 1192.

A decree may be revoked at any time upon joint application of the parties and satisfactory evidence of their reconciliation: Mich. 6263; Minn. 62,27; Ky. 52,3,5; Civ. C. 426; Ark. 2570; Miss. 1158.

But thereafter no divorce for a like cause can be granted them: Ky. The decree may either pronounce the marriage null and void from the beginning (as in Art. 615), or dissolve it forever: Tenn. 3223.

§ 6230. **Foreign Divorces.** By the laws of a few states, a divorce decreed in another state or country according to the laws thereof by a court having jurisdiction of the cause and of both parties is valid and effectual in the State: Mass. 146,41; Me. 60,15; Ind. 1049; Del. 75,14.

In such case, an order may be made for the care and maintenance of minor children who are inhabitants of the State as in § 6244-6: Mass. 147,30; N.J. *Divorce*, 24. But in others, when an inhabitant of the State goes into another state or country to obtain a divorce for a cause which occurred in the State while the persons resided there, or a cause which would not authorize a divorce by the laws of the State, a divorce so obtained is of no force or effect in the State: Mass., Me., Del.

§ 6231. **Appeal.** Generally, in all cases of divorce, whether the decree be granted or refused, there may be appeal to a higher (the supreme) court: Pa. *Divorce*, 17; Tenn. 3875; Wash. 2011.

So, upon all matters touching alimony, the assignment of property, and custody and support of children (see §§ 6245,6246): Cal. 5148; Dak. Civ. C. 74.

But in some, no appeal or review is allowed, except upon questions of alimony or when the bill is dismissed without a final hearing: O. 5706; Mo. 2185.

So, a new trial is allowed, as in other cases: Ga. 1723.

But no appeal lies (1) after one year from the decree of divorce: Pa. *ib.* 18: (2) after six months therefrom: Kan. 1881,126; Neb. 1885,49,2.

## Art. 624. Absolute Divorce. (C) Effect.

§ 6240. **General Effect.** The laws of many states, declare that the effect of an absolute divorce is (1) to fully and completely dissolve the marriage contract as to both parties: Ct. 14,3,2; Pa. *Divorce*, 15; O. 5695; Ind. 6248; Wis. 2374; Minn. 62,29; Kan. 80,647; Cal. 5090-1; Ore. Civ. C. 499; Nev. 221; Wash. 2008; Dak. Civ. C. 59; Miss. 1156; La. 159; D. 1195.

(2) To annul the marriage from the time of the verdict, unless it be for a cause rendering the marriage void *ab initio*: Ga. 1726.

The guilty party forfeits *all* rights acquired by the marriage: Io. 2230; Mo. 2182; Uta. 1156. Compare §§ 6242,6248, H.

So, of all rights to the property of the other party: Kan. The wife, if the innocent party, may resume her maiden name: Kan. 80,646.

It places them in the same situation as if the marriage had never been contracted: Cal., Dak., La.

"All and every the duties, rights, and claims accruing to either of the parties at any time theretofore, in pursuance of the said marriage, shall cease and determine:" Pa. *Divorce*, 15; N.C. 1295.

§ 6241. **Remarriage, etc.** (A) After an absolute divorce, either party may, in most states, marry again at any time: Mass. 146,22; Vt. 2391; Ct. 14,3,2; N.Y. 2,8,1,49; Pa. *Divorce*, 15; Kan. 80,647; N.C. 1295; Ky. 52,3,2; Tenn. 3323; Tex. 2866; Ore. Civ. C. 499; Wash. 2008; and the same would follow in states where the laws are silent; see § 6240.

**Limitations.** *Except*, that the libellee (or either party, in Minnesota and Kansas) cannot in several, marry until two years (in Missouri, five years; in Vermont, three years; in Kansas, six months; or in Nebraska, Oregon, Washington the time allowed for appeal or error) from the final decree: Mass.; Me. 60,12; Vt.; Kan. 1881,126,1; Neb. 1885,49,1; Mo. 2182; Ore.; Wash.; or sooner, by special decree of court: Mo.

(B) And in a few, no libellee convicted of adultery can marry again (1) at any time: N.Y. Civ. C. 1761; Dak. Civ. C. 64. But the parties may marry each other: N.Y.

So, the guilty party cannot marry at any time; except upon decree of court: Me.

(C) So, in other states, as to a person against whom a divorce has been granted for adultery (or, in Maryland, Virginia, for abandonment) the court may decree that he or she is not to marry again, under the pains and penalties of adultery: Md. 51,12; Va. 105,14; Miss. 1158.

Such decree may, however, be afterwards revoked or annulled at any time: Va.

And may be modified upon petition to court and verdict to that effect by a jury: Ga. 1728-30.

(D) So, in a few, the whole matter of rights and disabilities of marriage after divorce is left to the jury or court to decide, subject to the revision of the court: Ga. 1727; Ala. 2688.

(E) The libellant may not marry within two years of the decree except by permission of court; the libellee can never marry within such two years, nor afterwards except upon such order of court: Me. 60,12.

(F) In a few states, no wife or husband divorced for his or her adultery can marry the *particeps criminis* (1) during the life of the former husband or wife: Pa. *Divorce*, 23; Del. 75,12; Tenn. 3332; (2) at any time: La. D. 1197; Civ. C. 161. Such marriage renders the person divorced guilty of bigamy: La.

(G) If the parties marry each other again, the court upon their joint application and satisfactory proof may revoke all judgments of divorce, alimony, etc., which will not affect the rights of third persons: Wis. 2375; Minn. 62,27.

(H) If they cohabit together before such re-intermarriage, they are in in some states, guilty of adultery: Mass. 146,42; Mich. 6253; Wis. 2376; Minn. 62,28; Neb. 1,25,32; Miss. 1160; Ariz. 1932.

(I) So, any persons divorced for relationship and afterwards cohabiting are guilty of incest: N.J. *Divorce*, 31. And, if divorced for adultery or prior marriage and afterwards cohabiting or living together, they are guilty of adultery: N.J. *ib.* 32.

(J) There shall not be granted to any person more than one divorce except for impotency, separation for five years, or the other party's adultery: Ky.

(K) A woman divorced for adultery, and afterwards cohabiting with her paramour named in the libel, cannot alienate or devise her real estate; and it will descend at her death as if intestate: Pa. *Divorce*, 24; Tenn. 3331.

See also § 6224 for special provisions when there was no personal service.

§ 6242. **Change of Name.** (A) The court has jurisdiction to decree a resumption of any former name by the wife: Mass. 146,21; Vt. 2393; R.I. 167,24; Ct. 14,3,5; O. 5699; Ill. 40,16; Ky. 52,3,6; Tex. 339; Wash. 2009; D.C. 748. (B) So, in other states, only in actions where the wife is petitioner: Minn. 62,29; Mo. 2183; Ark. 2569; Nev. 221; or not in fault: Ore. Civ. C. 497.

And, in one, if there be a prayer in the petition to that effect, to decree a change of name of the minor children : Vt. 2394.

§ 6243. **Status of Children.** (A) A decree of divorce does not of itself render the issue of the marriage, or of the wife, born during marriage, illegitimate (1) when the divorce is for cause of relationship (§ 6111): N.J. *Divorce*, 3. (2) For adultery (§ 6202) (α) by the wife : Mass.<sup>a</sup> 146,23 ; N.Y.<sup>b,c,d,e</sup> Civ. C. 1759-1761 ; N.J. ; Pa. *Divorce*, 23 ; Mich.<sup>a,d</sup> 6249 ; Neb.<sup>a,d</sup> 1,25,28 ; Cal.<sup>a,c</sup> 5145 ; Dak.<sup>a,c,d</sup> Civ. C. 63 ; Ida.<sup>a</sup> *ib.* 6 ; Wy.<sup>a,d</sup> *ib.* 22 ; Ariz.<sup>a,d</sup> 1928,1955 ; D.C.<sup>a</sup> 744. (β) By the husband : Mass. ; N.J. ; Mich. ; Neb. ; Cal. 5144 ; Dak. Civ. C. 62 ; Ida. This would, of course, be law in all states. (3) For desertion (§ 6204) : N.J. (4) For lunacy (§§ 6201,6112) : Miss. 1157 ; D.C. 743.

In Delaware, no divorce renders the issue illegitimate, except as specified in § 6115, where the marriage is void : Del. 75,11.

And in many states, no divorce at all : Me. 60,16 ; O. 5696 ; Va. 119,7 ; W.Va. 66,7 ; N.C. 1295 ; Tenn. 3333 ; Mo. 2171,2174 ; Ark. 2526,2557 ; Tex. 2866 ; Cal. 6387 ; Nev. 795 ; Dak. Civ. C. 780 ; Ida. Prob. C. 316 ; Mon. Prob. C. 536 ; G. L. 507 ; Wy. 42,8 ; Fla. 93,4 ; La. 158.

In others, no divorce, for any cause, renders the issue illegitimate, except as herein and in § 6115 : N.H. 182,10 ; Ill. 40,3 ; Neb. 1,25,28 ; Col. 1093,1046 ; Ga. 1726 ; Miss. 1155 ; Fla. 93,5 ; D.C. 744. It does render the issue illegitimate, when for cause (1) of bigamy, either party having had another wife or husband living at the marriage : N.J. *Divorce*, 2 ; Ill. ; Col. (2) Of impotency : N.J. *Divorce*, 4. (3) Of pregnancy of the wife at the time of marriage : Ga.

But the children may be rendered illegitimate if so expressed in the decree of divorce : N.H., Neb. Children begotten before the commencement of the suit are, in all cases, presumed legitimate : Mich., Neb.

But the children are illegitimate when divorce is decreed (1) for cause of prior marriage : Ill. ; Col. ; Miss. 1156 ; Fla. ; D.C. 741 ; see, however, § 6116. (2) For cause of pregnancy of the wife at the marriage : Ky. 7,1 ; Ga. ; Ala. 2699 ; Miss.

NOTES.—<sup>a</sup> But their legitimacy is left to be determined as at common law. <sup>b</sup> As to children born or begotten before the act of adultery complained of, in case of adultery by the wife. <sup>c</sup> So, as to children born since the act of adultery, their legitimacy is to be determined by the court. <sup>d</sup> And in such case (§ 6243,2,α) children begotten before the commencement of the action are presumed legitimate until the contrary is shown. <sup>e</sup> When committed by the husband, as to children begotten before the action was commenced.

§ 6244. **Custody of Children.** Upon a decree of divorce (or, in Massachusetts, Maine, Vermont, Rhode Island, Connecticut, New Jersey, North Carolina, Texas, upon petition at any time thereafter ; see also below) the court may make such decree as it deem expedient for the care and custody of minor children, and determine with which parent any child or children shall remain : N.H.† 182,11 ; Mass.<sup>a</sup> 146, 29-30 ; Me.† 60,17 ; Vt.† 2388 ; R.I.\*† 167,23 ; Ct.† 14,3,8 ; N.Y.\* Civ. C. 1771 ; N.J.† *Divorce*, 23 ; O. 5696 ; Ind. 1046 ; Ill. 40,18 ; Mich.\*† 6238 ; Wis.\*† 2362 ; Io. 2229 ; Minn.\*† 62,18 ; Kan.<sup>b</sup> 80,645 and 643 ; Neb.\*† 1,25,15 ; Md.\* 51,13 ; Del. 75,11 ; Va.\*† 105,12 ; Va. †<sup>b</sup> 1879, Ex. 84,2-3 ; W.Va.\*† 69,11 ; N.C.\* 1296 ; Ky. 52,3,7 ; Mo. 2179 ; Ark. 2565 ; Tex. 2871 ; Cal. 5138 ; Ore. Civ. C. 497 ; Nev. 217 ; Col. 1098 ; Wash. 2007 ; Dak. Civ. C. 72 ; Mon. G. L. 512 ; Wy.† *ib.* 14 ; Uta. 1155 ; Ala. 2701 ; Miss. 1159 ; Fla.† 93,9 ; Ariz.† 1915 ; D.C. 747.

And in making such decree, the rights of the parents, in many states, are, in the absence of misconduct, to be held equal, and the happiness and welfare of the children are to determine their custody or possession : Mass. 146,32 ; Ct.† 1883,28 ; 1885,99 ; N.J. *Divorce*, 27 ; Wis. ; Minn. ; N.C. 1570 ; Ky. ; Nev. ; Wy. ; Ala.<sup>c</sup>



But in a few states, in all divorces, absolute or limited, the person not in fault is, generally, entitled to the custody of the minor children of the marriage : Ore. ; Ga. 1733 ; La. 157.

The court may, however, at its discretion, for cause order otherwise, or remove the children from the custody of either party : Ga., La. It may commit the child to the custody of each parent alternately for fixed periods of time : N.C. Children over ten years of age may select which parent they will go with : Uta. Or the parties may agree as to the custody of children : Uta.

In two states, when the State courts have jurisdiction over the custody of infant children of divorced persons, and such children are natives of the State, or have resided five years within its limits, they shall not, if of suitable age to signify their consent, be removed out of the jurisdiction of the State except with such consent ; or, if under that age, with the consent of both parents, unless the court, after cause shown, shall otherwise order : Mass. 146,31 ; N.J. *Divorce*, 25 ; see also in Part IV., Division I.

In cases of abandonment of the husband by the wife, he shall have the custody of the children after they are seven years old, if a suitable person : Ala. 2701.

The decree mentioned in this section and § 6245 may be revised or altered, or a new one made at any time, upon petition of either parent : N.H. 182,15 ; Mass. ; Me. ; Vt. ; R.I. ; Ct. ; N.Y. ; N.J. ; Ill. ; Mich. 6239 ; Wis. 2363 ; Io. ; Minn. 62,19 ; Kan. ; Neb. 1,25,16 ; Md. ; Del. ; Va. ; W.Va. ; N.C. ; Ky. ; Mo. ; Cal. ; Ore. Civ. C. 498 ; Nev. ; Ida. ; Wy. ; Uta. ; Miss. ; Ariz. 1916.

NOTES. — <sup>a</sup> So, in cases of a foreign divorce, if the minor children are resident in the State. <sup>b</sup> So also, in cases where a divorce is refused. <sup>c</sup> If the children be under the age of seven, and unless the wife is guilty of adultery.

§ 6245. **Support of Children.** Upon a decree of divorce (or, in Massachusetts,<sup>a</sup> Maine, Vermont, Rhode Island, New Jersey, Connecticut, North Carolina, upon petition at any time after decree ; see note <sup>b</sup>) the court may make such decree as it deem expedient for the maintenance of minor children : N.H.† 182,11 ; Mass.<sup>a</sup> 146,29 ; Me.<sup>b</sup>† 60,17 ; Vt.<sup>b</sup>† 2388 ; 1882,68 ; R.I.\*†<sup>b</sup> 167,23 ; Ct.<sup>c</sup> 14,3,9 ; 1885,99 ; N.Y. Civ. C. 1760 ; N.J.<sup>d</sup> *Divorce*, 19 ; O. 5696 ; Ind. 1046 ; Ill. 40,18 ; Mich.<sup>a,b,d</sup> 6238 ; Wis.\*†<sup>b</sup> 2362 ; Minn.\*†<sup>b</sup> 62,11 ; Kan.<sup>b,c</sup> 80,643,645 ; Neb.\*†<sup>b</sup> 1,25,15 ; Md.\*<sup>b</sup> 51,13 ; Del.<sup>b</sup> 75,11 ; Va.\*†<sup>b</sup> 105,12 ; W.Va.\*†<sup>b</sup> 69,11 ; N.C.\*<sup>b</sup> 1296 ; Ky.<sup>b</sup> 52,3,7 ; Mo.<sup>b</sup> 2179 ; Ore.<sup>b</sup> Civ. C. 497 ; Nev. 217 ; Wash. 2007 ; Ida.<sup>b</sup> *ib.* 7 ; Wy.†<sup>b</sup> *ib.* 14 ; Ga. 1742 ; Miss.<sup>b</sup> 1159 ; Fla.<sup>d</sup> 93,9 ; Ariz.† 1915 ; D.C. 747.

But such support is to be made by, or out of, the estate of the guilty party : N.H., Ore. And only if the husband is libellee, and out of his estate : Ga. This allowance may be made, although the wife for any cause be not entitled to alimony : Ga.

In Wisconsin, when a divorce is adjudged for fault of the wife, and the care of any children is awarded to the husband, the court may award him such sums for their support as it deems reasonable under the circumstances out of the wife's estate : Wis. 2365.

When an allowance is thus made to children, the husband will no longer be liable to third persons for necessaries furnished them : Ga.

NOTES. — <sup>a</sup> See § 6245, note <sup>a</sup>. <sup>b</sup> The decree may be subsequently altered, as in § 6244 specified. <sup>c</sup> See § 6244 note <sup>b</sup>. <sup>d</sup> Only when the divorce is for adultery, incest, or cruelty.

§ 6246. **Pending the Suit** the court may, in most of the states, make order concerning the care, custody, education, and maintenance of minor children, as in the last two sections, respectively : N.H. 182,9 ; Mass. 146,17 ; Me.† 60,6 and 17 ; Vt.†<sup>a</sup> 2376 ; R.I.† ; Ct. 14,3,7 ; N.Y.\* Civ. C. 1769 ; N.J.<sup>a</sup> *Divorce*, 22 ; Ind. 1042 ; Ill. 40,13 ; Mich.\*†<sup>a</sup> 6237 ; Wis.\*<sup>a</sup> 2361 ; Minn.\*† 62,17 ; Kan. 80,644 ; Neb. 1,25,14 ; Va.\*† 105,10 ; W.Va.\*† 69,9 ; N.C. 1296 ; Ky. 52,3,7 ; Cal. ; Ore. Civ. C. 496 ; Nev. 217 ; Wash. 2006 ; Dak. ; Ida. ; Wy. 1882,40,13 ; Ga.\* 1733,1741 ; Ala. 2701 ; Ariz. 1914.

And, generally, it may make order prohibiting the husband from imposing any restraint on the person of the wife : N.H. ; Mass. 146,16 ; Me. 60,7 ; Vt.†<sup>b</sup> 2376 ; Ind. 1042 ; Ill. 40,12 ; Mich. 6236 ; Wis. ; Minn.\*† 62,16 ; Neb.\*† 1,25,13 ; Va. ; \*† W.Va. ; \*† N.C.\* 1287 ; Ore. Civ. C. 496 ; Wash. ; Wy. 1882,40,11 ; Ariz. 1913. Compare § 6266.

If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband, whether plaintiff or defendant, unless there should be strong reasons to deprive him of it, either in whole or in part, the decision whereof is left to the discretion of the judge : La.\* 146,151.

If the wife who sues for a separation has left, or declared her intention to leave, the dwelling of her husband, the judge shall assign the house wherein she shall be obliged to dwell until the determination of the suit.

The wife shall be subject to prove her said residence as often as she may be required to do so, and in case she fails so to do, the proceedings are suspended : La.\* 147.

The court may also compel the man to deliver to the woman any of her separate estate which is in his possession or control, or prevent him from interfering with it : Va. 1882,60.

NOTES. — <sup>a</sup> On application of either party. <sup>b</sup> On application of the wife.

§ 6247. **Property: General Provisions as to Both Parties.** Upon an absolute divorce each party is restored to all property remaining at the commencement of the suit which the other obtained from or through such party during the marriage, in consideration and by reason thereof : Ky. 52,3,6 ; Civ. C. 425 ; Ark. 2568.

The parties may agree as to the distribution of their property : Uta. 1155.

Upon any absolute divorce the parties lose all rights to administration, dower, curtesy, or intestate share in each other's property, real or personal ; and also all right in property settled upon him or her in consideration of the marriage only : N.C. 1843. Compare § 3247.

When divorce is refused, the court may nevertheless make such order as may be proper for the disposition of the property of the parties : Kan. 80,643.

§ 6248. **The Wife's Real Property,** upon an absolute divorce, becomes, (A) in a few states, hers absolutely ; and she is entitled to immediate possession of it as if the husband were dead : O. 5700 ; Kan. 80,646.

So, in many, upon a divorce (1) for any cause except adultery by the wife : Mass. 146, 24 ; Vt.† 2380 ; Mich.† 6240 ; Wis.† 2364,2372 ; Minn.† 62,20 ; Neb.\*† 1,25,17 ; Ariz.† 1917. So, (2) when the husband is sentenced to imprisonment for life : Mich.,† Minn.,† Neb.,† Ariz.† So, in others, (3) only when the divorce is for fault of the husband : Me. 60,9 ; R.I. 167,8 ; N.Y. Civ. C. 1760 ; O. 5699 ; Ind. 1043 ; Del. 75,9 ; Tenn. 3328 ; Mo. 2183. So, in others, (4) specially when the divorce is for (1) relationship : R.I. 167,4 ; (2) insanity : R.I. ; (3) impotency : R.I. ; (4) crime : R.I. ; (5) adultery of the husband : R.I.<sup>a</sup> 167,8.

Upon a divorce for adultery by the wife her title to her separate, real, and personal estate during her life shall not be affected. And after her death, if she contracted a lawful marriage after the divorce, the interest of the husband in her separate estate ceases. But the court may decree to the husband so much of her separate, real, and personal estate as it may deem necessary for the support of the minor children decreed to the husband's custody : Mass. 146,27. And upon divorce for such cause she forfeits her dower, in many states ; see § 3246. And also, in Delaware, any charge, estate, or benefit settled upon her or in trust for her use in lieu of dower : Del. 75,8.

(B) But, in other states, upon any decree of divorce the whole matter is left to the court (or jury, in Georgia), which may restore to the wife all or any part of her estate, real or personal, as seems equitable : N.H. 182,12 ; Ill. 40,17 ; Io. 2229 ; Md.\* 51, 13 ; Va.\*† 105,12 ; W.Va.\*† 69,11 ; Nev. 218 ; Wash. 2007 ; Wy. *ib.* 15 ; Uta. 1155 ; Ga. 1722.

(C) And in Rhode Island, she is entitled to all her real and personal property "secured to her by law," and all her other real estate if there be no issue living, when the divorce is for adultery or other fault of the husband: R.I. 167,8. And if there be issue living, the whole matter is left to the discretion of the court: R.I. 167,10.

(D) If the wife is in fault the court may restore to her all or a part of her real property: Del. And in case of divorce for fault of the wife, and she had received from the husband any property in consideration of marriage or love and affection, such real estate, or what is left of such personal estate, may be decreed to the husband: Ct. 14,3,6.

(E) No judgment annulling a marriage or for divorce does, in any way, affect the right of a wife to the possession and control of her separate property, real and personal, except as provided specially herein; and nothing shall authorize the court to divest any party of his title in any real estate further than is expressly provided: Wis.† 2372.

(F) Upon divorce for the wife's adultery, the husband's rights in her property, real and personal, remain as before: N.Y. Civ. C. 1760.

So, upon divorce for adultery of the wife, the husband holds her real estate for her life in any case, and has curtesy, if entitled thereto: Me. 60,10; Vt. 2384; R.I. 167,5; Neb. 1,25,24; Ariz. 1924.

(G) All property and rights of either party, both concerning property or the children, not disposed of by decree of court, are by divorce divested from the guilty party and vested in the innocent one (compare § 6240): Nev. 218.

(H) The title to real property may not be divested by the decree: Tex. 2864.

(I) Upon divorce for fault of the wife the husband has his right to her real estate and is entitled to all her personal estate, in possession or action. And the rents and profits thereof as before: Tenn. 3329.

(J) A divorce deprives the husband of all control over the separate estate of the wife: Ala. 2700.

NOTE. — <sup>a</sup> On the part of the husband only.

§ 6249. **The Wife's Personal Property** may, in many states, be restored to her in the cases specified in § 6248 for the several states respectively, or any part of it, by decree at the discretion of the court: Mass. 146,24; Me. 60,9; R.I. 167,4; Ill.; Mich.† 6241; Minn.† 62,21; Neb.\*† 1,25,18; Md.; Tex. 2864; Nev. 218; Wy.†<sup>a</sup> 1882,40,19; Uta.; Ariz.† 1918.

So, only when she is not the party in fault: Ore. Civ. C. 497. Or the value thereof may be awarded: Mass., Me., Mich., Minn.,† Neb., Md., Wy.,†<sup>a</sup> Ariz.†

And also, in a few, the value of any real estate of the wife disposed of by the husband and wife during coverture: Minn.,† Md.

In others, her personal property remaining undisposed of, reverts to her like the real property (§ 6248): Wis. 2372; Tenn.; Mo. 2183.

She has her separate personal property: R.I. 167,8.

So, when the divorce is granted upon her libel: N.Y. Civ. C. 1760. See also §§ 6248, B,D, 6247.

Upon divorce for adultery by the wife, the husband holds her personal estate absolutely, except that the court may decree her a necessary subsistence from her own estate: Me. 60,10; Vt. 2384; R.I. 167,5-6; Mich. 6241; Neb. 1,25,24-5; Ariz. 1924-5.

So in any case of divorce for fault of the wife: R.I.

In several states, the court may require the husband to disclose on oath what personal estate has come to him by reason of the marriage, how it has been disposed of, and what portion remains in his hands: Mass. 146,26; Me.; Vt. 2381; Mich. 6244; Minn.; Neb. 1,25,21; Wy. 1882,40,17; Ariz. 1921.

So, in others, the wife may at any time during suit require an inventory and appraisement of the real and personal estate in possession of the husband: Tex. 2868; La. 149.

NOTE. — <sup>a</sup> Except if the divorce be for the wife's adultery.

§ 6250. **Payment to Trustee.** In most states, the court may order such personal property, or alimony, or the money paid in lieu thereof, paid to a trustee for the benefit



of the wife and minor children : N.H. 182,13 ; Mass. 146,25 ; Vt. 2383 ; Mich. 6242 ; Wis. 2368 ; Minn. 62,22 ; Neb. 1,25,19 ; Ore. Civ. C. 497 ; Wy. *ib.* 20 ; Ariz. 1919.

§ 6251. **The Husband's Real Property** is, as a general rule, not affected by a divorce, except under a decree for alimony (Art. 626).

(A) But the wife, in a few states, has dower or intestate share as if the husband were dead (1) in any case, except where the divorce is for her fault ; Me. 60,9.

So, in several, she has in such case dower if she survive the husband : N.Y. Civ. C. 1760 ; O. 5699 ; Kan. 80,646 ; and see also §§ 3246-3248.

*Except* when the divorce is for the husband's impotence : Me. See § 6248.

(2) She has dower as if he were dead in case of divorce for adultery by the husband : Mass. 174,13 ; R.I. 167,7 ; Mich. 6246 ; Minn. 62,24 ; Neb. 1,25,23 ; Nev. 220 ; Ariz. 1923.

(3) Or of crime by the husband (§ 6208) : Mass. ; R.I. ; Mich. ; Wis. 2373 ; Minn. ; Neb. ; Nev. ; Ariz. ; (4) or his habitual drunkenness : Mich., Neb., Ariz. ; (5) or his misconduct : Mich., Neb., Ariz.

(B) If the wife is in fault, she is barred of dower : N.Y. ; O. 5700 ; Kan. See also § 3246.

And the husband has the same rights in his real estate as if she were dead : Ind. 1044.

Alimony (§ 6261) may, however, be decreed in lieu of dower : R.I. So, in Georgia, if permanent alimony is decreed, the wife has no interest in the husband's estate, upon his death, but the alimony is continued out of his estate : Ga. 1752.

(C) In other states, the whole matter (except as above) is left to the court, as in § 6247 : Vt. 2381 ; Ill. ; Va.\* † 105,12 ; W.Va.\* † 69,11 ; Nev. 218 ; Wy. ; Uta. See § 6262.

So, the court may award her to retain her right of dower : D.C. 745.

A divorcee for the adultery of the wife bars her dower, and all distributive share in the estate of the husband (see also § 3246) : Ala. 2698.

(D) The wife has no dower in any case of divorce, except when a marriage is dissolved by the husband's sentence to imprisonment, as in § 6112 : Wis. 2373.

For the effect upon the property of each other so as to *change* title, see also Art. 626, *Alimony*.

**The Husband's Personality** is not generally affected. (A) But in Nevada, the wife has the same share in it as if he were dead (1) when the divorce is for cause of his adultery : Nev. 220 ; (2) or crime : Nev.

(B) And except as above, the whole matter is left to the court, as in § 6207 : Vt., Ill., Wis.,\* Nev., Wy., Uta.

See also Art. 626.

On absolute divorce for fault of the wife she loses all right to a distributive share or provision from the husband's personality on his death : N.Y. Civ. C. 1760 ; N.C. (see § 6247).

See also §§ 3246-7.

§ 6252. **The Community Property** is, as a rule, (A) equally divided between the two parties : Nev. 162 ; Ida. 1874-5, p. 636,12 ; Ariz. 1978. *Except* when the decree is for adultery or cruelty, the guilty party is only entitled to such portion as the court expressly allow : Nev., Ida., Ariz.

(B) If the decree be rendered for adultery or cruelty, it is assigned to the parties in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just ; if the divorce be upon any other ground, it is equally divided between the parties : Cal. 5146.

§ 6253. **The Homestead.** The court in rendering decree may assign the homestead of the innocent party, either absolutely or for a limited period, according to the facts of the case, and in consonance with the law of homesteads (Part IV.) : Dak. Civ. C. 74.

If a homestead has been selected from the community property, it may be assigned to the innocent party either absolutely or for a limited period, or it may be divided, or sold and the pro-

ceeds divided; if it has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party: Cal. 5146.

If the wife obtain the divorce, for fault of the husband the homestead is decreed to her and the minor children as if he were dead: Va. 183,7.

See *Exemptions*, Part IV.

§ 6254. **Subsequent Liabilities.** After the divorce (after a decree for permanent alimony) (A) the husband loses all right to interfere or control with the wife's acquisitions by purchase, descent, or otherwise: Ga. 1750; (B) he is not liable for her debts or contracts: Ga.

## Art. 626. Absolute Divorce. (D) Alimony.

§ 6260. **Definition.** It is an allowance out of the husband's estate made for the support of the wife when living separate from him: Ga. 1736. So, it may be either a specific part of the husband's estate or a sum of money: N.H. 182,12; and see § 6262. It may be either from the corpus of the estate or otherwise: Ga. 1720. It is either temporary or permanent: Ga.

**Subsequent Cohabitation** of the husband and wife annuls all provisions made for permanent alimony, either by deed or decree, in cases of absolute divorce, limited divorce (Art. 628), or separation (Art. 635), except that the rights of children under such deed or decree are not affected: Ga. 1751.

§ 6261. **Alimony: when Decreed.** (A) In most states, generally, in any case of absolute divorce, the court (or, in Georgia<sup>b</sup> the jury) has power to decree alimony to the wife: N.H.† 182,12; Mass. 146,36; Vt.† 2381; Ct. 14,3,5; N.J. *Divorce*, 19; O. 5700,5699; Ind. 1045; Ill. 40,18; Mich.\*<sup>a b</sup> 6245; Wis.\*<sup>a</sup> 2364; Io. 2229; Minn.\*<sup>a b</sup> 62,23; Neb.\*<sup>a</sup> 1,25,22; Md. 51,13 and 18; Del. 75,9; Va.\*† 105,12; W.Va.\*† 69,11; Ky. 52,3,6; Tenn.\* 3325; Mo. 2179; Ark. 6245; Nev. 220; Col. 1098; Wash. 2007; Ida. *ib.* 7; Mon. G. L. 512; Wy. *ib.* 15; Uta. 1155; Ga.\* 1720; Ala.<sup>c</sup> 2695; Miss. 1159; Fla.<sup>b</sup> 93,9; N.M.† 997; Ariz.\*<sup>a b</sup> 1922; D.C. 745.

(B) But, in many, so only when the divorce is for adultery or other fault of the husband: Me. 60,9; R.I. 167,9; <sup>a</sup> N.Y. Civ. C. 1760; Kan. 80,646; Cal. 5139; Ore. Civ. C. 497; Dak. Civ. C. 73; La.<sup>d</sup> 160; D. 1196.

In Oregon, whenever a marriage is annulled or divorce decreed, the libellant is in all cases entitled, in his or her individual right, to an undivided third part in fee of the other's real estate, in addition to the allowance of alimony: Ore.† Civ. C. 495.

It will be granted to the wife, though the husband applied for the divorce on the ground of "cruel and barbarous treatment" by her: Pa. *Divorce*, 7.

It will be granted to a woman who in good faith intermarried with a man having another wife living at the time, as in other cases of divorce, but such allowance must not be made as will be inconsistent with the rights of such other wife: Ill. 40,19.

The courts of equity may hear and determine all causes for alimony in as full a manner as the ecclesiastical courts in England: Mass. 146,33; Md. 51,17. Or "as courts of equity:" Mass. So, as to all matters "within the purview of the chapter on divorce:" Mass.

Alimony as above may be decreed upon petition of the wife at any time after the divorce: Mass.; and so in other states.

And in many, any decree for alimony or allowance may be revised at any time by the court: Mass. 146,39; Me. 60,14; Vt. 2386; Ill.; Mich. 6248; Wis. 2369; Io.; Minn. 62,25; Neb. 1,25,27; Mo. 2185; Ark. 2567; Cal.; Col.; Dak.; Ida.; Mon.; Wy. *ib.* 21; Ga.\* 1739; Miss.; Ariz. 1927.

But when a final division of the corpus of property is made by way of alimony, no subsequent provisions for the wife can be made: Wis.

NOTES. — <sup>a</sup> But not when the divorce is for cause of the wife's adultery. <sup>b</sup> Only when the estate and effects awarded to the wife are insufficient to support her and the children decreed to her custody, having due regard to their circumstances. <sup>c</sup> See § 6245, note <sup>d</sup>. <sup>d</sup> Only when the wife has not sufficient separate estate for her maintenance.

§ 6252 **Alimony: Amount.** (A) It may not, in several states, exceed (1) the use for life of one half the real estate and the absolute property in one half the personal estate of the husband: R.I. 167,9; (2) one third the husband's estate, real and personal: Ct. 14,3,5; Minn.; (3) one third of his income: La. 160.

(B) In other states, the whole matter of amount is left to the discretion of the court (or jury): Me.; Vt.; N.Y. Civ. C. 1760; N.J.; O.; Ind.; Ill.; Mich. 6245; Wis. 2364; Io.; Kan.; Neb.; Del. 75,9; Va.; W.Va.; Ky.; Tenn. 3326; Mo. 2179; Ark.; Cal.; Ore. Civ. C. 497; Nev. 220; Col. 1098; Wash.; Dak.; Ida.; Mon.; Wy.; Uta.; Ga.\* Ala.; Miss.; Fla.; Ariz.

Alimony may be decreed in gross or from year to year: Me.; O.; Mich.; Kan.; Del. 75,10; Mo. 2180; Ore. It may consist of either real or personal property: Kan.

In other states, it must always be a sum in gross; but (in Indiana) time may be allowed for its payment upon instalments, security being given: Ind. 1047; Minn.

(C) And the amount, subject to the above limits, shall be such as the court deem reasonable, having regard to the amount of personalty which came to the husband by the marriage, and his ability: R.I., N.Y., O., Mich., Wis., Minn., Kan., Neb., Tenn., Ga.,\* Ala., Miss.

In several, alimony is only decreed when the wife has not sufficient means for her maintenance, and at the discretion of the court: Neb.; La. 1196. See also below, and § 6261, note <sup>b</sup>.

If the divorce be for fault of the husband, the allowance is more liberal: Ala. 2696; if for fault of the wife, it is abated accordingly: Ala. 2697.

Alimony may include the amount necessary to support minor children committed to the wife's care: N.Y.; Ill.; Mich.; Wis.; Minn.; Neb.; Tenn.; Mo.; Cal.; Ore.; Nev.; Wash.; Dak.; Uta.; Ga.\* 1742.

And, in such case, the husband is not liable for necessities furnished them: Ga.\* In assigning alimony or allowances in any case of divorce or separation, the court must resort first to the community property, and then to the husband's separate property: Cal. 5141. When the wife has a separate estate (or, in California, when there is sufficient community property to give her proper support) the court has discretion to withhold any allowance to her from the separate property of the husband: Cal. 5142; Dak. Civ. C. 74.

In case of divorce for fault of the husband, the court may assign to her out of the husband's estate, real and personal, such share as it deems reasonable: Del. 75,9. So, in Wisconsin, in any case where alimony is allowed: Wis.

If for fault of the wife, the court may assign to her such part of the husband's personal property as it deems reasonable: Del. The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just: Cal. 5143; Dak. The husband may be required to disclose under oath the situation of his property: N.H. 182,12; Vt. 2331; and compare § 6249. So, at the time of filing the libel, the libellant must render a schedule on oath of property owned by the parties at the time, distinguishing the separate estate of the wife, if any: Ga.\* 1720.

The court may provide at what times and in what sums alimony or other allowances for support shall be paid: Wis. 2367; Kan. Alimony may at any time be revoked by the court: La.; and will be revoked if the wife contract a second marriage: La.

§ 6263. **Security.** The court may, in many states, if alimony or an allowance in the nature of alimony is decreed for the wife or children, require sufficient security for its payment: N.H. 182,14; Mass. 146,38; Vt. 2385; N.Y.\* Civ. C. 1772; N.J. *Divorce*, 19; Ill. 40,18; Mich.\* 6247; Wis. 2367; Minn. 62,23 and 26; Neb. 1,25,26; Mo. 2179,2180; Cal. 5140; Col. 1098; Dak. Civ. C. 74; Mon. G. L. 512; Miss. 1159; Fla. 93,9; Ariz. 1926.

Or it may impose it as a charge upon any specific real estate of the party liable: Me. 60,9; Wis.; Minn.

And, in Georgia, the property set apart to secure alimony, etc., is not liable for the husband's debts while the wife lives: Ga.\* 1750.



§ 6264. **Alimony to the Husband.** In a few states, upon all cases of absolute divorce, the court may decree a part of the wife's estate to the husband in the nature of alimony: Mass. 146,36; Va.\* † 105,12.

In a few states, no distinction is apparently made between the laws governing alimony to the wife and alimony to the husband: Io. 6229; Ore. Civ. C. 497; Wash. 2007.

§ 6265. **Alimony During Suit.** The court has, in most states, power to order an allowance to the wife petitioning for divorce (or, in Massachusetts, Maine, Rhode Island, New York, Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Delaware, Kentucky, Missouri, Arkansas, Texas, California, Oregon, Nevada, Washington Territory, Dakota, Idaho, Wyoming, Georgia, Alabama, Louisiana, Arizona, and District of Columbia, defending such suit), either absolute or limited, at any time after the bill to continue until final decree: Mass. 146,15; Me. 60,6; Vt. † 2377; R.I. 167,23; N.Y. Civ. C. 1769; O. 5701; Ind. 1042; Ill. 40,15; Mich. † 6235; Wis.<sup>a</sup> 2361; Io.<sup>a</sup> 2226; Minn. 62,15; Kan. 80,644; Neb. 1,25,12; Del. 75,5, Vol. 14, Ch. 548; Va. † 105,10; W.Va. † 69,9; N.C. 1291; Ky. 52,3,6; Civ. C. 424; Mo. 2179; Ark. 2563,2567; Tex. 2870; Cal. 5137; Ore. Civ. C. 496; Nev. 220; Col. 1098; Wash. 2006; Dak. Civ. C. 71; Ida. *ib.* 7; Mon. G. L. 512; Wy. 1882,40,12; Ga.<sup>a</sup> 1737; Ala. 2694; La. 148; Ariz. 1912; D. C. 746.

But not, in some states, when she has sufficient property of her own available: R.I., N.C.; Ga. 1738; La.

The husband cannot be compelled to pay such allowance unless the wife proves that she has constantly resided in the house appointed by the judge: La.

Upon an application for such temporary alimony, the merits of the cause are not in issue, except as bearing on the amount of alimony: Ga. 1740.

The amount may be made sufficient to cover the support of the family pending suit: Io.; Cal.; Nev.; Dak.; Wy.; Ga. 1741.

And if such support is allowed, the husband will not be liable for necessaries furnished them: Ga.

The court is to consider the age, sex, condition of the parties, and other matters deemed pertinent: Io. 2228.

NOTE. — <sup>a</sup> So, in these, to the husband out of the wife's estate.

§ 6266. **Attachment to Secure Alimony.** In most states, the court has jurisdiction also (1) to enjoin the libellee from conveying such portion of his property as seems necessary to secure alimony (or, in Texas, from disposing of any part of the estate): Vt. 2378; O. 5701; Kan. 80,644; Ky. 52,3,9; Tex. 2868; Nev. 220; La. 149; or (2) to preserve his estate, or compel him to give security to abide the decree: Va.\* † 105,10; W.Va.\* † 69,9; (3) to enforce the payment of costs or alimony by execution, attachment, sequestration, etc.: Mass.<sup>a</sup> 146,11; N.Y.\* Civ. C. 1772; N.J. *Divorce*, 19; Mich.\* 6235,6247; Wis. 2367; Io.<sup>b</sup> 2227; Minn.\* 62,15 and 26; 1881,28; Neb.\* 1,25,12; 1883,41; Del. 75,13; N.C.\* 1294; Ky.; Tenn. 3327; Mo. 2179; Ark. 2566; Nev. 218; Wy. *ib.* 16.

So, in several, pending suit the court may make such order in relation to the persons and property of the parties as in its discretion shall be deemed necessary or proper: Me. 60,17; R.I. 167,25; Wis. 2361; Del. 75,5; Tex. 2869; and compare § 6246.

On and after the day of service, it shall not be lawful for the husband to contract any debts on behalf of the community, nor to dispose of the lands belonging to the same: Tex. 2867. And any alienation made by him thereafter is null and void, if proved to have been made with a fraudulent intent of injuring the rights of the wife: Tex.

NOTES. — <sup>a</sup> In suits by the wife only. <sup>b</sup> See § 6265, note <sup>a</sup>.

§ 6267. **Fraudulent Transfer.** After a separation no transfer of any of his property by the husband, except *bona fide* in payment of pre-existing debts, shall pass the title so as to avoid the vesting thereof according to the final verdict of the jury in the divorce case: Ga.\* 1721.

From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same; and any alienation by him made after that time shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife: La. 150.

## Art. 628. Limited Divorce. (A) Causes and Process.

§ 6280. **Definitions.** Besides the absolute divorce hitherto mentioned, there are in many states forms of limited divorce, called *divorce from bed and board*: R.I.; N.Y.; N.J.; Pa.; Mich.; Wis.; Minn.; Neb.; Md.; Del.; Va.; W.Va.; N.C.; Ky.; Tenn.; Ga.; Ala.; La.; Ariz. 1942; D.C.

But, in other states, there is no limited divorce; and see specially: Fla. 93,3.

In some, "alimony without divorce" is in effect a limited divorce, and is so treated in this chapter: O., Ind., Kan., Fla. See also Art. 635.

This divorce is granted in all cases only on petition of the wife: Minn. 62,30.

§ 6281. **Causes.** Such divorce will or may be decreed, on the application of the injured or innocent party, for the following causes: (1) in many states, for desertion: N.Y. Civ. C. 1762; Pa.<sup>a</sup> *Divorce*, 25; O. 5702; Ind. 5132; Mich. 6229; Wis. 2357; Minn. 62,31; Neb. 1,25,7; Md. 51,13; Va. 105,7; W.Va. 69, 6; N.C. 1286; Tenn.<sup>a</sup> 3307; Fla. 93,11; La. 138; Ariz. 1953.

*In detail*, "on application of the party injured, if either party abandon the family:" N.C.; "for abandonment or desertion:" Md., Va., W.Va., La., as in § 6204; Wis.; "for utter desertion continued for two years:" Mich., Neb.; "for abandonment of the wife and refusal or neglect by the husband to provide for her:" Minn.; so, if continued one year: Fla.; "wilful desertion for one year:" Wis., Ariz.; "when the husband abandons his family or turns his wife out of doors:" Pa.,<sup>a</sup> N.C., Tenn.<sup>a</sup>

(2) In many, for cruelty: N.Y.; N.J. *Divorce*, 25; Pa.;<sup>a</sup> O.; Mich.; Wis.; Minn.; Neb.; Md.; Va.; W.Va.; N.C.; Tenn.;<sup>a</sup> Ala. 2702; Fla.; La.; D.C. 739.

*In detail*: "For extreme cruelty of either party:" N.J., Mich., Wis., Neb., Ala., Ariz.; "whether by personal violence or otherwise:" Neb., Mich., Wis.; "such cruel and barbarous treatment as to endanger life:" N.C., Pa.,<sup>a</sup> D.C.; "such indignities to the person as render his or her condition intolerable and life burdensome:" Pa.,<sup>a</sup> N.C., Tenn.,<sup>a</sup> La.; "reasonable apprehension of bodily hurt:" Va., W.Va., D.C.; as in § 6205: Wis.; "cruel and inhuman treatment:" N.Y., Minn., O., Fla., La.

(3) In several, for failure to support: Mich.; Neb.; Del. 75,1; N.C.; Tenn.<sup>a</sup>

*In detail*: "When the husband is of sufficient ability and cruelly neglects suitably to provide for the wife's support:" N.Y.; Mich.; Wis.; Neb.; Del.; Ariz.; "when either party turn the other out of doors, on application of the latter:" N.C., Tenn.;<sup>a</sup> "when his conduct is such as to render it unsafe or improper for her to live with him:" N.Y., Wis., Minn., Tenn.;<sup>a</sup> in a few, such neglect must have continued three years: Del.; one year: Ariz.

(4) In several, for adultery: Pa.<sup>a</sup> *Divorce*, 23; O.; Fla.; La.; Ariz.

*In detail*: Adultery of either party: Ariz.; if the husband live for three months in open adultery with another woman: Fla.

(5) In several, for intoxication: O., Wis., W.Va., N.C., La.

*In detail*: "When either party becomes an habitual drunkard:" N.C., La.: as in § 6206: Ind.; Wis.; W. Va. 1882,60; Ariz.

(6) "For extreme vicious conduct:" Md.

(7) For impotency existing at the time of marriage: Ariz.

(8) When the female was under fourteen at the time of marriage, which was without consent of the parents or guardians, and not voluntarily ratified by her since reaching that age: Ariz.

(9) In many, a limited divorce or alimony may be granted for any cause of absolute divorce: R.I. 167,11; Kan. 80,649; Ky. 52,3,6; Ala.; Fla. 1885, 3581.

(10) When the consent of either party was obtained by fraud or force: Ariz.

(11) For conviction of either party for felony after the marriage: O., Ind., La., Ariz.

(12) For the same general reasons (omnibus clause) as are specified in § 6213 for the same state: Ariz.

(13) For a public defamation of one party by the other: La.

(14) For an attempt of one against the life of the other: La.

(15) When either party, charged with an infamous crime, has fled from justice, on the other party's producing proofs of his guilt: La.

(16) For any "gross neglect of duty": O.

(17) When either party was under the age of consent at the time, as in § 6201,13: Del.

(18) When the husband makes a false charge of prostitution against the wife: W. Va.

(19) In Georgia, a divorce from bed and board may be granted for any cause held sufficient by the English courts prior to May 4, 1784: Ga. 1714.

(20) A divorce from bed and board may always, in one state, be decreed when an absolute divorce is prayed for, if the causes prove sufficient: Md.

So, (21) the jury may at discretion find a total or limited divorce in cases of cruelty or intoxication: Ga. 1713. "Such as renders their living together insupportable:" La.

And (22) "for such other causes as may seem to require" such divorce: R.I., Ky.

NOTE. — <sup>a</sup> On application of the husband only.

§ 6282. **Collusion, etc.** Commonly the rules in §§ 6214-6217, apply to limited divorce. So, no limited divorce can be granted for adultery when it was committed by connivance of the parties: Ariz. 1953.

**Condonation.** No limited divorce can be granted for adultery when the parties have voluntarily cohabited after knowledge of it: Ariz. 1953.

§ 6283. **Jurisdiction** to grant limited divorce is vested in the courts of the several states as follows: (1) when any husband and wife are both resident in the State: N.Y. Civ. C. 1763; Minn. 62,30; (2) when the marriage was solemnized in the State and the plaintiff is resident therein at the time of petition: N.Y.; Minn.; (3) when the marriage took place out of the State, but the parties have resided therein one year, and the plaintiff is resident therein at the time: N.Y.; Minn.

See, for other states, § 6220.

§ 6284. **Residence.** The libellant must have resided six months within the State immediately before the suit: Ariz. 1943. See § 6222 for other states.

§ 6285. **Service and Proceedings.** The proceedings are generally to be commenced and conducted as in the case of absolute divorce: Minn. 62,34; Ala. 2703. See § 6224.

They are by bill in chancery: Fla. 93,12.

§ 6286. **Evidence.** Commonly, the rules of evidence as specified in § 6225 apply: Ariz.

§ 6287. **Court.** The courts having jurisdiction of limited divorces are the same respectively as in § 6220, enumerated: Minn. 62,30; Kan. 80,649; Ariz. 6141. So, probably, in all.

§ 6288. **Trial.** The facts in a bill for alimony are to be found by a jury: Fla. 93,12. In Georgia, a divorce from bed and board requires the verdict of only one jury: Ga. 1711. For other states, see § 6227.



§ 6289. **Defences.** The defendant may prove the wife's ill-conduct in justification as a defence: N.Y. Civ. C. 1765; Minn. 62,33. So, her open adultery: Fla. 93,12. See for other states §§ 6214-7, 6228.

### Art. 630. Limited Divorce. (B) Effect.

§ 6300. **Remarriage.** After a limited divorce, in several, neither party can marry again during the life of the other: Va. 105,13; W.Va. 69,12; Ky. 52,3,8; Ga. 1732.

§ 6301. **Duration.** A limited divorce may be either forever or for a limited time: N.Y. Civ. C. 1762; N.J. *Divorce*, 5; Mich. 6229; Wis. 2357; Minn. 62,30; Md. 51,13; Va. 105,15; Tenn. 3223.

So, in others, the court may decree that the parties be perpetually separated in their persons and property: Va. 105,13; W.Va. 69,12.

§ 6302. **Status of Parties.** In a few states, persons divorced from bed and board are perpetually separated and protected in their persons and properties: Va., W.Va., Ky.

So, in two others, the widow is like a *feme sole*, as to her person, property and earnings: Mich. 6287; Ga. 1732; Fla. 93,13.

The husband is no longer liable for the wife's support: Ga.<sup>a</sup>

NOTE. — <sup>a</sup> If sufficient provision for her was made by the court decreeing the divorce.

§ 6303. **Effect of the Decree.** Except as in § 6301, the effect is like that of a decree of absolute divorce: Va. 105,13; W.Va. 69,12.

The court granting the decree may, generally, revoke it at any time thereafter. See § 6305.

§ 6304. **Absolute Divorce.** The parties already divorced from bed and board may still have a bill for absolute divorce: Md. 51,15.

When a divorce from bed and board has been decreed for desertion and five years (three years in West Virginia) have elapsed without reconciliation, the court may decree a divorce from the bond, if of opinion that it is otherwise proper, and that no reconciliation is probable: Va. 105,15; W.Va. 69,13.

§ 6305. **Reconciliation.** (See also § 6229.) Persons divorced from bed and board may be reconciled and live together as husband and wife: R.I. 167,11; Pa. *Divorce*, 25; Ga. 1734.

But they must first file in court a written agreement to that effect: Ga.

So, in others, a judgment for limited divorce may be revoked by the court at any time, upon joint application of the parties and satisfactory evidence of reconciliation: N.Y. Civ. C. 1767; Mich. 6263; Wis. 2370; Minn. 62,37; Neb. 1,25,41; Md. 51,13; Va. 105,15; W.Va. 69,13; Ky. Civ. C. 427.

§ 6306. **Real Property.** (See also §§ 6247-6252, note.\*) The effect on the property, both real and personal, of the husband and wife is, in several, the same as in absolute divorces respectively: O. 5703; Mich. 6240; Minn. 62,20; Neb. 1,25,17; Va. 105,13; Ky. 52,3,8.

The court may by decree give the wife absolute control of her separate property: Minn. 62,35.

Separation from bed and board carries with it separation of goods and effects: La. 155. All the wife's real estate is restored to her: Mich. 6287. See § 6302.

One-half the real or personal property derived by the husband through the wife is restored to her: Pa. *Divorce*, 23.

§ 6307. **Personal Property.** (See also §§ 6249, 6251, states noted.\*) Such part of her personal estate which came by her marriage to the husband is restored to her as the court deem reasonable : <sup>a</sup> Minn. 62,21 ; Neb. 1,25,18.

The personalty that the husband received by the marriage is restored to the wife : Minn. But only one half of it is so restored : Pa. *Divorce*, 28.

NOTE. — <sup>a</sup> Except as in § 6249.

§ 6308. **Special Cases.** In case of separation from bed and board, the party against whom it shall have been pronounced, shall lose all the advantages or donations the other party may have conferred by the marriage contract or since, and the party at whose instance the separation has been obtained shall preserve all those to which such party would have been entitled; even though such donations, etc., were reciprocally made : La. 156.

§ 6309. **Property of Husband.** Generally the effect upon property is the same as in absolute divorce, except that it does not bar dower, curtesy, or distributive rights : Ky. 52,3,8.

§ 6310. **Decree Refused.** By the laws of several states, in a judgment in an action for a divorce from bed and board, although such divorce be denied, the court may make such order for the custody, support, and maintenance of the wife and children by the husband or out of his property as the nature of the case may render suitable : Mich. 6262 ; Wis. 2366 ; Minn. 62,36 ; Neb. 1,25,40 ; W.Va. 1882,60.

So, in case of an action for absolute divorce, which is denied : Cal. 5136 ; Dak. Civ. C. 70.

§ 6311. **Alimony to the Wife** is in some states allowed in cases of limited divorce at the discretion of the court : N.Y. Civ. C. 1766 ; Pa. *Divorce*, 25 ; O. 5703 ; Ind. 5104 ; Minn. 62,34-5 ; Ariz. 1947, 1956. So in one other, only if the wife be the party petitioning : N.C. 1290. See also Art. 626.

As in cases of absolute divorce : Mich.<sup>a</sup> 6245 ; Wis. 2364 ; Neb. 1,25,22 ; Ala. 2703. So, of course, in states where the suit is for alimony ; see § 6280.

In Rhode Island, the court may assign the petitioner a separate maintenance out of the estate of the husband or wife, as necessary and proper : R.I. 167,12.

This alimony may be decreed without rendering a judgment of separation : N.Y. ; Mich. 6262 ; Wis. 2366.

NOTE. — <sup>a</sup> Except that alimony may be allowed upon a limited divorce even for the cause of the wife's adultery.

§ 6312. **Amount.** It may not exceed one-third the husband's income : Pa. *Divorce*, 25 ; N.C.

In others, the alimony is to be reasonable, according to the husband's [or wife's] ability : N.Y., Pa., Ind., N.C., Ariz.

Alimony may be allowed pending the suit : Minn. 62,34.

§ 6313. **Alimony to the Husband** may be allowed if he be the party petitioning for divorce : N.C. 1290.

§ 6314. **Children.** The court may make order for the custody and support of children, as in §§ 6244-5 : N.Y. Civ. C. 1760 ; O. 5703 ; Wis. 2362,2365 ; Ala. 2703 ; La. 157 ; Ariz. 1956. See also in § 6244 states so noted.\*

§ 6315. **Subsequent Adultery.** In case of the wife's adultery, committed after a limited divorce, the court may deprive her of alimony and her right of dower, and deprive her of the custody of the children : D.C. 749.

**Art. 635. Separation.**

§ 6350. **Separation in Fact: Children, etc.** (1) In several states when the parents of minor children live separately, the proper court on petition of the wife or of either parent has power to make decrees or orders concerning their care, custody, education, and maintenance: N.Y. 2,8,2,1-2; Cal. 5199,5214; Dak. Civ. C. 106; Ga. 1794; Ala. 2746. (2) In others, the court has the same power to make such decrees, upon petition of either parent, as if they were divorced: Mass. 147,36; Vt. 2389; N.J. *Divorce*, 26,28; Cal.; Dak.; Ga.

(3) So, specially upon petition of either husband or wife when the other has joined the society of Shakers, and detains the child: N.Y. 2,8,2,4.

But in Michigan, the wife is entitled to the custody of all such children under twelve, and the father to such as are over twelve; but the court may order otherwise: Mich. 6294.

So, in Nebraska, when, from any cause, a husband and wife shall separate, the wife may obtain an order of court for the custody of any child or children not exceeding twelve years of age, if she be not the offending party: Neb. 1,25,43-4.

In several, a married woman whose husband deserts her, or from intemperance or other cause fails to provide for her, or is incapacitated to do so, may in her name make contracts for her labor and that of minor children, and is entitled to her and their wages, and may sue for or recover the same in her name: Vt. 2327; O. 3111; 1884, p. 209; Wis. 2344; Mo. 3286.

When a wife, for justifiable cause, is actually living apart from her husband, the probate court may, on petition of the wife (or, in Massachusetts, her guardian if she is insane), (1) prohibit the husband from imposing any restraint upon her liberty: Mass. 147,33; (2) and make such order as it deem expedient concerning the support of the wife, the care of the minor children, their custody and maintenance: Mass.; Ct. 14,3,8.

When a husband from profligacy or other cause neglects to provide for his children, the wife has all the rights and duties of a father, may place them at work, bind them out, receive their earnings, etc., without his interference; *provided* she educate and maintain them properly; if she is unsuitable, the court may appoint a guardian: Pa. *Marriage*, 28.

When any husband and wife live separate without being divorced, or when they are divorced but no decree has been made for the custody of children, and they have a minor child, the Chancery or Supreme Court upon habeas corpus may make order for the access of the mother to her infant child at such time as it may direct; and, if the child be under seven, may order it to be delivered to the mother until it reach that age, unless she be an improper person: N.J. *Infants*, 21-22.

When a husband abandons his wife, she is entitled to the custody of their minor children, unless a court of competent jurisdiction order otherwise: Ill. 68,16; Io. 2215.

When the husband and wife live separate and apart, neither has any superior right to the custody, control, or education of the children: Cal. 5198; Dak. Civ. C. 106.

In the case of the death of any parent to whom such custody of minor children has been awarded, the custody does not revert to the surviving parent without a decree of court, and a guardian may be appointed in lieu thereof: N.J. *Divorce*, 29.

If a married man renounce the marriage covenant, or refuse to live with his wife in the conjugal relation, by joining himself to a sect forbidding marriage, the wife may petition for a proper and just division of property, real and personal, of the defendant; and she will be awarded the custody of minor children; and in such case, all gifts or grants or devises by the husband which tend to deprive his family of their support are void, and the property may be recovered back: O. 3113-7; Ind. 5132, 5134.

So if a father, wife, or widow take such action, the court may appoint a guardian for children, and make a provision for their maintenance out of such person's estate, and sales or gifts of the person will be invalid as above: Ky. 52,3,11-2.

If a father has disappeared, leaving minor children born during his marriage, the mother shall take care of them, and shall exercise all the rights of her husband with respect to their education and the administration of their estate.



But if the mother contracts a second marriage she cannot preserve the superintendence of her children but with the consent of a family meeting composed of relations or friends of the father.

There shall be appointed for the children a provisional tutor in the manner herein directed, if at the time of the disappearance of the father the mother should be dead, or if she should die before their attaining the age of majority.

The same thing shall take place if the husband or wife who has disappeared, has left minor children born of a former marriage: La. 81-5.

§ 6351. **Separate Maintenance.** In many states, if any husband (without justifiable cause: N.J., Ill., Mo.), separate himself from his wife or fail to provide her with necessary subsistence according to his means, she has a process to obtain an allowance out of his property for the support of herself and children, without a divorce: N.H. 183,3; Mass. 147,33; N.J. *Divorce*, 20; Ind. 5132,5139; Ill. 68,22; Mich. 6291; 1885,149; Kan. 80,649; N.C. 1292; Mo. 3283; Cal. 5137, *Amendment*; Wy. 1882,40,18; Ga. 1744,1746,1747.

So, in others, the guardian or next friend of any such deserted wife who is insane: N.C.; see in Part IV., Div. I.

And the court may prohibit the husband from imposing any restraint upon her liberty: Mass. So in Florida, such decree releases the wife from the husband's control: Fla. 93,13.

The court may make order concerning the care and custody of the children: Mass.; Ind.; Mich. 6293; and compare § 6350.

The wife is entitled to acquire and use separate property: Fla.

Such allowance can only be during the joint lives of husband and wife: Mich.

Such separate maintenance may also be granted (1) for any of the causes of divorce, the husband being guilty: N.H. 183,15; Kau.; (2) when the husband deserts the wife for one year: Cal.; Fla.<sup>a</sup> 93,11-12; (3) or lives in open adultery for three months: Fla.; <sup>a</sup> (4) or in cases of cruel, inhuman, and barbarous treatment: Fla.<sup>a</sup> (5) when the husband has joined a religious society professing that marriage is unlawful: N.H., O., Ind.; (6) or when he has been convicted of crime and actually imprisoned in a state prison; N.H., Ind.: (7) when he is a drunkard or spendthrift: N.C.

In Georgia, permanent alimony may be granted the wife (1) in cases of voluntary separation: Ga. 1744; (2) where, against her will, she is abandoned or driven off by the husband: Ga.

Such allowance or alimony (§§ 6350-1) may however be barred, if the husband by voluntary deed make an adequate provision for the wife's support: Ga. 1745.

If a married woman holds real estate in her right, and her husband by criminal conduct towards her or by ill usage gives her cause to live separate from him, such wife may petition the court and pray that such estate may be enjoyed by her for her sole use and benefit: Vt. 2331-2; Mo. 3292.

So, when any man has abandoned his wife for three years continuously, with total neglect of duty, she may petition the court to empower her to convey such real estate as if sole: Ct. 1885,110,61.

When any man abandons his wife, he is deemed to have abandoned his right to the custody and control of her property and the rents and income thereof; and such property immediately vests in her and is her separate estate; and she may, while so abandoned, sue or be sued, and transact business as if sole: Ct. 14,2,6; Tenn. 3348.

If a husband without sufficient cause deserts his wife, children, father or mother, so that they are received into the almshouse, the board of trustees may issue a writ of sequestration against the husband's property: Del. 48,15; see § 6608.

If the husband is under interdiction or absent, the judge may, when satisfied of the fact, authorize the wife to sue or be sued, or to make contracts: La. 132.

All proceeds of such sales or payments and other personal estate so received may be used by her for the necessary support of herself and family: Mo. 3287.

The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains: La. 123.

NOTE. — <sup>a</sup> But not in case of open adultery by the wife.

§ 6352. **Effect.** After such separate maintenance (or after such alimony, etc., granted) the husband ceases to have any power to control the wife's acquisitions by purchase, descent, gift, or otherwise: Ga. 1750; and the property of the husband set apart for her support is not subject to his debts while she lives: Ga.

And she shall hold in her own right and for her use the earnings of her minor children during any separation in this Article mentioned: N.H. 183,2; R.I. 166,23; Cal. 5169; Nev. 164; Dak. Civ. C. 83; Ga. 1756.

And she may also sell or convey real or personal estate: R.I.

So, in others, she may hold her own earnings or acquisitions to her separate use: N.H., Cal., Nev., Dak., Ga. Compare § 6422.

Free from the debts of the husband: Mo., Ga.

And at her death intestate, the same descend to her children or next of kin: Ga.

The orders specified above and in § 6353 may also be made and consequences follow, (1) when any cause exists which is, or may be if continued cause of divorce, and the wife is the injured party: N.H. 183,2; Minn. 69,5; (2) or has become insane: N.H.

Money or other property acquired by a married woman living separate from and not supported by her husband, which has been kept separate and can be distinguished from the husband's property, shall not be deemed his or taken for his debts so long as they live separately, and he fails to support her in whole or part: Del. V. 14, C. 80. But it may be taken for her debts contracted while so living apart: Del. She may sue and be sued in respect to such money or property: Del.

§ 6353. **Powers of Wife Separated.** (A) When a husband abandons his wife (and except in Minnesota, New Mexico, leaves the State, and is absent therefrom) one year without providing for the support of his family; or where he is imprisoned in the penitentiary (except in New Mexico); the wife may get an order of court authorizing her to manage, sell, or incur the property of the other as shall be necessary in the judgment of the court for the support of the family and the purpose of paying debts of the other or debts contracted for the support of the family: Ill. 68,11; Io. 2207; Minn. 69,5; Dak.<sup>a</sup> Civ. C. 85; N.M.<sup>a</sup> 1090.

So, *mutatis mutandis*, the husband, when deserted by the wife: Ill., Io., Minn., Dak., N.M.<sup>a</sup>

The same process may be had in any case where there would be cause for divorce: Minn., N.M.

(B) When a husband (1) abandons his wife or (2) is separated from his wife, (in New Jersey), not making a sufficient provision for her maintenance (or, in Indiana, Michigan, Kentucky, when he is sentenced to confinement in the state prison); the wife, if of age, may get an order of court authorizing her (1) to sell and convey or lease her real estate, and to sell or dispose of any remaining personal estate which came to her husband through her or through the marriage: R.I. 166,23; N.J. 1878,223; Mich. 6264,6275; Ky. 52,2,5; Ore. 35,5; and also (2) authorizing any person owing or holding any money or personal estate to which the husband is entitled in her right, to pay and deliver the same to her upon her personal receipt: Ind. 5133; Mich. 6265; Ky. 1874, Feb. 13.

Any married woman who is living separate from the husband by virtue of any decree of court founded upon her application, may sell, convey, or transfer any estate or interest she may have in any real estate as if sole (but this does not apply to real estate that came to her by gift of the husband: N.J.): N.J. *Married Women*, 6 and 18; Minn.

All the proceeds of such sales, and all moneys and personal estate which shall come to the hands of the wife under this article, may be used and disposed of by her during the absence of the husband as her own property in the same manner as if unmarried: Mich. 6266.

(C) In several, a married woman whose husband has absented himself from the State, not sufficiently maintaining her, has a process in court to enable her to sell, receipt for, and convey her real or personal estate, and any personal estate which may have come to the husband by reason of the marriage, or to which he is entitled in her right; and she may use and dispose of such property or the proceeds during his absence as if unmarried; and the authority so obtained continues until he returns and claims his marital rights: Mass. 147,31; Me. 61,7-8; Vt. 2329-30; Ind. 5132.

So, *mutatis mutandis*, when the husband has been sentenced to confinement in prison: Mass.; Me.; Vt. 2334; Ind.

(D) Any married woman whose husband is not, and has not for one year been, residing in the territory *bona fide*, may, if of full age, convey her real estate as if sole, affidavit of the husband's absence being made by two witnesses at the time of acknowledgment: Ida. 1874-5, *Conveyances*, 2-3. Any married woman living in separation from her husband and entitled by decree of any court to alimony, etc., may, by her deed to him or any other person, release or bar her dower in any lands whereof her husband may be seized: N.J. *Married Women*, 17.

And in such case (§ 6350) she has a process to obtain an order of court vesting her with all the rights, privileges, and liabilities of a *feme sole* as to the acquiring, holding, and disposing of property real and personal, making contracts, being liable thereon, and suing and being sued thereon in her own name: Vt. 2328; O. 3111; 1884, p. 209.

But after such order, the husband is not liable upon a contract so made by her, or for a tort by her committed: Vt.

And she may further transact business in her own name as a sole trader; and apply her earnings and profits to her support and that of her children, free from the interference or control or the liabilities of the husband: Pa. *Feme Sole, etc.*, 5; *Marriage*, 27; Wis. 2344; W.Va. 122,13.

If a husband, being a mariner or at sea, stays away so long without making provision for his wife and children that they are likely to become chargeable on the town; or if any husband lives in adultery with another woman; and refuses or neglects within seven years to return; his lands and estate are liable to execution for debts contracted by the wife or guardian of the children for their maintenance: Pa. *Feme Sole Traders*, 4.

If the husband disappears, as in § 2510, the wife has all the powers of a *feme sole* to make contracts and execute deeds, after an administrator (§ 2511) has been appointed: Ind. 2234.

Any woman may so be authorized to make contracts under seal or otherwise in her own name: Mich. 6267.

She may, if so authorized, make deeds and other instruments in her own name, and do all other acts necessary and proper to carry into effect the powers so granted to her: Mich. 6268.

When a husband abandons his wife, or fails to support her, she may be authorized (1) to sell and convey her real estate and any personal estate which came to the husband by reason of the marriage and remains in the State undisposed of: Mo. 3284; (2) and to receive and receipt for such moneys or personal estate held by third persons: Mo. 3285.

Any woman living separate from her husband may receipt for, convey, mortgage, lease and devise her real and personal estate as if sole: N.J. 1880,62; W.Va. 65,6; 122,3; Tenn. 3344, 3346.

NOTE. — <sup>a</sup> As to her own property only.

§ 6354. **Cessation.** The power so granted continues (1) until the husband returns, or is released, and claims his marital rights: Mich. 6269,6275; Ky. 52,2,5; Ore.; (2) or the order of court is set aside on the application of such absent party: Dak. Civ. C. 85 c.

All contracts lawfully made by any married woman by virtue of such power (see below) shall be binding on her and her husband in like manner as if their marriage had taken place after the making of such contracts; and she shall, during the absence of her husband from the State, be liable to be sued thereon as if unmarried: Ill. 68,12; Mich. 6270; Io. 2208; Ore.; Dak. Civ. C. 85 b.



She shall also be liable to be sued in like manner for all other acts done or liabilities incurred by her during the continuance of the power so granted to her: Mich. 6271; Io.; Ore.; Dak.

The decree bars her [or him] from all rights or estate by curtesy, dower, or otherwise in the lands of the other: Minn. 69,5; N.M.

§ 6355. **Property and Liabilities of Husband.** Any married man living separate from his wife under a judgment or decree of court founded on his application may convey, mortgage, lease, etc., any interest or estate in real property except such as came to him by gift from or through the wife, in the same manner and with the same effect as if unmarried: N.J. *Married Women*, 16.

During such separation without his fault the husband is not liable for debts (but if with or for his fault, he remains liable, in Delaware): N.J. *Divorce*, 20; Del. V. 14, C. 80; Mo. 3283; Ga. 1750. If they again cohabit, he is responsible for all debts incurred during their separation: Del. So, he is not liable for any such debts, until she offer to return: Nev. 173.

And until such allowance or settlement (§ 6351), the husband is liable for support and necessities furnished to her and the children in her custody: Ga. 1749. But the husband is not so liable, if the wife be actually living in adultery: Ga. And such liability of the husband may be terminated by notice: Ga. But no notice shall relieve him from liability, if his wife is separated from him for cause of his own misconduct: Ga. When a wife is in fact separated from the husband (without any decree or order of court), the husband remains bound for necessities furnished to the wife, as in ordinary cases (Art. 640): Ga. 1758.

When the husband stays away so long that his family are like to become a charge to the town, or lives in adultery with another woman and refuses to return, his real estate is liable for any debts incurred by the wife for necessary support of the family: Pa. *Feme Sole*, etc., 4.

A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him: Cal. 5175; Nev. 173; Dak. Civ. C. 85. Nor is he liable for her support when she is living separate from him by agreement, unless so stipulated therein: Cal., Dak.

§ 6356. **Suits.** When the husband has deserted or separated from the wife, or neglected or refused to support her, as above, she may protect her reputation by suit for slander or libel: Pa.<sup>a</sup> *Marriage*, 35; Ga. 1755; and may sue to recover (enforce any contract relating to: Ga.) her separate earnings or property: Pa.<sup>a</sup> She may also sue for torts to her person: Ga.; and for torts to her children: Ga.; but if her husband be the defendant, she must sue by next friend: Pa.<sup>a</sup>

So, it seems, in others, a woman living separate as above may sue or defend any cause without joining the husband: R.I. 166,23; N.J. *Practice*, 24; Mich. 6267; W.Va. 122,12; Ky.; Cal. 10370; Nev. 175; Wash. 6; Dak.<sup>b</sup> C. Civ. P. 185; Mon. Civ. C. 7; Ga. 1774. So, if separated by agreement in writing: Cal., Ida., Uta.

When a husband (or wife: Ill., Io.) has deserted his family, the wife (or the husband) may prosecute and defend in his (or her) name which he (or she) might have prosecuted: Pa.<sup>c</sup> *Marriage*, 21 and 23; Ill. 68,3; Io. 2564; Minn. 66,35; Ky. Civ. C. 34; Tenn. 3505; Ark.<sup>d</sup> 4953; Ala. 2901. See also § 6352.

No such suit is abated by the husband's return: Ore. 35,6.

When the husband has deserted his family, the wife may prosecute or defend any action which she might have prosecuted or defended if sole: Pa. *Marriage*, 23; Ark. 4953; Ida. C. Civ. P. 185; Uta. Civ. C. P. 227. So, *vice versa*, the husband, if the desertion is by the wife: Ill.

NOTES. — <sup>a</sup> So, also a woman divorced from bed and board; or <sup>b</sup> separated by mutual written agreement. <sup>c</sup> *i. e.*, she may be sued, as to debts for necessities, the husband having been absent a year; and may sue upon all obligations or any cause of action, whether he be absent a year or not. <sup>d</sup> Applies to the case when there are children born.

§ 6357. **Wives of Aliens, etc.** (Compare § 6430.) In a few states, when a married woman comes into the State without her husband (in several, when she has so resided in the State six months: N.H., or in Rhode Island, one year; he never having lived with her in the State: Mass., Me., R.I., Mich., Ky.), she may acquire,

hold, and convey real and personal estate (transact business: Mass., R.I., Mich.), (make contracts: Mass., Me., R.I., Mich., Ky.), (sue and be sued in her own name: Mass., Me., R.I., Mich., Ky.), (dispose of her property in the State: Mass., Me., R.I., Mich.), (have the exclusive care and guardianship of minor children living with her: N.H., R.I.; and their earnings, to be expended as if the husband were dead: N.H.), (execute deeds and other instruments in her own name: R.I.), (and has all the rights and powers of a sole trader: Mass., R.I.), as if unmarried: N.H. 183,4; Mass. 147,29; Me. 61,10; R.I. 165,1-4; Mich. 6283; Ky. 52,2,10.

Such woman may be sued as if unmarried upon all contracts or for all other acts made or done by her since her arrival in the State (or since the expiration of such year, respectively): R.I.; Mich. 6284.

She may execute deeds and other instruments in her own name: R.I., Mich.; and do all other acts necessary or proper to carry into effect these powers: R.I., Mich. *Except* that such woman may not contract another marriage: N.H. Or sue or be sued for breach of such a contract: N.H.

If her husband also become a citizen of the State, and they cohabit, the same effect follows as to the business and contracts of the wife as if the marriage had then been first solemnized; N.H. 183,5; Me. 61,10; R.I. 165,5; Mich. 6285.

If such a woman with husband out of the State obtain a divorce therein, or the husband obtain one elsewhere, she retains the custody, etc., of the minor children living with her: N.H. 183,6; R.I. 165,6. Unless the court order otherwise, she not being of good moral character. R.I. 165,7. And may keep her separate earnings and property: R.I.

So, the court may appoint a guardian for such children: R.I. 165,8. See Part IV., Div. 1.

No person can take from her the custody of such child, or remove it from the State against her consent: N.H. 183,7.

**§ 6358. Effect upon Property after Death, etc.** No husband who shall have, for one year previous to the wife's death, neglected wilfully, or refused to provide for her, or wilfully deserted her, shall have the right to claim any share in her real or personal estate, under curtesy or intestate laws: Pa. *Marriage*, 27. So, the decree mentioned in § 6353 bars all rights of the party defendant to dower, curtesy, etc., in the lands or personalty of the other: Minn., N.M. See § 6354.

**§ 6359. Louisiana Law. Of the Separation of Property Prayed for by the Wife during Marriage.** The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

The neglect to reinvest the dotal effects of the wife, in cases where the law directs such reinvestment, is also sufficient cause for the wife to demand a separation of property.

The wife must petition for the separation of property, and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration.

Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves.

The separation of property although decreed by a court of justice, is null, if it has not been executed by the payment of the rights and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can meet them, or at least by a *bona fide* non-interrupted suit to obtain payment.

The separation of property, obtained by the wife, must be published three times in the public newspapers, at farthest, within three months after the judgment which ordered the same.

If there be no paper published in the place where the judgment is rendered, the publication must be made in that which is published in the place nearest to it.

The wife who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains which has existed till that time, if it be her interest so to do, and upon her contributing, in case of acceptance, to pay the common debts.

She retakes, also, her dowry and all she brought in marriage, or which she acquired separately during the marriage by inheritance or otherwise.

The separation of property does not impart to the wife any of the rights of a surviving wife; but she preserves the right of exercising them, in case of the death of her husband.

The judgment which pronounces the separation of property, is retroactive as far back as the day on which the petition for the same was filed.

The personal creditors of the wife cannot, without her consent, petition for a separation of property between her and her husband.

Nevertheless, in case of the failure or discomfiture of the husband, they may exercise the rights of their debtor to the amount of their credits.

The creditors of the husband may object to the separation of property decreed and even executed with a view to defraud them. They may even become parties to the suit for a separation of property, and be heard against it.

The wife, who has obtained the separation of property, must contribute, in proportion to her fortune and to that of her husband, both to the household expenses and to those of the education of their children.

She is bound to support those expenses alone, if there remains nothing to her husband.

The wife separated in property has again the free administration of her estate. She may dispose of her movable property and alienate the same. She cannot alienate her immovable property without the consent of her husband, or, if he should refuse it, without being authorized by the judge.

Whenever a marriage shall have been contracted in this State, and the husband, after such marriage, shall remove or shall have removed to a foreign country with his wife, if the husband shall behave or have behaved towards his wife in said foreign country in such a manner as would entitle her, under our laws, to demand a separation of property, it shall be lawful for her, on returning to the domicile where her marriage was contracted, to institute a suit there against her husband for the purposes above mentioned, in the same manner as if they were still domiciliated in said place. In such cases an attorney shall be appointed by the court to represent the absent defendant; the plaintiff shall be entitled to all the remedies and conservatory measures granted by law to married women, and the judgment shall have force and effect in the same manner as if the parties had never left the State: *La. 2425-2437.*

#### CHAPTER IV.—HUSBAND AND WIFE.

##### Art. 640. Liabilities of Husband.

§ 6400. **Note.** For the liabilities and distribution of the husband's estate after his death, see Div. I., T. 3, Chaps. 4 and 5; after Divorce, see the last chapter.

§ 6401. **General Principles.** The laws of a few states enact that the husband is the head of the family, and the wife is subject to him: Cal. 5156; Dak. Civ. C. 56; Ga. 1753; N.M. 988.

Her legal civil existence is merged in that of the husband, except so far as the law recognizes her separately, either for her own protection, her own benefit, or the preservation of public order: Ga.

The husband is bound to support his wife (see Part V. and §§ 6608, 6637): Mass. 1885, 176; Ct. 1877, 114, 1-2; Cal.; Dak.; Ga. 1757; N.M.

He owes her fidelity, favor, and protection: N.M. "He should make her a participant in all the conveniences he enjoys:" N.M. "He should show her the utmost and every attention in cases of sickness, misfortune, or accident, and provide for her the necessities of life according to his condition or ability:" N.M. The wife owes fidelity and obedience to the husband: N.M. She is obliged to live with him: N.M. In many states, it is made a penal offence for the husband to abandon his wife or not to support her according to his means. See in Part V.

Neither the husband nor wife can remove the other or their children from their homestead against the other's consent (unless such husband or wife owning the homestead provide another suitable homestead in good faith: Ill.): Ill. 68, 16; Io. 2215.



Neither husband nor wife is entitled to recover any compensation for labor performed or services rendered for the other, whether in the management of property or otherwise : Vt. ; Ill. 68,8 ; Wis. See § 6422.

The husband and wife contract towards each other obligations of mutual respect, assistance, fidelity, and support : Cal. 5155 ; Dak. Civ. C. 75 ; La. 119. The husband may choose any reasonable place or mode of living, and the wife must conform thereto : Cal., Dak.

The wife is bound to live with her husband, and to follow him wherever he chooses to reside ; the husband is obliged to receive her, and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition : La. 120.

The wife cannot appear in court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband : La. 121.

The wife must support the husband, when he has not deserted her, out of her separate property when he has no separate property, and there is no community property, and he is unable from infirmity to support himself : Cal. 5176 ; Nev. 174 ; Dak. Civ. C. 77.

In New Mexico, the husband and wife have a process in court to compel the other to fulfil the duties above specified : N.M. 989,990.

§ 6402. **Pre-existing Debts of the Wife.** (A) A husband, or his separate property, is not in general liable for the debts of the wife contracted before her marriage : Me. 61,4 ; Vt. 1884,140,3 ; N.J. *Married Women*, 10 ; Pa. *Deeds*, 104 ; O. 3110 ; 1884, p. 209 ; Ill. 68,5 ; Wis. 2346 ; Io. 2203,2212 ; Minn. 69,3 ; Neb. 1,53,7 ; Md. 1880,253 ; Va. 1875, 359,3 ; N.C. 1822 ; Ky. 52,2,4 ; Tenn. 3342 ; Mo. 1881, p. 161 ; Cal. 5170 ; Ore. 1878, p. 93, § 8 ; Nev. 166 ; Wash. 2405 ; Dak. Civ. C. 83 ; Ida. 1874-5, p. 637,13 ; Wy. 82,6 ; S.C. 2037 ; Ga. 1753 ; Ala. 2704 ; Fla. 150,7 ; La. 2398 ; N.M. 1089 ; Ariz. 1979.

The same would follow, in other states, from §§ 6411-2: N.Y., Ind., etc.

(B) So, in many, he is not liable on any cause of action against the wife which originated prior to the marriage : N.H. 183,18 ; Mass. 147,9 ; Ct. 19,5,9 ; Io. ; N.C. ; Mo. And the same would probably follow from A, above.

(C) But the husband is, in a few, liable for such debts (1) to the extent of any property acquired from the wife by antenuptial agreement : N.Y. 1853,576,2 ; W.Va. 122,11 ; (2) to the extent of any property received by him from or through the wife : Ind. 5125 ; Ky. ; Mo. ; Col. 2273 ; Ga.

Such liability is not extinguished by the wife's death : Ind. 5126 ; Col. 2274.

§ 6403. **Present Debts.** (A) As a general principle, the husband is not liable for any separate debts of the wife contracted after marriage : Me. 61,4 ; N.J. *Married Women*, 10 ; Pa. *Marriage*, 34 ; O.<sup>a</sup> 3110 ; 1884, p. 209 ; Ill. 68,5 ; Io. 2203, 2212 ; Minn. 69,3 ; N.C. 1824 ; Ore. 1878, p. 93, § 8 ; S.C. 2037 ; N.M. 1089 ; D.C. 730.

So, specially, he is not liable on her contracts made (1) in respect to her separate property, trade, business, labor, or services : Mass.<sup>b</sup> 147,10 ; Ct.<sup>c</sup> 19,5,9 ; N.Y.<sup>a</sup> 1860,90, 8 ; Ind. 5122 ; Mich. 6298 ; Ark. 4626 ; Ariz. 1963 ; (2) or for her benefit or that of her family : Ct.,<sup>c</sup> S.C.

So, he is not generally liable on any judgment (1) recovered against the wife alone : Mass. 147,9 ; Ark. 4628 ; (2) or for costs in a suit brought or defended by her : Ark. See Part IV.

But his consent is presumed to her agency in all purchases of necessities suitable for her condition, made for the use of herself and family : Ga. 1757. This presumption may, however, be rebutted by proof : Ga.

So, he is bound for necessities as at common law : Minn., Ky., N.M.

"If the husband neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with articles necessary for her support, and

recover the reasonable value thereof from the husband : " Cal. 5174 ; Nev. 172 ; Dak. Civ. C. 84.

The husband's property is to be applied first to satisfy any joint liability of the husband and wife for the support of the family ; and the wife is entitled in equity to an indemnity for property of her own taken for such purpose : Ct. 1877,114,2.

NOTES. — <sup>a</sup> Except to the extent of her separate property coming to him by reason of the marriage or under marriage contract. <sup>b</sup> But the husband is bound, unless she comply with the provisions of Art. 652. <sup>c</sup> If such contract was made upon her personal credit. <sup>d</sup> Except as to property coming to her by gift of such husband.

**§ 6404. Torts.** (A) A husband is not generally liable for torts committed by his wife except (1) under his actual coercion : Vt. 1884,140,3 ; Ct. 19,5,9 ; so, (2) when he would be liable even if the relation of marriage did not exist : Me. 61,4 ; O. 3110 ; 1884, p. 209 ; Ind. 5120 ; Ill. 68,4 ; Mich. 7714 ; Io. 2205 ; Ore. 1878, p. 92, § 4 ; Wash. 2402. See also *Execution*, Part IV.

" Neither husband nor wife, as such, is answerable for the acts of the other : " Dak. Civ. C. 83.

(B) But a person is generally liable for torts committed by his wife, child, or servant by his command, or in the prosecution and within the scope of his business, whether voluntary or by negligence : Ga. 2961. See also in Part IV.

And every husband living with his wife is jointly liable with her for all damages accruing from any tort committed by her, and costs : N.C. 1833.

And " nothing in this chapter is to be construed to exempt a husband from liabilities for torts committed by his wife : " Minn. 69,6 ; N.M. 1091.

A person may generally recover for torts committed against his wife, child, ward, or servant. See in Part IV.

## **Art. 641. Liabilities of the Wife.<sup>a</sup>**

**§ 6410. Debts of Husband.** (A) A wife is not generally liable (nor is her separate property liable) for the debts of her husband (and see § 6420) ; Mass. ; Vt. 1884,140,2 ; Ct. 1877,114,1 ; N.J. *Married Women*, 15 ; Pa. *Marriage*, 37 ; Ill. 68,5 ; Io. 2203,2212 ; Minn. 69,3 ; Md. 51,19 ; N.C.<sup>a</sup> ; Tenn. 3341 ; Mo. 3295 ; Ark.<sup>b</sup> 4633 ; Cal. 5171 ; Ore. 1878, p. 93, § 8 ; Nev. 163 and 167 ; Wash. 2405 ; Dak. Civ. C. 83 ; Ida. 1874-5, p. 635, § 5 ; Fla. 150,1 ; N.M. 1089.

So, in Virginia, as to his debts contracted before marriage : Va. 1875,359,1.

(B) The separate property of the wife (Art. 642) is not bound by any judgment or execution against the husband : Mass. 147,8 ; Vt. 2323,2324 ; Md. 51,19 ; Ky. 52,2, 2 ; Mo. 3295 ; Dak. C. Civ. P. 439 ; Mon. G. L. 866 ; and see Part IV. —

Nor does such judgment bind his curtesy or other interest in her real estate : Pa. *Marriage*, 18 ; Ky. ; Tenn. 3338 ; Mo. Nor the rents and profits of such her real estate : Ky., Mo., Ore., Dak. Nor the proceeds thereof, if sold : Mo. Compare § 6423.

(C) But both husband and wife are equally liable for the expenses of the family and the education of the children, and either or both may be sued : Ct. 1877,114,2 ; Ill. 68,15 ; Io. 2214 ; Ore. 1878, p. 94, § 10 ; Wash. 2407 ; Ala. 2711 ; 1881,41 ; N.M. 1089.

The wife is liable for necessities procured for the use and benefit of herself and her children under eighteen : Mon.

A debt for necessities furnished to the family may, in a few states, be enforced against the wife's property, after an execution against the husband is unsatisfied : Pa. *Marriage*, 15 ; Ala. 2712.

So, a judgment or execution against the husband (1) for a debt due for necessities furnished to the wife or the family, may be enforced against her separate property, real

or personal: Vt. 2324; Mo. 3295-6; Ark. 4624. (2) So, a judgment, etc., for labor or materials furnished in the cultivation or improvement of her separate property: Vt., Mo.

NOTES. — <sup>a</sup> See § 26. <sup>b</sup> As to debts contracted or damages incurred by the husband before marriage.

§ 6411. **Her Own Debts.** (A) Debts of the wife contracted before marriage may be enforced against her and her separate property after the marriage: Me. 61, 4; R.I. 166,15; Ct. 19,5,9; N.Y. 1853,576,1; N.J. *Married Women*, 12; Pa. *Deeds*, 104; Ind. 5127; Mich. 6288; Wis. 2346; Minn. 69,2; Md. 1880,253; Del. V. 14,550,2; Va. 1875,359,3; W.Va. 122,10; N.C. 1823; Ky. 52,2,2; Tenn. 3342; Mo. 3296; Cal. 5171; Nev. 167; Col. 2275; Dak. Civ. C. 83; Ida. 1874-5, p. 637,13; Wy. 82,7; Ala. 2704; Fla. 150,7; N.M. 1088; Ariz. 1979.

And a judgment may be recovered against her in her name: Me., Del. Or against the husband and wife jointly: Me.

But in others, the action must be brought against the husband and wife jointly: R.I. 166,16; N.Y.; Ind.; Md. 1880,253; Va.; W.Va.; Col.; Wy. So, the husband must be served with the summons: N.C. 1824.

The judgment may, however, be enforced, as before, only against her separate property: Me., N.Y., Ind., Md., Va., W.Va. N.C., Col., Wy.

§ 6412. **After Marriage.** (A) Debts of the wife contracted by her (or in her name, with her authority: Pa.) after marriage may be enforced against her and her separate property: Me. 61,4; R.I. 166,15; Ct. 19,5,9; 1877,114,2; N.J. *Married Women*, 10; Pa. *Deeds*, 104; O. 5319; 1884, p. 65; Minn.; N.C.<sup>a</sup> 1824; Cal. 5171; Nev. 167; Wash. 2406; Dak. Civ. C. 83; N.M. 1088; D.C. 730.

And a judgment may be recovered against her in her name: Me.; R.I. 166,16; O.

Or she may be sued jointly with the husband: Me.; R.I.; Md. 51,20; Ala. See § 6455.

So, a copy of the summons must be served on the husband: N.C. But she cannot be arrested: Me. 61,5. See in Part IV.

(B) So, in several states, the contracts made by a married woman in respect to her separate property, trade, business, labor, or services are binding on her and her separate property as if sole (see also Art. 652): Mass. 147,10; Ct. 1877, 114,1; N.Y. 1860,90,8; Ind. 5123; Mich. 6298; Wash.; Ala. 2711; 1881,41; Ariz. 1963. See also § 6482; and § 1974.

So, in others, all contracts contracted by her upon her personal credit for her benefit or that of the family: Ct. She may contract debts for necessities furnished herself or children (N.Y. 1860,90,1; Ky.), and for all expenses incurred for the benefit of her separate property, and is sued therefor as in § 6455: Pa. *Marriage*, 15; Tex. 2854. See also § 6410.

Such debts, to bind her real estate, must be evidenced by writing signed by her: Ky.

NOTE. — <sup>a</sup> When the husband and wife both joined in such debt or contract.

§ 6413. **Judgments recovered against the wife may be enforced against her separate property, as if she were sole:** Vt. 1884,140,1; O. 5319; 1884, p. 65; Ark. 4630; and see §§ 6411,6412; and in Part IV.

§ 6414. **Torts of the Wife.** A married woman with her separate property is liable for torts committed by her (if not under the husband's coercion: Ct.): Me. 61,4; Ct. 19,5,9; Ind. 5120; Ill. 68,4; Io. 2205; Minn. 69,2; Wash. 2402; N.M. 1088. See also § 6404.

If under his coercion, they are jointly liable (compare § 6404, A 1): Ind. 5121.



So, in others, a judgment against the husband for the wife's tort must first be enforced against her separate property : Pa. *Deeds*, 104 ; Wy. 82,8.

§ 6415. **After Death.** (See also in the Probate Code, Part IV., Division I.) In Maine, the administrator of a deceased married woman whose husband survives may pay (1) all reasonable expenses of her last sickness : Me. 61,11 ; (2) all debts contracted by her for the benefit of herself or her family for which credit was given her, and for which her husband is not liable or able to pay : Me. 64,60.

## Art. 642. Property of the Wife.\*

§ 6420. **Property Possessed at Marriage.** (A) **The Real Property** of a woman, upon her marriage, remains, in all states, her separate property : N.H. 183,1 ; Mass. 147,1 ; Me. 61,1 ; Vt. 2324 ; R.I. 166,1 ; Ct. 1877,114,1 ; N.Y. 1848,200,1-2 ; N.J. *Married Women*, 1-2 ; Pa. *Deeds*, 104 ; *Marriage*, 13 ; O. 3108 ; 1884, p. 209 ; Ind. 2488,5116 ; Ill. 68,9 ; Mich. 6288,6295 ; Wis. 2340, 2341 ; Io. 2202 ; Minn. 69,1 ; Kan. 62,1 ; Neb. 1,53,1 ; Md. 51,19 ; Del. V. 14, 550,1 ; V. 15,165,1 ; Va. 1875,3259,1 ; 1877,329,1 ; W.Va. 122,1-2 ; N.C. 1840 ; Ky. 52,2,1 ; Tenn. 3343 ; Mo. 3295 ; Ark. 4621 ; Tex. 2851 ; Cal. 5162 ; Ore. 1878, p. 92, § 1 ; Nev. 151 ; Col. 2266 ; Wash. 2400 ; Dak. Civ. C. 78 ; Ida. 1874-5, p. 635,1 ; Mon. G. L. 866 ; Wy. 82,1 ; Uta. C. Civ. P. 569 ; S.C. 2035 ; Ga. 1754 ; Ala. 2705 ; Miss. 1167 ; Fla. 150,1 and 3 ; La. 2334 ; N.M. 1087 ; Ariz. 1960, 1967 ; D.C. 727.

Free from the interference or control of her husband : N.H. ; N.Y. ; N.J. ; Pa. ; O. 3109, *ib.* ; Ind. 5117 ; Wis. ; Minn. ; Kan. ; Neb. ; Md. ; Del. ; Va. ; W.Va. ; Ky. ; Ark. 4624 ; Col. ; Wy. ; Miss. ; Fla. ; D.C.

Not liable for his debts : Vt. ; R.I. ; Ct. ; N.Y. ; N.J. ; Pa. ; O. ; Ind. ; Mich. ; Wis. ; Minn. ; Kan. ; Neb. ; Md. ; Del. ; Va. ; W.Va. ; N.C. ; Ky. 52,2,2 ; Tenn. ; Mo. ; Ark. ; Ore. ; Col. ; Wash. ; Ida. *ib.* 5 ; Civ. C. 439 ; Mon. ; Wy. ; S.C. ; Ga. ; Ala. ; Miss. ; Fla. ; Ariz. ; N.M. ; D.C. See § 6410.

So, the earnings of the wife are not liable for the debts of the husband : Cal. 5168 ; Dak. Civ. C. 83. See § 6424.

(B) So, in most states, the personal property of a woman, upon her marriage, remains her sole and separate property : N.H. ; Mass. ; Me. 61,2 ; R.I. ; Ct. ; N.Y. 1860,90,1 ; N.J. ; Pa. ; O. ; Ind. 2488 ; Ill. ; Mich. ; Wis. ; Io. ; Minn. ; Kan. ; Neb. ; Md. ; Del. ; Va. ; W.Va. ; N.C.<sup>a</sup> ; Tenn. 3341 ; Mo. 3296 ; Ark. ; Tex. ; Cal. ; Ore. ; Nev. ; Col. ; Wash. ; Ida. ; Mon. ; Wy. ; Uta. ; S.C. ; Ga. ; Ala. ; Miss. ; Fla. ; La. ; N.M. ; Ariz. ; D.C.

(C) Every married person has the same right and liberty to acquire, hold, enjoy, and dispose of every species of property as if unmarried : Wash. 2396.

(D) But in Connecticut, all the personal property of any woman, whether acquired by her before or after marriage, and the proceeds thereof, if sold, vest in the husband ; but in trust (1) to receive and enjoy the income during his life, subject to the duty of expending so much as may be necessary for the support of the wife during her life and the children during their minority, and to apply any part of the principal thereof which may be necessary for the support of the wife or otherwise with her written assent ; (2) and upon his decease, the remainder of such trust property shall be transferred to the wife, if living ; otherwise, as the wife may by will have directed ; or in default thereof, to those entitled by law to succeed to her intestate estate ; but if the husband shall have paid liabilities incurred by her before marriage, a court of equity, on application, may discharge the said trust, and vest absolutely in him such portion of said property as may be equivalent in value to the amount of the liabilities so paid : Ct. 14,2,3.

§ 6421. **Rights of Husband and Wife.** (A) In some states, a husband acquires by marriage no rights whatever to any property of the wife, real or personal : Me. 61,2 ; Ct. 1877,114,1 ; Io. 2203. So, conversely, of the wife : Ct. So, as to the wife's real property and chattels real : Ky. 52,2,1. Neither husband nor wife has, in general, any interest in the property of the other : Cal. 5159 ; Nev. 168 ; Dak. Civ. C. 78.

*Except* (1) "the use thereof : " Ky. (2) And he has power to rent the real estate for not more than three years at a time, and to receive the rent : Ky. (3) Except as to descent, curtesy, dower, etc. : Ct.

So, in others, the provisions of § 6420 do not affect his tenancy by the curtesy : R.I. 166,14 ; Md. 51,20 ; Del. V. 12,572,1 ; and see Art. 330.

(B) But in several, he has the management and control of all the wife's separate property (compare § 6427) : Tex. 2851 ; Ida. *ib.* 6 ; Ala. 2706 ; Fla. 150,3 ; Ariz. 1972. For sales, see Arts. 647,650.

But should he fail or refuse properly to support her and educate her children from the proceeds of her lands, she has a process in court to obtain an allowance : Tex. 2856.

No judgment suffered by a husband, or feoffment or conveyance made by him of the wife's real estate operates as a discontinuance, or impairs her right of action or entry after his death : Ky. 63,1,4. And see in Part IV., *Ejectment* ; and compare § 1404.

The husband has power to receive any property coming to his wife, and his receipt therefor is a full discharge in law and equity : Ala. 2710.

(C) **Reduction to Possession.** §§ 6420,6422 do not, however, in Missouri, apply so as to affect the husband's title to personal property reduced to his possession with the express assent of the wife : Mo. 3296. But it shall not be deemed to have been so reduced by the husband by his use, occupancy, or care thereof, and it shall remain the wife's property, unless, by the terms of a written assent, full authority has been given by her to him to sell or dispose of the same for his own use and benefit : Mo.

The fact that a married woman permits her husband to have the custody and control of her separate property is not of itself sufficient evidence that she has relinquished her title to it ; but in such case the husband is presumed to act as her agent or trustee : Ark. 4637. This presumption may be rebutted by evidence establishing a sale or gift of such property by the wife to the husband : Ark.

And no husband who during the marriage (the wife not being a free trader) has received, without objection on the wife's part, the income of her separate estate, is liable to account for the same for a longer time than the year next preceding her decease, or her suit for the same ; N.C. 1837.

When any sale is made by the wife of her separate property for the benefit of the husband, or where he shall have used the proceeds of such sale with her consent in writing, it is deemed a gift ; and neither she nor those claiming under her have any right to recover the same : Ida. *ib.* 7 ; Ariz. 1973.

The husband is not required to account to the wife, her heirs or representatives, for the rents, income, and profits of her separate estate ; but they are not subject to his debts : Ala. ; Fla. 150,5.

He is debtor to the wife for her property or its rents and profits received by him, but not for more than one year from the receipt of the same ; and if permitted by the wife to use the same for the support of the family, he is not accountable therefor : Miss. 1176.

§ 6422. **Property Acquired since Marriage.** (A) All real property acquired after marriage by the wife either (1) by devise or descent (N.H., Me., Vt., R.I., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis.,<sup>a</sup> Io., Kan., Neb., Md., Del., Va., W.Va., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., Wash., Ida., Mon., Wy., S.C., Ga., Fla., La., N.M., Ariz.) ; (2) by purchase (N.H., Me., Vt., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis.,<sup>a</sup> Io., Neb., Md., Del.,<sup>a</sup> Va., W.Va.,<sup>a</sup> Tenn., Mo., Ark., Wy., S.C., Ga., Fla., N.M.) ; (3) or by gift (N.H., Me., Vt., N.Y.,<sup>a</sup> N.J., Pa., O., Ind.,

Ill., Mich., Wis.,<sup>a</sup> Io., Kan.,<sup>a</sup> Neb.,<sup>a</sup> Md.,<sup>a</sup> Del.,<sup>a</sup> Va., W.Va.,<sup>a</sup> Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col.,<sup>a</sup> Wash., Ida., Mon., Wy.,<sup>a</sup> S.C., Ga., Fla., La., N.M., Ariz.); (4) by her own labor (N.Y., O., Va., Ark., Ore., Nev.,<sup>b</sup> Uta., N.M.) ; (5) or in any other manner (R.I., Ct., N.J., Pa., Mich., Io., Minn., Neb., Del., Va.,<sup>a</sup> N.C., Ark., Mon., Wy., Uta., Ga., S.C., Ala., Miss., N.M., Ariz., D.C.<sup>a</sup>), remains her sole and separate property, as in § 6420 specified : N.H. 183,1 ; Me. 61,1 ; Vt. 2322, 2324 ; 1834,140,1-2 ; R.I. 166,1 ; Ct. 1877,114,1 ; N.Y. 1848,200,3 ; 1860,90,1 ; N.J. *Married Women*, 3 ; Pa. *Marriage*, 13,34 ; O. 3108 ; 1885, p. 131 ; Ind. 5117 ; Ill. 68,9 ; Mich. 6295 ; Wis. 2342 ; Io. 2202 ; Minn. 69,1 ; Kan. 62,1 ; Neb. 1,53,1 ; Md. 51,19 ; Del. V. 15,165,1 ; Va. 1877,329,1 and 2 ; 1877,266 ; W.Va.<sup>a</sup> 122,3 ; N.C. 1840 ; Ky. 52,2,1 ; Tenn. 3343 ; Mo. 3295 ; Ark. 4621,4624 ; Tex. 2851 ; Cal. 5162 ; Ore. 35,4 ; 1878, p. 92 ; Nev. 151,165 ; Col. 2266 ; Wash. 2400 ; Ida. *ib.* 1 ; Mon. G. L. 866 ; Wy. 82,1 ; Uta. C. Civ. P. 569 ; S.C. 2085 ; Ga. 1754 ; Ala. 2705 ; Miss. 1162 ; Fla. 150,1 and 4 ; La. 2334 ; N.M. 1087 ; Ariz. 1960 ; D.C. 727. See also § 6423.

(B) So, in most states, of all personalty acquired (1) by devise or descent : N.H. ; Me. ; Vt. ; N.Y. ; N.J. ; Pa. ; O. ; Ind. ; Ill. ; Mich. ; Wis. ;<sup>a</sup> Io. ; Kan. ; Neb. ; Md. ; Del. ;<sup>a</sup> Va. ; Mo. 3296 ; Ark. ; Tex. ; Cal. ; Ore. ; Nev. ; Col. ; Wash. ; Ida. ; Mon. ; Wy. ; S.C. ; Fla. ; N.M. ; Ariz. ; (2) gift : N.H., Me., Vt.,<sup>a</sup> N.Y.,<sup>a</sup> N.J., Pa., O., Ind., Ill., Mich., Wis.,<sup>a</sup> Io., Kan.,<sup>a</sup> Neb.,<sup>a</sup> Md.,<sup>a</sup> Del.,<sup>a</sup> Va., Mo., Ark., Tex., Cal., Ore., Nev., Col.,<sup>a</sup> Wash., Ida., Mon., Wy.,<sup>a</sup> S.C., Fla., Ariz. ; (3) purchase : N.H., Me., Vt., N.Y., N.J., Pa., O., Ind., Ill., Mich., Wis.,<sup>a</sup> Io., Neb., Md., Del.,<sup>a</sup> Va., Mo., Ark., Wy., S.C., Fla. ; or (4) in any way : Vt., R.I., Ct., N.J., Mich., Minn., Del.,<sup>a</sup> Va.,<sup>a</sup> Tenn., Ark., Mon., Wy., Uta., S.C., Ala., Miss., N.M., Ariz., D.C.<sup>a</sup> So, in most of these, (5) her personal earnings (see also § 6522) : N.H. ; Me. 61,3 ; R.I. ; Ct. ; N.Y. ; N.J. *ib.* 4 ; Pa.<sup>c</sup> *Marriage*, 42-3 ; O. ; Ill. 68,7 ; Wis. 2343 ; Io. 2211 ; Minn. ; Kan. 62,4 ; Neb. 1,53,4 ; Md. 51,23 ; 1882,265 ; Del. V. 14, C. 550,3 ; Va. ; Mo. ; Ark. ; Ore. ; Nev.<sup>b</sup> 165 ; Wash. 2404,2423 ; Uta. ; N.M. ; Ariz. 1881,37. So, (6) the earnings of her minor children living with her when she is separate from the husband : Wash., Ariz. And see § 6350. So, profits of a trade carried on by her separately : N.Y., N.J., Kan., Neb., Ark. (For profits of a trade, see also Art. 652.) Except (1) when acquired by payment for or pledge of the property of the husband : N.H. ; (2) except when acquired by her personal industry : Vt.

And all work performed by a married woman for a person other than her husband is presumed to be on her separate account, unless there is an express agreement to the contrary : Mass. 147,4.

Her earnings, goods, and credits may be attached by trustee process or otherwise, as if sole : N.H. 249,41. *Except* that earnings accruing from labor performed for her husband or in his employ, or payable by him, shall not be her separate property : Vt. ; Ill. 68,8 ; Wis. So, nothing herein authorizes any claim by either husband or wife against the other for personal services : Me., Vt.

NOTES. — <sup>a</sup> Except if derived by gift or purchase, etc., from the husband. <sup>b</sup> But only when the husband has allowed her to appropriate the proceeds of such labor. <sup>c</sup> But she must first file her petition in court that she intends to claim such earnings, which petition is duly recorded ; see also Art. 652.

§ 6423. **Property of the Husband.** By the codes of a few states, all property, real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, shall be his separate property : Tex. 2851 ; Cal. 5163 ; Nev. 151 ; Wash. 2408 ; Ida. 1874-5, p. 635, § 1 ; Ariz. 1967. The same would be law everywhere.



Neither husband nor wife has any interest in the property of the other; but neither can be excluded from the other's dwelling: Cal. 5157; Dak. Civ. C. 78.

§ 6424. **Special Kinds of Property.** (A) In two states, every woman resident in the State who shall receive a patent for her own inventions under United States laws may hold and enjoy the same and all proceeds to her separate use, and transfer and dispose of the same as if unmarried: N.Y. 1845,11,1; W.Va. 122,7.

But this act shall not authorize her to contract any pecuniary obligations to be discharged at a future time: N.Y.

(B) When the husband becomes insane, the wife may hold to her own use the earnings of minor children during such insanity: N.H. 183,2; and see § 6422.

(C) The proceeds of her separate estate sold (or of a mortgage paid: Del.; or stock sold: Del.) remain her separate property: Vt. 2324; R.I. 166,2; Ct.<sup>a</sup> 14,2,1; Kan. 62,1; Neb.; Md.; Del. V. 12,572,2; Ky. 52,2,3; Tenn. 3340; Mo.; Ark. 4624; Ala. 2709.

She may invest and manage the same in her name: Ct., N.J., Md., Del., Ark., Ala. Compare § 6450. Or a trustee may be appointed: R.I. Compare § 6427. They cannot be paid by any person except by her consent, upon separate examination: Tenn.

(D) So, in several, when her real estate is taken, or damages paid, under eminent domain, she has a process in court to secure the investment of the proceeds to her own use: Mass. 147,14; Me. 61,9; Vt. 2326; Mo. 3289; and see in Part IV.

(E) Stocks or bonds given by a parent to a daughter, with the proceeds and dividends thereof, belong to her, if married, in her own right, and are not subject to her husband's debts (except for necessities: see § 6412): Vt. 2323.

So, any stock in the name of any female, and expressed on the face of the certificate to be for her use, belongs to her free from all claims on the part of the husband, and passes by her will or by descent to her heirs, and she may receive dividends and give receipts as if unmarried, but may not anticipate the same or give orders in advance therefor: Ky. 52,4,15.

(F) All real estate conveyed to a married woman in consideration of property acquired by her personal services during coverture shall be held by her to her sole and separate use: Ct. 14,2,1.

(G) The savings from the income of the separate estate of the wife are her separate property: Minn.; N.C. 1837; Mo.

(H) The rents and profits of her real estate: N.Y.; N.J.; O.; Ind.; Mich.; Wis. 2340; Minn.; Kan.; Neb.; Va.; W.Va.; Tenn. 3343; Mo. 3295; Ark.; Tex. 2851; Cal.; Nev. 151; Col. 2266; Wash.; Ida.<sup>b</sup> *ib.* 9; Mon.; Wy.; Uta.; Ariz. 1975; 1885,5.

(I) All sums recovered in suits by the wife concerning her separate property: R.I. 166,17; 204,26; O.; or in ordinary suits for tort, etc.: O., Mo. And compare § 6454.

(J) A husband and wife may hold property (1) as joint tenants, as tenants in common, or as community property: Cal. 5161; Nev. 158; (2) as joint tenants or tenants in common: N.Y. 1880,472; Dak. Civ. C. 82; and probably in other states. See § 1373.

So, real property held by her in joint tenancy with her husband is her separate property: Wis.

NOTES. — <sup>a</sup> If invested in her name or in that of a trustee. <sup>b</sup> But only when so declared in the grant or devise to her; otherwise they are community property.

§ 6425. **Death of the Husband.** The widow of any person who shall die testate or intestate may demand and receive from the executors and administrators all the personal property which at or immediately before coverture between the decedent and his said widow belonged to her, or which during coverture came to her by gift, bequest, or inheritance, and which at the death of the deceased remained in his possession: N.J. *Executors, etc.*, 13.

Generally her separate property remains hers upon his death; and so expressly, in a few: R.I. 166,1; Ind. 2488.

See also §§ 3105-6,3109,

§ 6426. **Descent and Distribution.** When a married woman dies intestate, her property, real and personal, descends to her heirs, and administration or distribution may take place accordingly: Me. 61,6; Ind. 2488; Del. V. 14,550,5.

But nothing in this article prevents or affects the right of the husband to administer without rendering account upon her personal estate not disposed of by will: R.I. 166, 14; and see in Part IV., Div. I.

*Except* that (1) the husband has his share under the laws of descent, etc. (Div. I, Title III); (2) the husband has a lien for improvements made on a deceased wife's real estate, when he has no curtesy: Ct. 1885,110,40.

§ 6427. **Trustees for Married Women** may on the woman's petition be appointed by the proper courts to hold her separate property in trust for her and such uses as she may declare in the conveyance or as the court order: N.H. 183,14; Mass. 147,13; R.I. 166,18; Pa. *Marriage*, 19; *Trustees*, 56; Md. 51,21; Ida. *ib.* 8; Ariz. 1974. See also, generally, in the Probate Code.

§ 6428. **Paraphernalia.** Certain property of the wife called (in Georgia) paraphernalia, are not, in a few states, subject to the debts or control of the husband, although given to her by him or any other person: R.I. 166,4; Col. 2266; Ga. 1773.

This property consists (1) of her wearing apparel: Col., Ga.; (2) of that of her children: Ga.; (3) of her ornaments suitable to her condition in life: Ga.; so, specially, her watch: Col., Ga.; jewelry: R.I., Col.; silver: Col.; table-ware: Col.; plate: R.I.; and, generally, of all such articles of property as have been given to her for her own use and comfort: Ga. 1773.

**Louisiana Law.** All property, which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of the marriage, is paraphernal.

The wife has the right to administer personally her paraphernal property, without the assistance of her husband.

The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exist a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the thing which produced them.

The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.

The husband, who administers the paraphernal property of his wife, notwithstanding her formal opposition, is accountable to her for all the fruits, as well those existing as those which have been consumed.

If all the property of the wife be paraphernal, and she have reserved to herself the administration of it, she ought to bear a proportion of the marriage charges, equal, if need be, to one half her income.

The wife may alienate her paraphernal property with the authorization of her husband, or in case of refusal or absence of the husband, with the authorization of the judge; but should it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same.

The husband may release the mass of his property from this legal mortgage, by executing a special mortgage in the manner required in § 6429 for dotal effects.

The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits as above expressed: La. 2333-2391.

§ 6429. **Louisiana Law.** The separate property of the wife is divided into dotal and extradotal.

Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry : La. 2335.

**Civil Law of Dowry.**

By dowry is meant the effects which the wife brings to the husband to support the expenses of marriage.

Whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage by other persons than the husband, is part of the dowry, unless there be a stipulation to the contrary.

The settlement of the dowry may include all the present and future effects of the wife, or her present effects only, or a part of her present and future effects, or even an individual object.

The constitution in general terms of all the effects of the wife, does not include her future effects.

Dowry cannot be settled, nor can it even be increased during the marriage.

Dowry can be settled either by the wife herself, or by her father or mother, or other ascendants, or by other relations, and even by strangers.

If the father and mother settle jointly a dowry, without distinguishing the part of each, it shall be supposed to be constituted by equal portions.

If the dowry be settled by the father alone, for paternal and maternal rights, the mother, although present at the making of the contract, shall not be bound ; but the father alone shall remain answerable for the whole of the dowry.

If the surviving father or mother settles a dowry for paternal and maternal effects, without specifying the portions, the dowry shall be first taken out of the rights of the future wife in the succession of the deceased father or mother, and the rest out of the estate of the person who settled the dowry.

Although the daughter who has received a dowry from her father and mother may have effects belonging to her which they enjoy, the dowry shall be taken out of the estate of the person settling the dowry, unless there be a stipulation to the contrary.

Those who settle a dowry are bound to the warranty of the things thus settled.

The interests of the dowry begin, of right, from the day of the marriage, against those who have promised the same, although there may be time given for the payment, unless there be a contrary stipulation.

The dowry is given to the husband for him to enjoy the same as long as the marriage shall last.

The action which the husband has to recover the dowry from those who have settled the same, is prescribed against by the same space of time as all other personal actions.

The income or proceeds of the dowry belong to the husband, and are intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, that of their children, and other expenses which the husband deems proper.

The husband alone has the administration of the dowry, and his wife cannot deprive him of it ; he may act alone in a court of justice for the preservation or recovery of the dowry, against such as either owe or detain the same, but this does not prevent the wife from remaining the owner of the effects which she brought as her dowry.

In case, however, of the husband's absence or neglect to sue for the dotal effects of the wife, she may sue for them herself, having first been authorized by the proper judge.

It may likewise be stipulated by the marriage contract that the wife shall receive annually, upon her own acquittances, a part of her revenue for her maintenance and personal wants.

The husband is not bound to give security upon his receiving the dowry, unless he has been bound to do so by the marriage contract.

If the dowry, or part of it, should consist in movable effects, valued by the marriage contract without declaring that the estimated value of the same does not constitute a sale, the husband becomes the owner of such movable effects and owes nothing but the estimated value of the same.

The ownership of dotal immovables, whether valued or not, can never be transferred to the husband, even by express agreement.

An immovable bought with the dotal funds is dotal.

It is the same with respect to the immovable given in payment of a dowry settled in money.



Immovables settled as a dowry can be alienated or mortgaged during the marriage neither by the husband nor the wife, nor by both together, except as is hereinafter expressed.

The wife may, with the authorization of her husband, or, on his refusal, with the authorization of the judge, give her dotal effects for the establishment of the children she may have by a former marriage; but if she be authorized only by the judge, she is bound to reserve the enjoyment to her husband.

She may likewise, with the authorization of her husband, give her dotal effects for the establishment of their common children.

Immovables settled as dowry may be alienated with the wife's consent, when the alienation of the same has been allowed by the marriage contract; but their value must be reinvested in other immovables.

The dotal immovables may be likewise sold, with the authorization of the judge, at public auction, after three advertisements or publications in the usual places or in the newspapers, for the purpose of liberating from jail either husband or wife; of supplying the family with alimony, in the cases provided for under the title: *Of Father and Child* (Art. 660); of paying the debts of the wife or of those who settled the dowry, when such debts are of a certain date prior to the marriage contract; or for the purpose of making heavy repairs indispensably necessary for the preservation of the immovable settled as a dowry; and, in fine, when the immovable is held undivided with a third person, and the same is ascertained not to be susceptible of being divided.

In all such cases, what remains unemployed out of the proceeds of the sale, above the necessities which have been the occasion of the sale, shall remain dotal effects, and shall be laid out as such for the benefit of the wife.

The wife may also mortgage, or otherwise incumber, her dotal property in the cases mentioned in the fifth chapter of the title: *Of Husband and Wife*, by complying with the formalities therein required.

If, except as above expressed, the wife or husband, or both jointly, alienate the dotal estate, the wife or her heirs may cause the alienation to be set aside after the dissolution of the marriage; and no prescription shall run during the marriage in bar of this right. The wife shall have the same right after the separation of property.

Dotal immovables not declared alienable by the marriage contract are imprescriptible during the marriage; they become prescriptible after the separation of property.

With respect to the effects of the dowry, the husband is subject to all the obligations of the usufructuary.

If the dowry be likely to be lost, the wife may sue for a separation of property, as will be explained hereafter.

If the dowry consist of immovables, or if it consists of movables not valued by the marriage contract, or valued with the declaration that the valuation is not intended to divest the wife of her property in the same, the husband or his heirs may be compelled to restore the same without delay after the dissolution of the marriage.

Should the dowry consist of a sum of money, or movables valued by the marriage contract without a declaration that the estimated value is not intended to convey the property of the same to the husband, the restitution of the same cannot be enforced until one year after the dissolution.

If any of the immovables, the ownership of which is vested in the wife, have perished or grown worse by use, and without any neglect on the part of the husband, he shall be bound to restore only such as may remain, and in the situation in which they are; nevertheless, the wife may, in all cases, take back her linen, clothing, and jewels in her actual use, under the obligation of accounting for their value, when such linen, clothes, and jewels have been, in the first instance, settled with estimation.

If the dowry includes bonds or credits which could not be recovered, whether owing to the insolvency of the debtors or otherwise, but not owing to the fault or neglect of the husband, he shall not be answerable for the consequences, and shall be bound only to restore the instruments or vouchers upon which the credits are grounded.

If a dowry consist of a usufruct, the husband or his heirs, at the time of the dissolution of the marriage, are bound only to return the right of the usufruct, and not the profits which accrued during the marriage.

If the dowry consists, in whole or in part, of herds or flocks, not valued in the marriage contract, or valued with a declaration that the estimated value does not deprive the wife of her

property in the same, the husband shall be bound only to deliver such proportion of the increase or young proceeding from such flocks and herds during the marriage as shall be necessary to complete the whole number of head of cattle that he originally received.

If the marriage has lasted ten years since the time at which the payment of the dowry became due, the wife or her heirs may claim the same from the husband after the dissolution of the marriage without being bound to prove that the husband has received it, unless the husband shall satisfactorily prove that he has uselessly done everything in his power to obtain the payment of the same.

This responsibility of the husband does not hold when the wife herself has promised the dowry, for in such case neither she nor her heirs could claim what she has not paid.

If the marriage be dissolved by the death of the wife, the interests and profits of the dowry to be returned run of right to the benefit of her heirs from the day of the dissolution.

If it be by the death of her husband, the wife has her choice either to claim the interests of her dowry during the year of mourning, or to claim a sustenance to be taken out of the succession of her husband. But in both cases she has a right during that year to be supplied with habitation and mourning dresses out of the succession, which charges shall not be deducted out of the interests due to her.

If the lease which the husband has granted of the dotal immovable has more than a year to run at the dissolution of the marriage, it shall be dissolved at the end of a year from the dissolution, if the lessee does not prefer to quit sooner the property rented.

The wife has a legal mortgage on the immovables, and a privilege on the movables of her husband, to wit :—

1. For the restitution of her dowry, as well as for the replacing of her dotal effects which she brought at the time of her marriage, and which were alienated by her husband, and this from the time of the celebration of the marriage.

2. For the restitution or the replacing of the dotal effects which she acquired during the marriage, either by succession or by donation, from the day when such succession devolved to her, or such donation began to have its effect.

The privilege granted by the preceding article cannot in any case extend to immovables, and can never affect the rights of creditors, whose mortgage is prior to that of the wife.

When by marriage contract, the parties, being of age, shall agree that the legal mortgage of the wife shall exist only on one or more immovables belonging to the husband, the immovables and other property not included therein, shall remain free and released from the legal mortgage of the wife. It shall not be lawful to stipulate that no mortgage whatever shall exist in favor of the wife for the dotal rights.

During the marriage the husband may, with the consent of his wife, if she be of age, be authorized by the judge, with the advice of five of the nearest relations of the wife, or friends, for want of relations, to mortgage, specially for the preservation of his wife's rights, the immovables which he shall designate ; and then the surplus of his property shall be free from any legal mortgage in favor of his wife.

If the wife be a minor, the judge may still grant the authorization above mentioned, provided it be with the assent of a family meeting, composed as aforesaid, and a curator *ad hoc* appointed to the wife.

If the husband was already insolvent, and had neither art, trade, nor profession, when the father settled a dowry on his daughter, she shall be bound to collate to the succession of her father only the action she has against the succession of her husband, to be reimbursed for the wife.

But if the husband has become insolvent only since the marriage, or if he exercised a trade or profession, which was to him instead of an estate, the loss of the dowry falls solely upon the wife.

When the wife has not brought any dowry, or when what she has brought as a dowry is inconsiderable with respect to the condition of the husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the *marital portion* : that is, the fourth of the succession in full property, if there be no children, and the same portion, in usufruct only, when there are but three or a smaller number of children ; and if there be more than three children, the surviving, whether husband or wife, shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife, who died first : La. 2337-2332.

§ 6430. **Property Acquired in Other States.** (Compare § 6357.) If a husband and wife, married elsewhere, come into the State, either at the same or different times, and reside therein as husband and wife, she retains all the property which she had acquired by the laws of any other forum, or by any marriage contract or settlement made out of the State : Mass. 147,30 ; Kan. 62,5 ; Neb. 1,53,5.

With regard to subsequent rights, their so residing together has effect as if they were then for the first time married in the State : N.H. 183,5 ; Mass. ; Me. 61,10 ; R.I. 165,5 ; Mich. 6285.

So, in others, their rights as to property acquired by them in the State during the marriage are regulated by the State law : Tex. 2859 ; Ida. 1874-5, p. 637,15 ; Ariz. 1981.

§ 6431. **Record of Separate Property.** (See also § 6442.) By the laws of several states, all property, real and personal, which may be owned or claimed at the time of marriage by any woman, or which she may acquire after marriage by gift, devise, or descent, must <sup>a</sup> be registered as herein : Ark.<sup>a</sup> 4634 ; Tex. 4344 ; Nev. 153 ; Ida. *ib.* 3 ; Mon. G. L. 866 ; Fla. 150,8 ; Ariz. 1969.

So, in a few others, of personal property only : Cal.<sup>a</sup> 5165 ; Ore. 35,2 ; Dak. Civ. C. 82.

(A) Any married woman, or woman who shall in future be married, may present to any officer authorized to take the acknowledgment of deeds, a list of all such property, which list she swears to before the officer, who certifies to it; and thereupon it may be recorded in the county (1) where it is situated : Tex. 4345-9 ; (2) where the parties reside : Cal., Dak., Ariz. ; (3) where she resides : Nev., Mon. (B) In two others, she makes a sworn list, which is recorded by the county clerk or the recorder where she resides : Ore. 35,1-2 ; Ark. (C) In a few others, it is recorded in all the counties where any of the real estate lies ; but otherwise, if the married woman be resident in the State, in the county where she resides, as above : Nev. 153 ; Ida. *ib.* 3-4 ; Ariz. 1970. (D) An inventory is recorded in the circuit clerk's office within six months of the marriage : Fla. (E) Such record may also be made by any person giving or selling property to such married woman : Ark. 4635. A conveyance or will duly recorded has the same effect : Ark.

NOTE.—<sup>a</sup> “May,” in the noted states.

§ 6432. **Effect of Record.** (A) When the married woman is resident in the State, the record is notice of her title to all property inventoried therein except as to real estate situated in another county ; as to such, the record in such county is notice (Nev. 154 ; Ida. *ib.* 5 ; Ariz. 1971) ; when she is not resident in the State, the record in any county is notice only as to real or personal property lying in such county : Nev.

(B) Such record is conclusive as against creditors and purchasers of the husband : Tex. 4359 ; Fla. 150,8.

So, failure to duly file such record is *prima facie* evidence in favor of such creditors and purchasers that the property claimed by her is not her separate property : Ark. 4636 ; Nev. 155 ; but confers no rights on the husband : Ark., Fla.

(C) Such record is notice and *prima facie* evidence of the title of the wife : Ark. 4634 ; Cal. 5166 ; Ore. 35,1 ; Dak. Civ. C. 82.

§ 6433. **Common Property.** All property acquired by either the husband or wife during marriage, except such as is acquired by gift, devise, or descent, etc. (see §§ 6420-23), is deemed the common (or *community*) property of the husband and wife : Tex. 2852 ; Cal. 5164 ; Nev. 152 ; Wash. 2409 ; Ida. *ib.* 2 ; La. 2332 ; Ariz. 1968.

And during the coverture may be disposed of by the husband only : Tex. ; Cal. 5172 ; Nev. 156 ; Wash.

And all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or acquets, unless the contrary be proved : Tex. 2853.



Community property is generally liable for the debts of either husband or wife contracted during marriage : Tex. 2857.

The husband has the sole management of such property and absolute power of disposition, as of his own separate estate : Cal. ; <sup>a</sup> Nev. ; Wash. ; Ida. *ib.* 9 ; Ariz. 1975.

*Except*, that he may not devise more than one half thereof : Wash.

The rents and profits of the wife's separate estate are community property, unless the granting instrument provide otherwise : Ida. *ib.* 9.

The property of married persons is divided into separate property and common property.

Common property is that which is acquired by the husband and wife during marriage in any manner different from that above declared : Mo. ; La. 2334.

All private or religious marriages are deemed to be contracted under the law of community of acquets and gains, unless otherwise stipulated in the authentic act : La. D. 2176.

Community property is defined to be all property which is not the separate property of the husband or wife as in Art. 642 defined, acquired after marriage by the husband or wife or both : Cal. 5687.

But the husband may not convey or encumber the community real estate unless the wife join with him in the deed : Wash. 2410 ; Ida. 1885, p. 137. So of community personality : Ida.

It is not liable for the contracts of the wife made after marriage, unless secured by a pledge or mortgage thereof executed by the husband : Cal. 5167.

NOTE. — <sup>a</sup> Except as to power to devise it by will.

**§ 6434. Of the Community of Acquets or Gains.** Married persons may stipulate that there shall be no partnership between them.

In this case, the wife preserves the entire administration of her movable and immovable property, and the free enjoyment of her revenues.

She may alienate her movable and immovable property, in the manner and in the cases above provided for with respect to paraphernal property.

Each of the married persons separate in property, contributes to the expenses of the marriage in the manner agreed on by their contract ; if there be no agreement on the subject, the wife contributes to the amount of one half of her income.

When the wife, who is separate in property, has left the enjoyment of her property to her husband without any procuration, he is not answerable for the fruits, until a demand of them be made by his wife, or if it is not made, until the dissolution of the marriage. He is not accountable for the fruits which have been previously consumed : La. 2392-6.

Every marriage contracted in this State superinduces of right partnership or community of acquets or gains if there be no stipulation to the contrary.

All property acquired in this State by non-resident married persons, whether the title thereto be in the name of either the husband or wife or in their joint names, shall be subject to the same provisions of law which regulate the community of acquets or gains between citizens of this State.

A marriage contracted out of this State between persons who afterwards come here to live is also subjected to community of acquets with respect to such property as is acquired after their arrival.

This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund ; whilst the debts of both husband and wife anterior to the marriage must be acquitted out of their own personal and individual effects.

The husband is the head and master of the partnership or community of gains ; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife. He can make no conveyance

*inter vivos* by a gratuitous title of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. Nevertheless he may dispose of the movable effects by a gratuitous and particular title to the benefit of all persons. But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband in support of her claim in one half of the property, on her satisfactorily proving the fraud.

At the time of the dissolution of the marriage all effects which both husband and wife reciprocally possess are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage or which have been given them separately or which they have respectively inherited.

The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by the husband and wife conjointly, although what has been thus brought in marriage by either the husband or the wife be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

The fruits hanging by the roots on the lands belonging separately to either the husband or the wife at the time of the dissolution of the marriage are equally divided between the husband and the wife or their heirs. It is the same with respect to the young of cattle yet in gestation. The fruits of the paraphernal effects of which the wife reserved to herself the enjoyment are excepted from this rule.

When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses, or industry; but there shall be no reward due if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage by renouncing the partnership or community of gains.

The wife who renounces loses every sort of right to the effects of the partnership or community of gains. But she takes back all her effects, whether dotal or extradotal.

The wife who has taken an active concern in the effects of the community cannot renounce the same. Acts which are simply administrative or conservatory do not come, in this article, under the denomination of active concern.

The surviving wife who wishes to preserve the power of renouncing the community of gains must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

She ought also to make her renunciation within the same delays which are allowed for the beneficiary heir to explain his intentions. After the expiration of these delays, she may be in the same manner forced to make her decision, and judgment may be rendered against her as a partner unless she renounces.

The renunciation of the partnership by the wife must be made before a notary or a parish recorder and two witnesses.

Her linen and clothes shall not in any case be comprised in the inventory; she has a right to take them without any formality.

The widow above the age of majority who has allowed a judgment to pass against her as a partner by a court of general jurisdiction shall lose the power of renouncing.

The widow who has concealed or made away with any of the effects of the partnership or community of gains is declared to be a partner in community, notwithstanding her renunciation. It is the same with respect to her heirs.

If the widow dies before the expiration of the above fixed delay without having made or closed the inventory, the heirs shall be allowed for the purpose of making or closing it another term of equal length, to begin from the day of the death of the widow, and of thirty days more

to deliberate after the inventory shall have been closed. If the widow dies after the inventory was closed, her heirs shall be allowed to deliberate another term of thirty days, to begin from her death. They may, however, renounce the partnership or community of gains, according to the forms above established.

The wife separated from bed and board, who has not within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same, unless, being still within the term, she has obtained a prolongation from the judge after the husband was heard, or after he was duly summoned.

The creditors of the wife may attack the renunciation which may have been made by her or by her heirs with a view to defraud her creditors, and accept the community of gains in their own names.

The widow, whether she accept or renounce, has a right, during the delays which are granted to her to make an inventory and deliberate, to receive her maintenance and that of her servants out of the provisions in store, and, if there be none, she has a right to borrow on account of the common stock, on the condition, however, of using the privilege with moderation. She owes no rent for the residence she may have made during such term in a house appertaining to the community or belonging to the heirs of the husband; and if the house which both husband and wife did inhabit at the time of the dissolution of the marriage was rented by them, the wife shall not contribute during the same term to the payment of the rent, which shall be taken out of what belongs to the whole.

In case of the dissolution of the marriage by the death of the wife, her heirs may renounce the partnerships or community of gains, within the term and according to the forms which the law prescribes to the surviving wife.

Married persons may, by their marriage contract, modify the legal community as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property belonging to either of them, of which the fruits shall not enter into the partnership: La. 2399-2424.

## Art. 644. Marriage Contracts.

§ 6440. **General Principles.** In most states, (A) a husband and wife may by a marriage contract made before marriage determine what rights each shall have in the estate of the other during marriage and after its dissolution by death, and bar each other of all rights not so secured: Me. 61,6; Del. V. 14,550,5; N.C.<sup>a</sup> 1270,1836.

So, as to the community property, also: Wash.<sup>a</sup> 2416.

(B) So, at any time before a marriage, the parties may enter into a written contract providing that after the marriage the whole or any part of the real or personal estate of either party shall become or remain the property of either party: Mass. 147,26. Such contract may limit to either husband or wife an estate in fee or for life in the whole or any part of the property, and designate any other limitations; all of which shall take effect at the marriage as if contained in a deed conveying such property: Mass.

(C) So, in others, all contracts, made between two persons in contemplation of their marriage, remain in full force after it takes place: N.Y. 1848,200,4; 1849,375,3; N.J. *Married Women*, 13; Mich. 6299; Ariz. 1964.

And cannot be altered after marriage; see § 6445.

(D) So, in several, "nothing in this act shall invalidate any marriage settlement or contract now made or to be hereafter made:" Mass. 147,15; Minn. 69,6; Kan. 62,6; Neb. 1,53,6; Cal. 5177; Nev. 176; Col. 2272; Ida. 1874-5, p. 637,14; N.M. 1091.

(E) And in two, parties contemplating marriage may enter into what stipulations they please, provided they be not contrary to good morals or some rule of law: Tex. 2847; La. 2325.

(F) So, in Georgia, any agreement between the parties to a marriage contemplating a future settlement upon the wife, whether by parol or in writing, may be enforced by a court of equity at instance of the wife any time during the husband's life, provided the rights of third persons, purchasers or creditors in good faith and without notice, are not affected thereby. An agreement perfect in itself, and which needs no future conveyance to effect its purposes, is an executed contract, and does not come under the definition of marriage articles: Ga. 1775.



The husband may voluntarily execute such agreement, or he may at any time during the coverture, either through trustees or directly to his wife, convey any property to which he has title, subject to the rights of prior purchasers or creditors without notice : Ga. 1776.

Marriage contracts and post-nuptial settlements will be enforced at the instance of all persons in whose favor there are limitations of the estate. Marriage articles will be executed only at the instance of persons coming within the scope of the marriage consideration ; but when executed at their instance, the court may execute also in favor of volunteers. All persons are volunteers, except the parties to the contract and the offspring of the wife : Ga. 1781. See § 1416.

Marriage is a valuable consideration ; and the wife stands as to property of the husband settled upon her by marriage contract as other purchasers for value, *provided* that by such contract the husband does not incapacitate himself from paying his existing just debts : Ga. 1782.

The most ordinary conventions in marriage contracts are the settlement of the dowry and the various donations which the husband and wife may make to each other, either reciprocally or the one to the other, or which they may receive from others in consideration of the marriage.

The partnership or community of acquets or gains needs not to be stipulated ; it exists by operation of law in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it ; they may even agree that it shall not exist.

From the various conventions which are customary in marriage contracts, or which are a consequence of the marriage, result various distinctions with respect to the property which may be the object of these conventions : La. 2331-3.

Husband and wife may, by their marriage contract, make reciprocally or one to the other, or receive from other persons in consideration of their marriage, all kinds of donations, according to the rules and under the modifications prescribed in the title : *Of donations inter vivos and mortis causa* : La. 2336.

**Limitations.** But in no case can they (1) enter into any agreement or make any renunciation to alter the legal orders of descent, either with respect to themselves in what concerns the inheritance of their children, or posterity, which either may have by any other person, or in respect to their common children : Tex. 2847 ; *Ida. ib.* 22 ; La. 2326 ; *Ariz.* 1988.

(2) Nor can they make a valid agreement to impair the legal rights of the husband over the person of the wife or the persons of their common children : Tex. ; *Ida. ib.* 23 ; La. 2327 ; *Ariz.* 1989.

(3) No settlement is good against creditors where a greater value is secured to the wife and children of the marriage than the portion actually received with the wife in marriage and such estate as the husband at the time of marriage actually possessed, after deducting all just debts ; and in case of suit, the burden of proof is on the party claiming under such contract ; *provided* that, if legacies are given to the wife, or distributive shares fall to her after marriage, and the husband becomes entitled thereto, such property, if other property is not sufficient, may be taken to make up the portion secured by such contract : N.C. ; *Tenn.* 2436-7.

NOTE. — <sup>a</sup> In these states, it seems that such a contract may be made at any time, whether before or after marriage.

§ 6441. **Form.** A marriage contract must, in all states, be in writing ; and (1) it must, in a few, have two witnesses : Me. 61,6 ; Tex. 2848 ; Ga. 1777 ; La. 2328.

(2) It must be acknowledged by both husband and wife before some officer authorized to take the acknowledgment of deeds : Tex. Or it may be duly proved by one of the two witnesses : Tex. 4343.

(3) It must be acknowledged or proved like a deed : N.C. 1269 ; Mo. 2327 ; 3280-1 ; Ark. 4582 ; Cal. 5178 ; Nev. 177 ; Wash. 2416 ; *Ida.* 1874-5, p. 637, § 16 ; *Ariz.* 1982.

So, in Louisiana, it must be made before a notary. Every marriage contract in writing, made in contemplation of marriage, shall be liberally construed to carry into effect the intention of the parties, and no want of form or technical expression invalidates it : Ga.

§ 6442. **Record.** (Cf. § 1624.) All marriage contracts (or, in Delaware, North Carolina, Georgia, settlements of lands of either party whereby the liability of such

lands for debts and contracts is affected ; and in Massachusetts, South Carolina, a schedule of the property so affected) must be recorded in the registry of deeds for the county, etc., where the lands lie (in Massachusetts, North Carolina,<sup>a</sup> Georgia, Alabama, in the county where the husband resides, or the wife, if he is out of the State ; in the county where the married couple reside at the time of execution of the contract, if post-nuptial : N.C.) (1) within one year of execution : Del. 74,8 ; Ala.<sup>a</sup> 2172 ; (2) within ninety days (*a*) after the marriage : Mass. 147,27 ; or (*β*) after the execution of the contract : Ga.<sup>b</sup> 1778 ; (3) within six months after the execution : N.C. 1269,1821 ; (4) within forty days : S.C. 1776,2038-9. (5) No time is specified : Va. 114,4 ; W.Va. 96,4 ; Mo. 3281 ; Ark. 4584 ; Tex.<sup>c</sup> 2850,4343 ; Cal. 5179 ; Nev. 178 ; Ida.<sup>c</sup> 1874-5, p. 637, § 17 ; Miss. 1211 ; Ariz. 1983.

If not so recorded, (1) they will not be valid as against persons without notice : Del. ; Ark. 4586 ; Tex. 4335 ; Ga. ; Miss. ; (2) nor as against purchasers of the property : Va., W.Va., N.C., Tex. ; (3) or subsequent creditors : Va., W.Va., N.C., Tex., S.C., Ala. (4) They will be void except as between the parties and their personal representatives or heirs : Mass. ; Mo. 3282 ; Nev. 180 ; Ida. *ib.* 19 ; Ariz. 1985. (5) The effect of non-record is the same as in the case of ordinary deeds : Cal. 5180. They must also be recorded in every county where land affected by them may lie : Mass. ; Nev. 178-9 ; Ida. ; Ariz.

And, in some, such post-nuptial contracts must be recorded in the same way : Del., N.C.

If recorded, they may generally be received in evidence without further proof : Mo. 2327 ; Ark. 4587. Cf. § 1625.

The effect of record in any county is to impart full notice to all persons as to property therein : Mo. ; Ark. 4585 ; Nev. 179 ; Ida. *ib.* 18 ; Ariz. 1984.

Deeds for the settlement of personal property in consideration of marriage must be recorded in the county where the settlor resides : Tenn. 2845.

If the trustee or husband having possession of the contract fail to record it, the wife has a process to compel record : Ga. 1779.

Marriage contracts affecting the wife's property, made before marriage, must be recorded in the county where the husband resides, and re-recorded in any county to which he may remove : Tenn. 2846.

NOTES. — <sup>a</sup> So, as to personal property. <sup>b</sup> But record is also made in the county where the husband resides, or <sup>c</sup> where the married persons reside.

§ 6443. **Female Minors**, aged eighteen, may, in Massachusetts, join with their guardians in making a marriage contract : Mass. 147,28.

So, in others, any minor legally capable of marrying may join in such contract with the written consent of both parents, or the guardian : Tex. 2848 ; Ida. *ib.* 20 ; La. 1785, 2330 ; Ariz. 1986.

And for such purpose, such ward may join the guardian in conveying property to trustees : Mass.

In several, any minor capable of contracting marriage may make a valid marriage contract or settlement : Cal. 5181 ; Nev. 181 ; Ga. 1784,2734.

§ 6444. **Settlements Void as against Creditors.** (Compare Art. 647.) In one state, any such marriage contract made by either party before marriage is void as against his or her creditors then existing ; if made after marriage it is void against such creditors existing at the time the contract was made : N.C. 1820.

So, such agreement cannot derogate from the rights of creditors, nor the deed prevent its being set aside in equity for fraud : Wash. 2416.

§ 6445. **Post-Nuptial** contracts are, in several, as valid as marriage contracts, etc., made before marriage (see § 6440, note <sup>a</sup>) : Del. 74,8 ; N.C. ; Wash. 2416 ; Ga. 1776 ; and are subject to the same rules : Ga.

But no such contract between a husband and wife made during marriage is valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a longer term than three years, unless it be in writing, duly proved or acknowledged, and upon separate examination of the wife, as required in the case of deeds (§ 6500), it appear to the satisfaction of the officer that the wife freely executed such contract, and consented thereto at the time of such examination, and that the same is not unreasonable nor injurious to her; the certificate of the officer to state such facts and be conclusive unless impeached for fraud: N.C. 1835.

So, in several, marriage contracts may not be altered after marriage: Tex. 2849; Ida. *ib.* 21; La. 2329; Ariz. 1987.

§ 6446. **Law of Louisiana.** Every donation *inter vivos*, though made by marriage contract to the husband and wife, or to either of them, is subject to the general rules prescribed for the donations made under that title.

It cannot take effect for the benefit of children not yet born.

Fathers and mothers, the other ascendants, the collateral relations of either of the parties to the marriage, and even strangers, may give the whole or a part of the property they shall leave on the day of their decease, both for the benefit of the parties and for that of the children to be born of their marriage, in case the donor survive the donee.

Such a donation, though made for the benefit of the parties to the marriage, or for one of them, is always, in case of the survivorship of the donor, presumed to be made for the benefit of the children or descendants to proceed from that marriage.

A donation in the form specified in the preceding paragraph is irrevocable only in this sense, that the donor can no longer dispose of the objects comprised in the donation on a gratuitous title unless it be for moderate sums, by way of recompense or otherwise.

The donor retains till death the full liberty of selling and mortgaging, unless he has formally barred himself of it in the whole or in part.

A donation in favor of marriage may be made cumulatively of the property, present and future, provided that to the act be annexed a statement of the debts and charges of the donor existing on the day of the donation, in which case the donee, on the decease of the donor, may accept merely the present property, renouncing the surplus of the property of the donor.

If the statement mentioned in the preceding article has not been annexed to the act containing a donation of present and future property, the donee shall be obliged to accept or reject that donation wholly; and in case of acceptance, he shall claim only the property existing on the day of the donor's decease, and he shall be liable to the payment of all the charges and debts of the succession.

Donations made by marriage contract cannot be impeached or declared void on pretence of a want of acceptance.

Every donation made in favor of marriage falls if the marriage does not take place.

Donations made to the husband or wife by parents, relatives, or strangers, or cumulatively, as above, fall if the donor survive the donee and his or her posterity.

All donations made to a married couple by their marriage contract are, at the time of the opening of the succession of the donor, reducible to the portion that the law permitted him to dispose of: La. 1734-1742.

§ 6447. **Of Donations between Married Persons, either by Marriage Contract or during the Marriage.** Married persons can, by marriage contract, make to each other reciprocally, or the one to the other, what donations they think proper, under the modifications hereafter expressed.

Every donation *inter vivos* of present property, made between married persons by marriage contract, shall not be deemed to be done on the condition of the survivorship of the donee, if that condition be not formally expressed, and it is subject to all the rules above prescribed for those kinds of donations.

A donation of property in future, or of property present and in future, made between married persons by marriage contract, whether simple or reciprocal, shall be subject to the rules established by the preceding section with regard to similar donations made to them by a third person, except that it shall not be transmissible to the children, the issue of the marriage, in case of the death of the donee before the donor.

Either of the married couple may, either by marriage contract, or during the marriage, give to the other, in full property, all that he or she might give to a stranger.



The husband or wife, if a minor emancipated, can, by marriage contract, give to the other, either by simple or by reciprocal donation, whatever can be given by a party who has attained the age of majority.

A minor, not emancipated, can give only with the consent of those relations whose consent is requisite for the validity of the marriage; and with that consent he or she can give all that the law permits a married person of full age to give to his or her consort.

If the relations whose consent is necessary be dead, the minor not emancipated cannot give without the authorization of a court of justice.

All donations made between married persons during marriage, though termed *inter vivos*, shall always be revocable.

The revocation may be made by the wife without her being authorized to that effect by her husband, or by a court of justice.

Those donations shall not be revoked by the birth of children, provided they do not exceed the *quantum* which married persons are permitted to dispose of to each other, to the prejudice of their children or legitimate descendants, as is above provided.

Married persons cannot, during marriage, make to each other by an act, either *inter vivos* or *mortis causa*, any mutual or reciprocal donation by one and the same act.

A man or woman who contracts a second or subsequent marriage, having children by a former one, can give to his wife, or she to her husband, only the least child's portion, and that only as a usufruct; and in no case shall the portion of which the donee is to have the usufruct exceed the fifth part of the donor's estate.

If a person who marries a second time has children of his or her preceding marriage, he or she cannot, in any manner, dispose of the property given or bequeathed to him or her by the deceased spouse, or which came to him or her from a brother or sister of any of the children which remain.

This property becomes by the second marriage the property of the children of the preceding marriage, and the spouse who marries again has only the usufruct of it.

Husbands and wives cannot give to each other, indirectly, beyond what is permitted by the foregoing dispositions.

All donations disguised, or made to persons interposed, shall be null and void.

All donations made by one of the married parties to the children, or to any one of the children, of the other party by a former marriage, and such as are made by the donor to relations to whom the other party is presumptive heir on the day of the donation, although the latter may not survive the relation who is the donee, shall be deemed made to persons interposed: La. 1743-1755; D. 1210.

## **Art. 645. Powers of the Wife.** (See also Art. 648.)

§ 6450. **Separate Property.** A married woman may receive (N.H., Mass., Ark., Miss., N.M.), receipt for (Mass., R.I., N.J.), hold (Mass., Md., W.Va., Wy., Miss., N.M.), manage (Mass., Me., Ill., Io., Ark., Ore., Wash., Miss.), dispose of (Mass., Tenn., Nev., Miss., N.M.), lease (Ind., Wash.), sell and convey (Me., Ct., N.Y., Ill., Mich., Io., Kan., Neb., Md., W.Va., Ky., Ark., Ore., Nev., Col., Wash., Wy., Miss., Ariz., D.C.), devise or bequeath (see Art. 646) (Me.; R.I.; N.Y.; Mich.; Io.; Neb.; Md.; Va.; W.Va.; N.C.; Ark.; Ore.; Wash.; Miss.; Ariz.; D.C.) her separate property, real and personal, as if sole (except as in Art. 650), without joinder or consent of the husband: Mass. 147,1; Me. 61,1; R.I. 166,3 and 13; Ct. 1877,114,1; N.Y. 1860,90,1; 1848,200,3; N.J. *Married Women*, 8; Ind. 5117; Ill. 68,9; Mich. 6295; Io. 2202; Kan. 62,2; Neb. 1,53,2; Md. 51, 20; Va. 1877,329,2; 1878,265; N.C. 1840; Ky. 24,19; Tenn. 3350; Ark. 4621, 4624,4625; Ore. 1878, p. 92, § 1; Nev. 159; Col. 2267 and 2278; Wash. 2400; Wy. 82,1-2; Miss. 1167; N.M. 1087; Ariz. 1960; D.C. 728.

So, she has the same rights and remedies concerning it as if sole <sup>a</sup>: N.H. 183,12; Ga. 1783.

She may control her real or personal estate, and make contracts concerning it, as if sole: N.H.; Ct.; N.Y. 1860,90,3; O. 3109; 1884, p. 209; Ind.; Mich.; Io. 1935; Kan.; Neb.; Del. V. 14,550,4; Va.<sup>b</sup> 1877,329,1; W.Va. 122,3; Ark.; Ore. 1878, p. 94, § 9; Col.; Wy. 1882,68,3; S.C. 2037; Miss.; Ariz.; D.C. 729.

She may, generally, make contracts and incur liabilities as if sole, in many states; see § 6482.

**Limitations.** But every restriction upon such power of the wife made in the marriage contract (Art. 644) must be complied with: Ga.

No contract of sale of a wife as to her separate estate with her husband or trustee is valid without an order of court: Ga. 1785.

She cannot, without the joinder of the husband, convey real estate directly or indirectly conveyed to her by him, or paid for by him, or given or devised to her by his relatives, except if it was conveyed to her as security or in payment for a *bona fide* debt actually due to her from him: Me. 61,1.

Proceedings to annul the acts of the wife for want of authority can be instituted only by the husband or wife, or by their heirs: La. 134.

The wife, even when she is separate in estate from her husband, cannot alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing: La. 122.

If the husband refuses to empower his wife to contract, the wife may cause him to be cited to appear before the judge, who may authorize her to make such contract, or refuse to empower her, after the husband has been heard, or has made default: La. 125.

A married woman over the age of twenty-one years may, by and with the authorization of her husband, borrow money or contract debts for her separate benefit and advantage, and to secure the same, grant mortgages or other securities affecting her separate estate, paraphernal or dotal, as below provided: La. 126; D. 1713.

In carrying out the power to borrow money or contract debts, the wife, in order to bind herself or her separate or dotal property, must be examined at chambers by the judge of the district or parish in which she resides, separate and apart from her husband, touching the objects for which the money is to be borrowed or debt contracted; and if he shall ascertain either the one or the other is for her husband's debts, or for his separate benefit or advantage, or for the benefit of his separate estate or of the community, the said judge shall not give his sanction authorizing the wife to perform the acts or incur the liabilities above set forth.

If the wife shall satisfy the judge that the money about to be borrowed or debt contracted is solely for her separate advantage, or for the benefit of her separate or dotal property, then the judge shall furnish her with a certificate setting forth his having made such examination of the wife as is above required; which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage, or other act which may be required for the security of the debt contracted, and shall be annexed to the act, which act, when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all courts of this State and have the same effect as if made by a *feme sole*: La. 127-8; D. 1714-5.

The incapacity of the wife is removed by the authorization of the husband or, in cases provided by law, by that of the judge.

The authorization of the husband to the commercial contracts of the wife is presumed by law if he permits her to trade in her own name; to her contracts for necessities for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them.

The unauthorized contracts made by married women, like the acts of minors, may be made valid after the marriage is dissolved, either by express or implied ratification.

A married woman may act as mandatory, and her acts will bind the mandator and the person with whom she contracts, although she be not authorized by her husband; but the mandator has no action against her on the contract: La. 1786-7.

NOTES. — <sup>a</sup> See, however, § 6454. <sup>b</sup> The husband must, however, join in such contract, except as to such property as she may acquire as a sole trader (Art. 652). And see Art. 650.

**§ 6451. General Provisions.** In some states, all laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing to the husband, are repealed: Ore. 1880, p. 6, § 1; Wash. 2398.

*Except as to voting and holding office: Ore., Wash.*

"And henceforth, the rights and responsibilities of the parents, in the absence of misconduct, shall be equal, and the mother shall be as fully entitled to the custody and control of the children and their earnings as the father; and in case of the father's death, the mother shall come into as full and complete control of the children and their estate, as the father does in case of the mother's death:" Ore. *ib.* § 2; Wash. 2399.

"The common law as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not be held to impose any disability or incapacity on a woman, as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts which she could do, in reference to property, if unmarried: Miss. 1167.

§ 6452. **Special Provisions.** A receipt by the husband of the rents and profits of the wife's separate property is generally a sufficient discharge, unless previous notice in writing is given by the wife.

Payment to a married woman for money lent or deposited by her (or for her personal services: Ct.) will be valid as if she were sole: Ct. 14,2,8; Md. 51,27.

When a deposit of earnings, etc., in a savings bank, etc., is made by a woman then or thereafter married, the bank may pay it out on receiving her personal receipt: Del. V. 14,550,3; W.Va. 122,8; Ky. 52,4,16; Ark. 4627; Ala. 2036; Fla. 35,11. See *Banks*, in Part III.

Any married woman may deposit in savings banks sums of money, the proceeds of her own labor and her children's, less than \$2,000 in all, and draw, control, or transfer the same as if sole: Ga. 1772. If it become necessary in any suit prosecuted or defended by a married woman for her to give any bond or undertaking, she may execute such bond as if sole, and it may be enforced against her separate property: Ark. 4631. She may make contracts as if sole, except as to her chattels real, household furniture, plate or jewels, money in savings banks, stock in corporations, and debts secured by mortgage: R.I. 166,6.

§ 6453. **Suits for Property.** A married woman may, in most states, prosecute and defend suits concerning her own property as if sole: N.H. 183,12; Me. 61,5; Ct. 19,5,9; N.J. *Married Women*, 11; Ind. 254; Mich. 6297; Wis. 2345; Io. 2211; Del. V. 14,550,4; W.Va. 122,12; N.C. 178; Ky. Civ. C. 34; Mo.<sup>a</sup> 3296; 1883, p. 113; Ark. 4625,4951; Cal. 10370; Ore. Civ. C. 30; 1876, p. 73; 1878, p. 93, § 7; Nev. 1070; Col. 2268; Civ. C. 6; Wash. 6 and 2404; Ida. C. Civ. P. 185; Mon. Civ. C. 7; Wy. 82,3; Civ. C. 25; Uta. C. Civ. P. 227; S.C. Civ. C. 135; Ga. 1774; Ala. 2892; Ariz. 1962,2443; D.C. 729. See also § 6454.

So, though the suit be between the wife and her husband: Ore. 1878, p. 93, § 3; La. C. P. 105.

Or, in some, she may so sue jointly with her husband: Me.; Del.; Tex. 1204.

In several, they must sue or be sued jointly: R.I. 166,16; Pa. *Marriage*, 20; Ind. 5129; Va. 1877,329,1. So, probably, in other states.

But a recovery is for her exclusive benefit: Pa.

Or the husband may sue to recover possession of such property in his own name: Tex.

The husband alone cannot maintain an action concerning the wife's property: Me., Del.

The wife, if the husband fail to sue, may have order of court to sue in her name: Tex.

NOTE. — <sup>a</sup> But for personal property only.

§ 6454. **Other Suits.** (A) In many states, a married woman may in all cases sue and be sued without joining the husband, in like manner as if she were sole: N.H. 183,12; Mass. 147,7; Vt. 1884,140,1; N.Y. Civ. C. 450; N.J. *Married Women*, 10-11; O. 4996; 1884, p. 65; Ill. 68,1; Io. 2562; Minn. 66,29; Kan. 62,3; 80,29; Neb. 1,52,3; Md. 51,22; 1882,265; Ore. 1878, p. 93, § 7; Col. 2279; Wash. 2396; Dak. C. Civ. P. 77; Wy. 1882,68; Uta. 1021; Miss. 1167.



Except that suits between husband and wife are not allowed: Mass.; N.J. *Married Women*, 14; La. C. P. 105. (Except, of course, for divorce, separation, etc.; and, in Louisiana, for property, with the court's authorization.)

(B) But in most states, the wife may prosecute or defend an action by her against her husband as if sole: Ind. 254; Wis.; W.Va. 122,12; N.C.; Ky.; Mo.; Ark.; Cal.; Ore.; Nev.; Col.; Wash.; Ida.; Dak.; Mon.; Wy.; Uta.; S.C.; Ga. 1774; Miss. 1168; Ariz. For citations, see also below, and in § 6453.

But in North Carolina, in all actions against a married woman the husband must be served with the writ, and may with her consent be allowed to defend in her name: N.C.<sup>a</sup> 1824.

(C) So, in many other states, her husband must be joined with her, except as below, and in §§ 6642,6410,6522,6413,6453,6360: Wis. 2608; N.C. 178; Ky. Civ. C. 34; Tenn.<sup>c</sup> 3352; Mo. 3468; Ark. 4951; Cal. 10370; Ore.<sup>b</sup> 1876, p. 73, § 1; Nev. 1070; Col. Civ. C. 6; Wash. 6; Ida. C. Civ. P. 185; Mon. Civ. C. 7; Wy. Civ. C. 25; Uta. C. Civ. P. 227; S.C. Civ. C. 135; Ala. 2892; Fla.<sup>c</sup> 162,70; N.M.;<sup>c</sup> Ariz. 2443.

In no case need she sue by next friend: Ind., N.C., Ga.

If either husband or wife unlawfully obtains or retains possession or control of property belonging to the other, either before or after marriage, the owner may sue therefor as if they were unmarried: Ill. 68,10; Io. 2204; Ore. 1878, p. 93, § 3; Wash. 2401; La.

In Louisiana, the husbands have in their control all personal and possessory actions to which the wives are entitled; and may sue in their own name: La. C. P. 107. But actions relating to the dotal or paraphernal property must be brought by the wife, duly authorized by the husband, or by the judge, if he fails to do it: La. A suit against a married woman for a cause relative to her separate interest must be brought both against her and the husband: La. C. P. 118.

(D) So, in several, she may sue for her earnings in her own name: Me. 61,3; Ill. 68,7; Wis.; Io. 2211; Ore.; Wash. See § 6422; and compare Art. 652.

(E) She may sue in her own name for any injury to her person or character as if sole: Me. 61,5; Ind. 5131; Wis. 2345, *Amendment*; Del. V. 17,611; Ark. 4628; Ore.; Col.; Wy. 82,3.

And any judgment so recovered shall be her separate property: Pa., Ind., Wis.; provided that nothing herein shall affect the right of the husband to maintain a separate action for any such injuries as now provided by law: Wis.

Both must join in an action for torts done to the wife; but the damages recovered are for her separate use: Pa. *Marriage*, 22.

No married woman can sue, without the husband's consent; even if she is a free trader (unless divorced, etc., see Art. 635): La. C. P. 106.

Any married woman may be sued jointly with her husband on a note, bill, bond, or other contract which she executed jointly with him, and judgments are in such cases liens on the property of both defendants, and may be enforced against the property of either: Md. 51,20.

If the husband and wife are sued together, the wife may defend for her own right (and if either neglect to defend, the other may defend for such one also: O., Ill., Io., Kan., Neb., Ky., Ark., Cal., Ida., Mon., Wy., Uta.): O. 4997; Ill. 68,2; Io. 2563; Kan. 80,30; Neb. 2,35; Ky.; Ark. 4952; Cal. 10371; Nev. 1071; Col. Civ. C. 7; Wash. 7; Ida. C. Civ. P. 186; Mon. Civ. C. 8; Wy. Civ. C. 26; Uta. C. Civ. P. 228; Ariz. 2444.

She may defend in all cases in which she is interested, whether joined or not: Wash.

The husband may sue for a tort committed on the person or reputation of the wife: Ga. 1755.

If the husband refuses to empower his wife to appear in court, the judge may give such authority; La. 124.

NOTES. — <sup>a</sup> Except as provided in Art. 652. <sup>b</sup> Superseded by (A) above. <sup>c</sup> By implication, the laws being silent.

§ 6455. **Joint Suits.** (1) When a married woman enters into a contract jointly with her husband for the benefit of her separate estate or their joint estate, they may be jointly sued upon the same : Ct. 19,5,10 ; Md. 64,62 ; Wash. 7 ; and her property may be attached or taken on execution as if she were unmarried : Ct.

(2) So, they may join in all causes arising from injuries to the property, person, or character of either or both of them, or from any contract in favor of either or both : Ct. 19,5,12 ; Wash.

The husband and wife must be jointly sued (α) for all debts contracted by the wife for necessities furnished herself or children : Pa. *Marriage*, 15 ; Tex.<sup>b</sup> 1205 and 2855 ; (β) for all expenses incurred by her for the benefit of her separate property : Tex.<sup>b</sup> ; (γ) for all separate debts and demands against the wife : Tex.<sup>a</sup>, <sup>b</sup> 1206. See §§ 6403,6412.

NOTES. — <sup>a</sup> But in such case no personal judgment can be rendered against the husband. <sup>b</sup> Judgment may however be levied either against the wife's property, or community property, at the plaintiff's option.

§ 6456. **Powers in Corporations, etc.** (See also in Part III.) A married woman owning stock in an incorporated company may vote at elections of officers, etc., by proxy or otherwise : N.Y. 1851,321,1 ; W.Va. 122,9.

*Except* the case of mutual fire insurance companies : N.Y., W.Va.

She may sell and transfer railroad stock as if sole : Pa. *Marriage*, 40.

So of stock in any company : Ala. 2037. Shares of stock in corporations held or owned by a married woman may be transferred by her, her agent or attorney, without the signature of her husband, in the same manner as if such married woman were a *feme sole* ; and any proxy or power given by a married woman touching any shares of stock of any corporation owned by her, is valid and binding without the signature of her husband, the same as if she were unmarried : Cal. 5325 ; Dak. Civ. C. 394. All dividends payable upon any shares of stock of a corporation held by a married woman may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor : Cal.

**In Partnerships.** A married woman may become a special partner either with the husband or with any other person ; she may contract with him or any other person as if sole ; and in all suits arising from such partnership may be a witness against the husband (see also § 6480) : Col. 2527.

## Art. 646. Wills by Married Women.

§ 6460. **Power to Will.** (A) In nearly all states a married woman of full <sup>a</sup> age and sound mind may (except as below) devise her separate real or personal property by an ordinary will without the husband's consent as if sole : N.H. 183,11 ; Mass. 147,6 ; 1885,255 ; Vt. 2039,2042 ; R.I. 166,13 ; Ct. 18,11,2 ; N.J. *Married Women*, 9 ; Pa. *Marriage*, 14 ; *Wills*, 2 ; O. 5914 ; Ind. 2557-8 ; Wis.<sup>a</sup> 2277 ; Minn. 47,1 ; Kan. 117,35 ; 1883,163 ; Neb. 1,23,123 ; 1,73,42 ; Md.<sup>a</sup> 49, 3 and 12 ; Del. V. 14,550,5 ; Va. 118,3 ; N.C. 1839,2138 ; Ky. 113,4 ; Tenn. 3351 ; Mo. 3961 ; Cal. 6273 ; Ore. 64,3 ; Nev. 813 ; Col. 2269 ; Dak. Civ. C. 684 ; Mon. Prob. C. 435 ; Wy. 82,4 ; Uta. 1884,44,1,1,4 ; S.C. 2036 ; 1869 ; Ga. 2410 ; Ala. 2713 ; Miss. 1169 ; Fla. 150,16 ; La. 135 ; 1480 ; Ariz. 1489 ; D.C. 728.

And the same is implied in other states where there is no provision to the contrary : Me., N.Y., Ill., Io., Mich., W.Va., Ark., Tex., Wash., Ida., N.M. See § 6450.

*Except* that such will shall not (without his written consent or joinder in the will) impair the rights of the husband (1) to curtesy : N.H. ; Mass. ; R.I. 182,3 ; N.J. ; Pa. *Marriage*, 26 ; *Wills*, 21 ; Md. 51,20 ; Del. ; N.C. ; Tenn. ; Mo. ; Ore. ; (2) to the use of one half of her real estate for life, if they have had no issue born alive : Mass. ; (3) to one half her personalty : Mass., Kan. ; (4) to his distributive share as if she died

intestate: N.H., N.J., Pa., Md.; (5) to his right to administer her personalty without account not so bequeathed: R.I. (6) So, she may not by such will devise more than one-half her property, real and personal, away from the husband: Kan.<sup>c</sup>; Col.; (7) the husband must consent and subscribe the will, in all cases: Md. And further, she must be privately examined; and the will must be made sixty days before her death; Md. The husband may not be a witness to such will: Pa.

(B) In a few, married women are incapable<sup>b</sup> of making wills, except as below (see also above): N.J. *Wills*, 3; Ga.<sup>b</sup> 2410. But a married woman may make a will (1) where express power to will her separate estate is reserved or granted to her in the instrument creating the same or by marriage contract (compare in §§ 1652, 1659); Pa. *Marriage*, 26; N.C.; Ky.; S.C. 1869; Ga.; (2) of her separate estate, with the husband's consent: Ga. (see generally in A); (3) in execution of a power vested in her (see also § 1652): Tenn. 3009; Ga.; (4) when abandoned by the husband (Art. 635), divorced from bed and board (Art. 630), or when for other cause the law gives her the right of a *feme sole* as to her earnings: Mass. (see below); Ga.

In New Jersey, a married woman cannot make a will of lands: N.J. *Wills*, 3. But this is, in fact, repealed by the provision in A above, which is a later statute. A married woman deserted by or living apart from her husband for a justifiable cause, when the proper court has entered a decree establishing such fact, may make a will in the same manner and to the same effect as if sole, and by such will or by deed without her husband's consent, dispose of all her estate, real or personal: Mass. 1885,255.

NOTE. — <sup>a</sup> A married woman aged eighteen may make a will, though not of age until twenty-one, in the noted states. And see § 6601 for states where a married woman is of age before twenty-one. <sup>b</sup> "For want of perfect liberty of action, being presumed to be under the control of their husbands:" Ga. <sup>c</sup> Such consent must be in writing and acknowledged before two witnesses.

## Art. 647. Fraudulent Conveyances to the Wife.

§ 6470. **What Are.** (See also Art. 459; *Insolvency*, Part IV.) A conveyance made by the husband to the wife without valuable consideration is fraudulent as against the husband's creditors existing at the time of such conveyance: Me. 61,1. So, any conveyance made to the wife upon consideration paid by the husband or out of his property: Me.

Nothing in Arts. 642,644, etc., is to authorize a husband to settle any of his property on his wife in any other manner or with any other effect than by law allowed: R.I. 166,14.

§ 6471. **Conveyances between the Husband and Wife.** (A) Nothing contained in this chapter authorizes a husband and wife to transfer property, real or personal, to each other except as before: N.H. 183,13; Mass. 147,3; 1884,132,1; R.I. 166,14. (B) No transfer or conveyance of goods and chattels (or lands: Miss.) between a husband and wife who are living together is valid as against third persons unless in writing, acknowledged, and recorded, like chattel mortgages (§ 4530): Ill. 68,9; Miss. 1178.

Possession has in such case no effect: Miss.

(C) But a conveyance, transfer, or lien executed by either husband or wife in favor of the other, is valid to the same extent as between other persons: Io. 2206; Ore. 1878, p. 92, § 5.

*Except* that a wife may by gift from her husband acquire as her separate property (1) wearing apparel and articles of personal use and adornment (*paraphernalia*) to the value of \$2,000: Mass. But this provision nevertheless does not render valid any gift by the husband in fraud of his creditors: Mass. See § 6423.

A contract of sale, between husband and wife, can take place only in the three following cases: —

1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.



3. When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry.

Saving, in these three cases, to the heirs of the contracting parties their rights, if there exist any indirect advantage : La. 2446.

## Art. 648. Other Contracts. (See also § 6450.)

§ 6480. **With the Husband.** (See § 6471.) (A) Nothing in these articles (644, 645, 646) is to authorize a married woman to make contracts with her husband : N.H. 183,12 ; Mass. 147,2 ; N.J. *Married Women*, 14.

When property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them : Io. 2203 ; Ore. 1878, p. 92, § 2 ; Ala. 2709.

(B) But in other states, all contracts between husband and wife are valid : Minn. 69,4 ; N.C.<sup>a, b</sup> 1836 ; Nev. 169 ; Col. 2527 ; N.M. 1089.

Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts (Arts. 170,173) : Cal. 5158 ; Nev. ; Dak. Civ. C. 79.

*Except* (1) contracts as to the real estate of either or any interest therein : Minn. (2) They may not by contract alter their legal relations, except as to property : Cal. 5159 ; Nev. 170 ; Dak. Civ. C. 80 ; and compare § 6440. Except as above, either husband or wife may act as the agent of the other : Minn., N.M.

(3) They may not contract with each other for work and labor, so as to receive compensation therefor from the other ; and the husband cannot rent the wife's plantation or carry on business with it on his own account ; but all business done by him with the means of the wife is deemed to be done on her account by him as agent, unless a contract changing such relation be recorded : Miss. 1177.

They may agree to an immediate separation, and make provision for the support of either of them or their children during such time : Cal. ; Nev. 170 ; Dak. The mutual consent of the parties is a sufficient consideration for such agreement ; Cal. 5160 ; Nev. 171 ; Dak. Civ. C. 81.

Married women may loan money to their husbands, and take a judgment or mortgage as security therefor, in the name of a trustee, and such mortgage, etc., taken in good faith is valid in law : Pa. *Marriage*, 24.

In all cases where the rights of creditors or purchasers in good faith come in question, the husband is held to have notice of the contracts and debts of his wife, and, *vice versa*, the wife of the husband's : Minn., N.M. In every case, where any question arises as to the good faith of any transaction between husband and wife, whether direct or by intervention of third persons, the burden of proof is on the party asserting the good faith : Wash. 2397.

A contract of sale between husband and wife can take place only in the three following cases : —

1. When one of the spouses makes a transfer of property to the other who is judicially separated from him or her, in payment of his or her rights.

2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

3. When the wife makes a transfer of property to her husband in payment of a sum promised to him as a dowry.

Saving, in these three cases, to the heirs of the contracting parties their rights, if there exist any indirect advantage : La. 2446.

NOTES. — <sup>a</sup> If not against public policy. <sup>b</sup> If not inconsistent with the provisions of § 6445.

§ 6481. **Special Cases.** In a few states, a married woman may constitute the husband her attorney, or release to her husband the right to control her property or any part of it, and to dispose of the income thereof for their mutual benefit ;

and may in writing revoke the same: Me. 61,2; Ill. 68,14; Io. 2210; Del. V. 14, C. 550,6; Ore. 1878, p. 93, § 6; Wash. 2403; N.M. 1089.

So, a husband may constitute his wife such attorney: Ill.; Io.; Ore.; Ga. 1759; N.M. But proof must be made as in other cases of agency: Ga. She may loan money to the husband on security of a judgment or mortgage on his estate in the name of a third person as her trustee, and the security will be good and valid: Pa. *Marriage*, 24. After his or her death the administrator of a deceased husband or wife may pay debts due the wife or husband surviving as if no relation had subsisted between them: Me. 64,60.

§ 6482. **With Third Persons.** (A) In a few states, a married woman may make contracts, oral or written, sealed or unsealed, as if sole: N.H. 183,12; Mass. 147,2; Vt. 1884,140,1; N.Y. 1885,381; N.J. *Married Women*, 5; Ind. 5115; Ill. 68,6; Io. 2213; Minn. 69,2; Ore. 1878, p. 92,1; Col. 2277 and 2280; Miss. 1167; N.M. 1088. Compare also § 6450. Including negotiable notes, or bills: Col.

*Except* in several, she may not be liable (1) as indorser, surety, or guaranty for her husband: N.H. 1879,57,27; Vt.<sup>a</sup> 1884,140,1; Ga. 1783. But widows and spinsters of age may bind themselves as sureties and endorsers like men: La. D. 1716; (2) or as such surety, etc., for any person: N.J.; Ind. 5119; Ga.; (3) or on any undertaking made by her on the husband's behalf: N.H.; Ga.; (4) or on behalf of any person: N.J.; (5) or as accommodation indorser: N.J. (6) She may not enter into a partnership, or carry on a partnership business, without the consent of the husband (except when the husband has deserted her, is idiotic or insane, is confined in the penitentiary): Ill. 67,6. (7) Any sale of her separate estate made to a creditor of her husband in extinguishment of his debts is void: Ga.

(B) The contracts of a married woman are as a general rule void: N.C.<sup>b</sup> 1826; Ga. 2730; N.M.<sup>c</sup> 1088,2757. *Except* (1) contracts for her necessary personal expenses: N.C.; (2) to pay debts existing before the marriage; N.C.; (3) for the support of the family (see § 6413): N.C.

(C) The covenants made by her in a deed in which the husband joins, as in Art. 650 provided, are often valid. See Art. 650.

The wife, whether separated in property by contract or by judgment or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage: La. 2398.

NOTES. — <sup>a</sup> Except by way of mortgage duly executed according to Art. 647. <sup>b</sup> Unless made with the husband's written consent. <sup>c</sup> Unless with his oral consent.

§ 6483. **Special Cases.**<sup>a</sup> (1) A married woman may contract for the purchase of a sewing-machine, as if sole: Pa. *Deeds*, 37. (2) She may execute an official bond, as principal: Ind. 5118; see Part IV.

Any married woman entitled by gift or devise to any contingent estate or interest in real or personal property may with the concurrence of her husband compound and receipt for, assign and convey the same, in all cases where she lawfully might if it were a fee-simple: N.J. *Married Women*, 13.

A married woman may give a refunding bond for a distributive share or legacy, which will bind her estate and release the administrator, as if she were sole: Pa. *Marriage*, 32; and see in Part IV. Div. I.

A married woman may execute any bond, bill, note, or other instrument for the payment of money; and if the consideration thereof went to the benefit of her estate, she is liable thereon: Col. 2277.

NOTE. — <sup>a</sup> For insurance by married women, etc., see Part III.

**Art. 650. Deeds by Married Women.** (See also Art. 645. The provisions of this article control: O. 3112; 1884, p. 209.)

§ 6500. **Of her Property** (A) In many states, no married woman can convey or incumber her separate real estate (1) unless the husband join in the deed (except as below specified): Vt. 1884,140,1 ; 2325 ; R.I. 166,4 ; N.J. *Married Women*, 14 ; O. 4107 ; Ind. 5116 ; Mich.<sup>a</sup> 6288 ; Minn. 69,2 ; Md. 51,30 ; Del. 83,4 ; 76,2 ; W.Va. 122,3 ; N.C. 1256 ; Ky. 24,21-1 ; Mo. 669 ; Tex. 559 ; Wash. 2313 ; Fla. 150, 6 and 9 ; La. 129 and 2397 ; N.M. 1088.

So, in Maine, she cannot convey real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, without his joinder in the deed : Me. 60,1.

*Except* real estate conveyed to her as security or in payment for a *bona fide* debt actually due to her from the husband : Me. *Except* mortgages to secure the purchase-money : Minn. *Except* leases not exceeding three years : Minn. ; O. 3108 ; 1885, p. 131 ; N.C. 1834. Nor is it good if to begin more than six months after execution : N.C. *Except* when authorized by court : Mich., La. ; or in cases where the alienation of the dotal immovable is permitted : La. See also Art. 635.

She may, however, be bound by an estoppel *in pais* as if sole : Ind. 5117.

So, in many states, (B) no separate property of the wife, real or personal, can be sold, conveyed, transferred, or incumbered by the husband (unless the wife consent) : Vt. 2325 ; R.I. 166,5 ; Ct.<sup>b,c</sup> 18,6,10 ; 14,2,4 ; N.J. *Married Women*, 15 ; Pa. *Deeds*, 104 ; *Marriage*, 13 ; O. 3109 ; 1884, p. 209 ; Ind. 5128 ; Va. 129,2 ; W.Va. 80,2 ; N.C. 1840 ; Tenn. 3347 ; Mo. 3295 ; Tex. 559 ; Nev. 182 ; Col. 2276 ; Wash. ; Ida. 1874-5, p. 635,6 ; Wy. 82,9 ; Fla. 150,6 ; Ariz. 1972. See also § 6450, and in Part IV. *Ejectment*.

Such consent of the wife must be evidenced (1) by writing duly acknowledged by her before a judge : Pa. ; (2) by joinder in the deed executed by him and her, as below prescribed.

(C) So, in many, any married woman of full age<sup>d</sup> may join with her husband in any conveyance of her real (or personal) estate : N.H. 183,10 ; Me. 73,14 ; Vt. 1923 ; R.I. 166,7 ; Ct. ; Pa.<sup>b</sup> *Deeds, etc.*, 22 and 32 ; O. ;<sup>d</sup> Ind.<sup>b,c</sup> 2921,2943 ; Ill.<sup>d</sup> 30,18 ; Io.<sup>c</sup> 1936 ; Minn.<sup>b</sup> 40,2 ; Md.<sup>d</sup> 51,20 and 30 ; Del. 83,4 ; Va. 117,4 ; W.Va. ; N.C.<sup>c</sup> 1256 ; Ky. 24,20 ; 52,2,3 ; Tenn. 2891 ; Mo.<sup>d</sup> 669 ; Ark.<sup>d</sup> 648 ; Tex.<sup>b</sup> 559 ; Ore.<sup>b</sup> 6,2 ; Nev.<sup>d</sup> 229 ; Ida.<sup>d</sup> 1874-5 ; *Conveyances*, 2 and 20 ; Mon. G. L. 179 ; Ga. 2706a ; Ala. 2707-8 ; Fla. 150,6 ; N.M. 2756 ; Ariz.<sup>a,g</sup> 2263 ; D.C. 450. The same would follow in states under A, above.

And the husband and wife may convey real estate of the wife by deeds signed, sealed, acknowledged by each of them separately, and delivered : R.I. 164,7 ; Nev. 247.

(D) But in others, she may execute and acknowledge all deeds, mortgages of her separate estate, bills of sale, or other conveyances (without the husband's joinder, etc., as required above ; except, probably, in all states, as to the husband's curtesy or other rights : § 3302), in the same manner as other grantors, etc. : Mass.<sup>f</sup> Me.<sup>f</sup> 61,1 ; N. Y.<sup>f</sup> 1860,90,3 ; Wis. 2221, 2224 ; Io.<sup>f</sup> 1935 ; Kan.<sup>d</sup> 62,2 ; Neb.<sup>d</sup> 1,73,42 ; Tenn. 3347 ; Ark.<sup>f</sup> 4621 ; Nev. 184 ; Col.<sup>c</sup> 2278 ; Wash. ;<sup>b</sup> Dak. Civ. C. 82 and 661 ; Wy. 1882,1,2 ; Uta. 647 ; S.C. 2036 ; Miss. 1193 ; Ariz. 2000. See also § 6450.

(E) In most states, the wife executes the deed, when the husband joins, (1) in the same manner and subject to the same rules as in other cases of deeds by joint grantors ;<sup>f</sup> N.H. ;<sup>f</sup> Mass. ;<sup>f</sup> Me. ;<sup>f</sup> Vt. ;<sup>f</sup> Ct. ;<sup>f</sup> N.Y. 1879,249,1 ; Ind. 2938 ; Ill. 30,19 ; Mich. 5662 ; Wis. 2224 ; Io. 1935 ; Minn. 1883,99,2 ; Kan. ; Neb. ; Md. 51,30 ; Mo. 1883, p. 21 ; Ark. ; Col. ;<sup>f</sup> Dak. ; Wy. ; Uta. ; S.C. ; Ala. ; Miss. ; Ariz. 2000.

(2) But in others, she must acknowledge the deed, and her consent be proved by a separate examination or other formality (§ 6501) : R.I. 166,8 ; N.J. ;



Pa. ; O. ; Del. ; Va. ; W.Va. ; N.C. 1246 ; Ky. 24,21 ; Tenn. ; Tex. 559 ; Cal. 6093 ; 6187 ; Ore. 6,14 ; Nev. 184 ; Wash. ; Ida. ; Mon. G. L. 196 ; Ga. ; Fla. 32,11 ; 150,9 ; La. 129 ; D. 1717 ; N.M. 2759 ; D.C.

But no married woman can destroy or impair the husband's curtesy without his written assent : Mass. 147,1 ; N.J. *ib.* 14. Nor shall any judgment or decree against her affect his right of curtesy : N.J. See § 3304.

But any personal property other than chattels real, household furniture, plate, jewels, stock, or shares, money in a bank or secured by a mortgage, may be sold and conveyed by her as if sole ; and she may make such contracts of sale accordingly. But this does not authorize her to transact business as a trader : R.I. 166,6.

In Connecticut, no sale or transfer of the wife's personalty or any interest therein is valid, unless the wife, or, if she be dead, those in whom her estate has vested or their guardians join in a written conveyance thereof ; and all reinvestments shall be in the name of the husband as trustee (see § 6420 : Ct.) : Ct. 14,2,4.

"The wife may, without consent of her husband, convey her separate property : " Cal. 5162 ; Dak. Civ. C. 82. A married woman cannot make a donation *inter vivos* without the special consent or concurrence of her husband, or unless authorized by court, as herein prescribed : La. 1480.

Such deed by husband and wife must (except as in § 6501) be signed and sealed, acknowledged by both, or attested and delivered, like other deeds.

A joint deed of land in the State by a wife non-resident with her husband has the same effect, and may be acknowledged or proved as if she were sole : Mich. 5663 ; Ore. 6,15 ; Wy. 1882,1,11.

"Every conveyance made by a husband and wife shall be deemed sufficient to pass any and all right of either in the property conveyed, unless the contrary appear in the conveyance : " Io. 1936.

The wife, whether separated in property by contract or judgment, or not separated, cannot, except by and with the authorization of the husband, and in default of the husband, with that of the judge, alienate her immovable effects, of whatever nature they may be, except in cases where the alienation of the dotal immovable is permitted : La. 2397.

NOTES. — <sup>a</sup> Applies to personal estate also. <sup>b</sup> Whether she be of full age or not. <sup>c</sup> Of real estate only. <sup>d</sup> "Full age" for the woman, in states so noted, is eighteen ; see also §§ 6509,6601. <sup>e</sup> In these states, the wife may convey her separate real property without the joinder of the husband, and bar his curtesy therein. <sup>f</sup> In these states, the same is implied by the provisions of § 6450, but there is no express law. <sup>g</sup> *Quære* whether this is not repealed by § 2000, below.

**§ 6501. Separate Examination.** The wife must be separately examined, in many states, as to all conveyances of real estate in which she joins. See § 6500 (E, 2). Thus (1) "she shall be examined privily (apart from the husband), and declare that the instrument is her voluntary act, and that she does not wish to retract it : " R.I. 166,8 ; O. 4107 ; Va. 117,4 ; W.Va. 65,4 ; 1883,13 ; Tex. 559, 4310 ; Cal. 6186 ; Nev. 250 ; Ida. *ib.* 22 ; Mon. G. L. 198 ; D.C. 451 ; (2) and in others, the form of acknowledgment, so far as it expresses the wife's examination, is as follows : "And the said Mary Smith, being at the same time privately examined by me apart from her husband, acknowledged that she executed the said indenture willingly, without compulsion or threats, or fear of her husband's displeasure : " N.J. *Conveyances*, 9 ; Pa. *Deeds, etc.*, 22 ; Del. 36,8 ; N.C. 1246 ; Tenn. 2891 ; Mo. 680 ; Fla. 32,11 ; 150,9 ; N.M. 2759 ; (3) in others, it is sufficient if she acknowledge before the officer (*i. e.* without private examination) that she joined of her own free will and consent, without any compulsion or force used by her husband : Tenn. 2891 ; Ark. 659 ; Ore. 6,14 ; Wash. 2313 ; Ga. 2706*a*. See also § 6502.

The officer must examine the wife separately, read the full contents of the conveyance to her ; and she must declare that she executed it voluntarily, and without coercion : Pa., O.

So, in several, she must be made acquainted with the contents of the instrument : Ky. 24,21 ; Tex. ; Nev. ; Ida. ; Mon. ; La. D. 1717 ; N.M.

The writing must be fully explained to her : W.Va., D.C.

(4) It must be acknowledged by her privily, apart from the husband : N.J. ; N.C. 1256 ; Ky. ; Tex. ; Ida. 1874-5, p. 635, § 6 ; La.

If, on separate examination as above, she refuse to consent, only the husband's estate will be conveyed by the instrument : R.I. 166,9.

This examination may generally be made at home or abroad, before any person authorized to take the acknowledgment of deeds : N.J.*ib.* 10 ; O. ; Del. 83,4 ; Va. ; N.C. 1246 ; Ky. ; Tenn. ; Tex. ; Nev. 249 ; Ida. *ib.* 21 ; Mon. G. L. 197 ; Fla. 150,9 ; N.M. 2758.

In others, it must be before a judge of the Superior (in Pennsylvania, *Supreme*) Court, or of the County Court in the county where the land is : Pa.,<sup>a</sup> W.Va. It may be before any judge of Common Pleas or a court of record : Pa. *Deeds*, 104,103. It must be before a notary : Del. 36,2 ; La. ; mayor, magistrate, or officer of a town within the United States, or before any minister or consul of the United States in a foreign country : Pa. *ib.* 23,107. Out of the State, it may be before any officer authorized under § 1582 : Pa. *ib.* 23,107 ; W.Va.

And must be by him certified on the deed, and recorded with it (see Art. 157) : N.J. ; O. ; Del. 83,8 ; Va. 117,5 ; W.Va. 65,5 ; N.C. ; Ky. ; Tenn. ; Tex. 4311 ; Nev. 251 ; Ida. ; Mon. ; Wy. 1882,1,12 ; Ga. ; D.C.

The married woman must be personally known to such officer, or her identity proved : Nev. 250 ; Ida. *ib.* 22 ; Mon. ; N.M.

The certificate must set forth that the woman was known to the officer, or her identity proved by a witness (two witnesses : Mo.) whose name is inserted ; and that her separate examination was duly made, as prescribed above : Nev. ; Ida. *ib.* 23 ; Mon. G. L. 199 ; N.M. 2760.

And if the deed [or a deed releasing dower] be executed by an attorney of the wife, his power must be executed with the same examination, etc., as required above : R.I. 166,10. The private examination remains valid, although the deed be not recorded : Del. 83,16.

NOTE. — <sup>a</sup> This does not apply to personalty : Pa. *Marriage*, 33.

§ 6502. **Statutory Forms of the Certificate of Acknowledgment** are provided in several states. Thus : —

(1) State of —, }  
County of —, } ss. On this — day of —, in the year —, before me [description of officer] personally appeared —, known to me [or, proved to me on the oath of —] to be the person whose name is subscribed to the within instrument, described as a married woman ; and upon an examination without the hearing of her husband I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

Tex. 4313 ; Cal. 6191.

(2) State [or, Kingdom] of — County [or, Town, etc.].

I, A. B. [description of officer], do certify that this instrument of writing from C. D. and wife E. F. [or, from E. F., wife of C. D.] was this day produced to me by the parties ; and the contents and effect of the instrument being explained to the said E. F. by me, separately and apart from her husband, she thereupon declared that she did freely and voluntarily execute and deliver the same to be her act and deed, and consented that the same might be recorded.

Given under my hand and seal of office. A. B.

[SEAL.]

Va. 117,4 ; W.Va. 1882,13,4 ; Ky. 24,21 ; D.C. 451.

(3) State of —, — County, to wit :

I hereby certify that on this — day of —, in the year —, before the subscriber [description of officer] personally appeared A. B., and C. D. his wife, and did each acknowledge the foregoing deed to be their respective act.

Md. 44,79.

§ 6503. **Personalty.** The husband and wife, in a few states, must join in all sales, transfers, and conveyances of the wife's personal property : Md. 51,30 ; Fla. 150,6. See also

§ 6501. So, in Pennsylvania, a married woman may transfer railway stock as if sole: *Pa. Marriage*, 40. See also § 6505.

§ 6504. **Release of Dower.** (See also § 3245.) Any married woman may release her dower by joinder in the deed with the husband, according to §§ 6500, 6501 (which see): *N.H.* 183,10; *R.I.* 164,11; *N.J. ib.* 9; *Pa. Deeds*, 109; *O.* 4107; *Ill.* 30,17; *Wis.* 2222; *Md.* 51,30; *Va.* 117,7; *W.Va.* 65,6; *Ky.* 24,20; *Mo.* 669; *Ark.* 649; *Wash.*; *S.C.* 1797; *Ga.* 2706*a*; *Fla.* 95,15; *La.* 129.

Whether she be of full age or not: *N.H.* If she be eighteen or upwards: *Wis.* By renunciation before an officer: *S.C.* 1796.

Or by separate deed: *R.I.* 164,12; *Ill.*; *Wis.*; *Md.*; *Ky.*; *Fla.* 95,14.

Such deed, the husband's interest having been previously divested by process of law or otherwise, may be executed by the wife in all respects as if sole: *Ill.*, *Wis.*

As she is to join in, or execute, a deed, it follows, of course, that the formalities of separate examination, etc., will be required as in § 6501 respectively.

§ 6505. **Special Cases.** When a husband and wife hold land as tenants, joint or in common (or, in New York, "by entireties"), they may make valid partition among themselves, which will bar dower if so expressed in the instrument: *N.Y.* 1880,472,1.

Nothing in this article applies to the case where the right of a married woman to convey or incumber her separate estate during marriage has been withheld in the will or deed creating such estate: *Pa. Marriage*, 39. A woman may sell and transfer State bonds, or stock in State corporations, as if sole: *Pa. ib.* 44. So of railroad stocks: *Pa. ib.* 40; of any stocks: *Ala.* 2037. She may sell, assign, or discharge mortgages and judgments as if sole: *Pa. ib.* 45. See also § 6480.

**Release of Homestead.** (See also in Part IV., *Exemptions*.) Generally, if the husband and wife are both living, both must join in the deed in order to release a homestead interest belonging to either: *N.H.* 133,3; and see in Part IV., *Exemptions*. **Exceptions.** But a mortgage of the owner of the homestead made at the time of its purchase to secure the purchase-money is valid: *N.H.* 133,2.

§ 6506. **Powers of Attorney.** (A) In a few states, any married woman aged twenty-one may execute and deliver her power of attorney to convey land as if sole: *N.Y.* 1878,300,1; *Wis.* 2222; *Del.* V. 15,467.

(B) In most states, a wife may convey her land by power of attorney, only it must be executed and acknowledged like a deed (§§ 6500-1), and duly certified (specifying the lands to be conveyed): *N.J. Conveyances*, 11-12; *O.* 4108; *Ind.* 2949; *Mich.* 5725; *Minn.* 40,2; *W.Va.* 65,12; *N.C.* 1257; *Ky.*<sup>a</sup> 24,36; *Mo.* 670; *Cal.* 6094; *Nev.* 183; *Fla.* 150,11.

And in the same way she may release dower: *O.*, *Mo.*, *Fla.*

Such power may be revoked by the wife at any time before a sale, but the revocation is operative until recorded in the county where the lands are: *O.* 4109.

A married woman having a mortgage or privilege on the property of her husband may appoint one or more agents, with power in her behalf during her temporary or permanent absence from the State to intervene in any contract of mortgage or sale made by the husband, and sign in her behalf such renunciation of said mortgage or privilege as the wife herself might do if personally present, and such power may be either general or special, and may be executed in the United States before any judge, or justice of the peace, or notary, or commissioners of this State, and in foreign countries before any consul, vice consul, or consular or commercial agent of the United States: *La.* 130; *D.* 1718.

Every general authority, even although stipulated for in the marriage contract, is void, except so far as it respects the administration of the property of the wife: *La.* 133.

NOTE. — <sup>a</sup> Only when not resident in the State.

§ 6507. **Covenants.** (A) In any deed made by a married woman of full age who joins with her husband therein, she may enter into any covenant of title, warranty, or against incumbrances, (1) and be bound therein as if sole: *Ind.* 5118.



But such covenant or warranty in a joint deed, though of the wife's property (except in Alabama), (1) does not bind the wife or her heirs: Vt. 1923; Neb. 1,73,48; Va. 117, 7; W.Va. 65,6; Ore. 6,2; Ala. 2237. So, in others, no such deed binds her to any covenant therein except special warranty against herself and her heirs, etc. [*quitclaim*]: Del. 83,4; Mo. 669; Nev. 248; Col. 223; Ariz.<sup>a</sup> 2264; D.C. 452.

(2) And such covenant, except so far as it relates to land or some interest therein owned by her in her own right, has, in New Jersey, no other effect than to estop her and all persons claiming as her heirs or by or through her, in the same manner as if she were a single woman: N.J. *Married Women*, 7.

And in all cases where either the husband or wife joins in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance unless it is expressly so stated on the face thereof: Io. 1937.

A wife may enter into the usual covenants of title as to real estate, and bind her separate property thereby: N.Y. 1860,90,3.

There may be a special covenant expressing the wife's intention to bind her separate estate: Ala.

NOTE. — <sup>a</sup> Perhaps this is repealed by Arizona, § 2000. See § 6500, note <sup>a</sup>.

§ 6508. **Covenants as Grantee, etc.** In all deeds of real estate or leasehold interest made to a married woman, she may bind herself and assigns by any covenant running with, or relating to, the said real estate, as if sole: Md. 51,29. And she is bound by the covenants in a lease which becomes vested in her: Md. 1882,335.

The landlord may distrain for rent due from a married woman when ninety days in arrear, and have action for possession and re-entry as if she were sole: Md. 51,28.

§ 6509. **Deeds by Married Women, Minors,** of their real estate may be ordered by the probate court, the husband being of full age, upon their joint petition, and his giving bond to dispose of the proceeds as the court may order: Ct. 4,5,24. See also § 6500, note <sup>b</sup>; and, generally, in Part IV., Division I.

But in some, a deed executed by the husband and wife according to §§ 6500-1 is valid, notwithstanding the wife's minority: Pa. *ib.* 32.

And any married woman aged eighteen may convey her right in the husband's lands if the father or mother (or if none, the judge of the Circuit Court) shall declare in the certificate that such conveyance would be beneficial to her, etc.: Ind. 2939-41.

§ 6510. **By Absent Married Women.** See § 6500, *ad fin.* A married woman residing out of the State may join with her husband in executing a deed and make execution and acknowledgment as if sole: N.Y. 2,3,11.

But any citizen may convey property situated in the State by his own signature alone, if the wife lives out of the State: Mon. G. L. 229.

So, a married woman residing out of the United States and executing a deed, her examination may be made and certified (1) before any United States minister or consular officer: Pa. *Deeds*, 107; (2) before any person qualified to take acknowledgments of other deeds (§ 1582): N.J. *Conveyances*, 9; Pa. *ib.* 23.

When proof or acknowledgment of a conveyance concerning the interest of a married woman in lands is taken out of the State or in a foreign country, it must be taken according to the laws of the State, and a certificate thereof appended: N.C. 1256,1258.

§ 6511. **Validating Statutes.** There are often statutes to be found making valid deeds, etc., previously executed, where the wife's joinder has been attended with some omission or informality. See Pa. *Deeds, etc.*, 64-69; 76-8; 105-6; 110-1; *Marriage*, 38 and 46; Mich. 5662*a*; Del. 83,5; W.Va. 65,11; 1883,13; Ky. 24,38; 1884,1498; Tenn. 2896; Fla. 150, 10 and 12.

## Art. 652. Sole Traders.

§ 6520. **Married Women doing Business.** (See also Art. 635.) There is in many states, a certain process by which a married woman can become a *sole*

*trader*: (Pa., Cal., Ida., Mon.); (free trader: N.C., Ga.); (free dealer: Fla.); (public merchant: La.); or carry on business in her own name: Ariz. 1990.

And in several states, some of the privileges are extended to her without formalities of any kind. (See also § 6352.) Thus, (A) a woman may carry on any business or trade or perform any labor or services on her sole or separate account, and her earnings shall be her sole or separate property, and may be used and invested by her in her own name: N.Y. 1860,90,2; Ind. 5130; Kan. 62,4; Neb. 1,53,4; Va. 1877,329,1; Ark. 4625; Col. 2271; Wy. 82,5.

(B) If a woman do business in her own name, her earnings, goods, and credits may be attached on trustee process or otherwise, and execution levied on her separate goods: Vt. 2321.

(C) When the husband has been insane for one year, the wife may so be authorized to do business on her separate account: R.I. 166,24.

(D) Every wife living separate from her husband either under a judgment of divorce, absolute or limited, or under a deed of separation executed by the husband and wife and recorded in the county where she is resident, or when her husband is an idiot or lunatic, is a free trader: N.C. 1831. So, every woman whose husband abandons her or maliciously turns her out of doors is a free trader, so far as to be competent to control and bind her separate property; but the liability of the husband for her reasonable support is not thereby impaired: N.C. 1832.

(E) When a married man is sentenced to, and is confined in the penitentiary, his wife during such confinement may carry on business as a *feme sole*, may sue and be sued accordingly, and is further entitled to all orders and privileges allowed under §§ 6351-2: Mo. 3291. (F) When a married woman carries on any business, she may sue upon any right of action accruing therefrom as if unmarried: Ct. 19,5,11. (G) Nothing herein authorizes a woman to carry on business in her own name when the same is managed or superintended by her husband: Nev. 225.

(H) If the wife is a public merchant, she may, without being empowered by her husband, obligate herself in anything relating to her trade; and in such case, her husband is bound also, if there exists a community of property between them.

She is considered as a public merchant, if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband: La. 131.

§ 6521. **Process.** Thus when a married woman<sup>a</sup> wishes to do business on her separate account, (A) she is to record in the clerk's office of the city or town (or in North Carolina, Montana, and Arizona, in the registry of deeds) a certificate setting forth (1) the names of herself and husband: Mass. 147,11; N.C. 1828; Mon. G. L. 867-8; and (2) the nature and place of business: Mass.; Mon.; Ariz.<sup>b</sup> 1991.

The husband may record such certificate if the wife does not: Mass.

No woman can become a free trader (1) unless aged twenty-one: N.C. 1827; (2) and the husband must consent and sign the above certificate: N.C.

Her signature (and in North Carolina his signature) must be witnessed by one subscribing witness: N.C.; or acknowledged like a deed: N.C., Mon.

No married man can become a sole trader as herein, when the capital originally invested exceeds \$10,000, unless the declaration above provided for contain her oath that the surplus above \$10,000 did not come from any funds of the husband: Mon. G. L. 871; Ariz. 1994 (\$5,000); and compare note <sup>a</sup>.

(B) A woman can become a free trader by ante-nuptial contract witnessed and recorded as above: N.C.

(C) And in Georgia, by publication of a notice, for one month, with the consent of her husband: Ga. 1760.

(D) In most states, only by petition to court, she may get a certificate: R.I. 166, 24; Pa. *Marriage*, 29; *Feme Sole*, etc., 6; Ky.<sup>b, c, m, n</sup> 52,2,6-7; Cal.<sup>a, b, c, d, e, h, i</sup> 11811-8; Nev.<sup>b, c, d, e, f</sup> 223-4; Dak. C. Civ. P. 885-891; Ida.<sup>b, c, d, e, h, i</sup> Civ. C. 885-891; Ala.<sup>a</sup> 2728-2731; Fla.<sup>b, g</sup> 150,13-14.

NOTES. — <sup>a</sup> In a few states, not every married woman can become a sole trader. Thus (in Pennsylvania, *ib.* 1), only when her husband is absent at sea; or, in Pennsylvania, Alabama, for profligacy or any cause fails to provide for her and deserts her. But by a later statute, the process is given the wife in any case: Ala. In California, only when the husband fails to support her or when there is ground for a divorce: Cal. Only when he is insane (§ 6520): R.I. <sup>b</sup> Notice of such intended

petition, etc., must be given by publication. <sup>c</sup> Any creditor of the husband may oppose the application. <sup>d</sup> Before making the order, the court administers to the woman an oath that she makes the application in good faith, for the purpose of enabling her to support herself and children, and not of defrauding or hindering creditors of the husband; and also that of the moneys to be used in such business not more than \$500 has come, directly or indirectly, from the husband. <sup>e</sup> A certified copy of the order and oath is recorded in the county land record office. <sup>f</sup> The giving the order is discretionary with the court; and the husband's insolvency alone is not sufficient cause. <sup>g</sup> Notice of the decree must also be given. <sup>h</sup> The applicant may invest in such business a sum derived from the community property or the separate property of the husband not exceeding \$500. <sup>i</sup> The petition must state that the application is made in good faith, to enable the applicant to support herself; it must set forth the fact of insufficient support by the husband and the causes thereof, if known; or any other grounds of application which are good cause for a divorce, with the reason why a divorce is not sought; and the nature of the business proposed, and the capital to be invested therein, if any, and the sources from which it is derived. <sup>j</sup> The court examines the applicant on oath as to the causes, etc. <sup>m</sup> The husband must join in such petition, or be made a party thereto. <sup>n</sup> Before decree, the court must be satisfied that the application is not made by either husband or wife with intent to hinder, cheat, or delay the husband's creditors, and that they will not be injured.

§ 6522. **Effect.** When a woman doing business has complied with § 6521, the husband is not liable on her contracts: Mass. 147,11; N.Y. 1860,90,4; Pa. *F. S. Traders*, 1 and 5; Ind. 5122; Ky.; Ark. 4626; Cal.<sup>a</sup> 11821; Nev.<sup>a</sup> 227; Ida.<sup>a</sup> Civ. C. 895; Mon.<sup>a</sup> G. L. 868 and 872; Ariz.<sup>a</sup> 1991-2,1995.

Nor is the property employed in the business liable, as the property of the husband, to attachment or execution: Mass.; Ind. 5130; Ky.; Cal. 11819; Nev. 225; Ida. Civ. C. 899; Mon. G. L. 869; Ariz.

But belongs exclusively to such married woman: Ky., Cal., Nev., Ida., Mon., Ariz.

The woman may contract and deal in all respects as if sole: N.C. 1828; Ky.; Nev.; Ida.; Mon.; Ga.; Ala. 2729; Fla.

She may carry on such business in her own name: Ky.; Cal.; Nev.; Ida.; Mon.; Ariz. 1992. See also § 6520.

She may enforce her contracts in her own name: Ky., Ga.

So, she may sue and be sued: Vt.; R.I.; Pa.; Wis. 2345; Ky.; Ark. 4951; Cal.; Nev.; Col. 2271; Ida.; Mon.; Wy.; Fla.; Ariz.

Her acquisitions become her separate estate: R.I., N.Y., Ind., Kan., Ky., Ark., Cal., Nev., Col., Ida., Mon., Wy., Ga., Fla., Ariz.

The husband's separate property cannot be taken for her debts: Nev., Mon.

She may freely and absolutely dispose of all her real and personal property during her life or by will: Pa., Ky.; and in case of intestacy, it goes to her next of kin as if the husband were dead: Pa. *ib.* 5.

She is responsible for the maintenance of her children: Cal. 11820; Nev. 226; Ida. Civ. C. 894; Mon. G. L. 870; Ariz. 1993. And is entitled to their earnings: R.I.

NOTE. — <sup>a</sup> Unless his special consent be given in writing.

§ 6523. **Cessation.** (Compare § 6353.) A woman's right as sole trader may be determined (1) by entry on the margin of the record (2) and three weeks' publication: N.C. 1830.

But such cessation will not (1) impair liabilities already incurred: N.C.; (2) or cover subsequent fraud on her part: N.C.

## CHAPTER V. — INFANTS.

### Art. 660. Minors.

§ 6600. **Note.** See generally, for the law of minors and their guardians, in the Probate Code, Part IV., Div. I.

**Definitions.** The law prescribes certain ages at which persons shall be considered of sufficient maturity to discharge certain civil functions, to make contracts and dispose of property. Prior to these ages they are minors, and for that disability unable to exercise these rights as citizens: Ga. 1657.



§ 6601. **Full Age.** (A) In most states, except for marriage (§ 6110) a person, whether male or female, is deemed of age at twenty-one: Wis. 3962; Tex. 2471; Ga. 1791; and so where the laws are silent.

A person is of age at the first minute of his proper birth-day: Cal. 5026; Dak. Civ. C. 10.

(B) But in many, a woman is of age at eighteen; a man, at twenty-one: Vt. 2421; O. 3136; Ill. 64,1; Io. 2237; Minn. 59,2; Kan. 67,1; Neb. 1,34,1; Md. 52,1; Mo. 2559; Ark. 3464; Cal. 5025; Ore. 13,75; Nev. 323; Wash. 2363; Dak.; Ida. 1874-5, p. 749,1.

(C) And in several, a woman of any age, when lawfully married, may exercise all the powers of a married woman as if of full age (and see Arts. 650,644): Md.; Tex. 2858; Ore. 13,77. So, if she be married to a person of full age, she is deemed of age also: Wash. 2364. When a woman over sixteen is married her minority ends: Neb.

(D) And in several, all minors male or female, attain their majority by marriage: Io.; Tex. 4857; La. C. P. 114.

§ 6602. **Disabilities of Minors.** (A) As a general principle, minors cannot make any contract whatever: Ga. 2731.

A minor cannot make any contract relating to real property, if under the age of eighteen, nor relating to personal property not under his immediate possession or control: Cal. 5033; Dak. Civ. C. 15. He cannot give any delegation of power: Cal., Dak.

(B) But a minor is, in several states, bound by his contracts for necessities: <sup>a</sup> Io. 2238; Kan. 67,2; Cal.<sup>a</sup> 5036; Wash. App. p. 16, § 2; Dak.<sup>a</sup> Civ. C. 18; Ga.; <sup>b</sup> and so, probably, in all.

(C) And he is also, except as above, bound by other contracts, unless he disaffirm them within a reasonable time (one year: Dak.) after coming of age, and (if he was above eighteen at the time of the contract: Dak., Cal.), restore to the other party all money, consideration, or property received by him by virtue of the contract (and remaining within his control at any time after attaining his majority: Io., Kan., Wash.): Io.; Kan.; Cal. 5034-5; Wash.; Dak. Civ. C. 16,17; Ga.

(D) So, he cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute: Cal. 5037; Dak. Civ. C. 19.

Minors emancipated may contract in the cases already provided by law; and when not emancipated, their contracts are valid if made with the intervention of their tutors, and with the assent of a family meeting, in the cases when by law it is required. When he has no tutor, or one who neglects to supply him with necessities, a contract or quasi-contract for providing him with such necessities is valid.

A minor is also capable of accepting the contract of mandate, under the restrictions and modifications contained in the title on that subject.

The obligation arising from an offence or quasi-offence, is also binding on the minor.

In all other cases, the minor is incapacitated from contracting, but his contracts may be rendered valid by ratification, either expressed or implied: La. 1785.

No contract can, however, be disaffirmed, in a few, where the other party had good reason by the minor's own misrepresentations as to his majority, or from the fact of his having engaged in business like an adult, to believe the minor capable of contracting: Io. 2239; Kan. 67,3; Wash. App. p. 16, § 3.

The exemption of the infant is a personal privilege. The party contracting with him cannot plead it, unless he was ignorant of the fact at the time of the contract; nor can third persons avail themselves of it as a defence: Ga. 2732.

Where a contract for the personal service of a minor has been made with him alone, and those services are afterwards performed, payment made therefor to such minor in accordance with the terms of contract is a full satisfaction for them, and the parent or guardian cannot recover a second time: Io. 2240; Kan. 67,4; Wash. App. p. 16, § 4; and see in the Probate Code.

Age forms a distinction between those who have and those who have not sufficient reason and experience to govern themselves and to be masters of their own conduct. But as nature does not always impart the same maturity and strength of judgment at the same age, the law determines the period at which persons are sufficiently advanced in life to be capable of contracting marriage and forming other engagements.

Emancipation and the other ways which free the son or daughter of a family from the father's authority, regard only the effects which the civil law gives to the paternal power, but changes in no respect those that are derived from natural right.

Males who have not attained the age of fourteen years complete and females who are under twelve are under the age of puberty; and males who have attained fourteen years complete and females the age of twelve complete are distinguished by the name of adults.

Minors are those of both sexes who have not yet attained the age of one and twenty years complete, and they remain under the direction of tutors till that age. When they have attained that age then they are said to be of full age: La. 34-7.

NOTES. — <sup>a</sup> If such contract was, in the noted states, made when the minor was not under care of a parent or guardian able to supply such necessities, <sup>b</sup> or such parent or guardian failed or refused so to do.

§ 6603. **Deeds.** The deed of an infant is absolutely void: Ind. 2917.

But, in Georgia, it is voidable at his pleasure on attaining majority: Ga. 2694.

The making of another deed at that time voids the first without an entry on the lands: Ga.

§ 6604. **Liabilities.** Minors are civilly liable for their torts: Cal. 5041; Dak. Civ. C. 23. See in Part IV. But not for exemplary damages, unless at the time of the act capable of knowing it was wrongful: Cal.; Dak. *ib.* 24.

§ 6605. **Students' Contracts.** In several states, there are laws providing that nothing may be recovered for money lent or goods sold or hired on credit to any student in a college or academy who is under age, unless he have the previous written permission of the parents or guardian of such student (or, in Virginia and West Virginia, of the officers of the college): N.J. *Infants*, 15; Va. 139,1; W.Va. 174,94.

So, no innkeeper, confectioner, restaurant-keeper, or livery-stable keeper can give credit to any student in an incorporated academy or other educational institution within the State: Mass. 102,21; and such contracts are void, and no confirmation by the minor after coming of age is of any effect: S.C. 2063.

And in other states, it is a penal offence so to give credit without the written consent of the parent, guardian, officer of the institution, etc.: Ct. 20,12,4; N.J. *ib.* 13-14. See also Part V.

§ 6606. **Emancipation.** (See § 6613.) In several states, there is a process by which any minor may obtain a decree of court rendering him of age for all purposes of property and contract: Kan. 67,8-9; Ark. 1362; Tex. 1881, 23; Ala. 2735; 1879, 42; Miss. 1839; La. 367,385; D. 2316.

But such minor must be of the age of eighteen: Ala., La. The father and mother must consent, if living: Ala.; La. 387. Unless the application is made on the ground of ill treatment, etc.: Ga. 2733; La. D. 2318.

§ 6607. **Rights of Parents.** "Nothing contained in the statutes on apprentices shall affect the father's right at common law to assign or contract for the services of his children during their minority:" Mass. 149,22; Mich. 6376; Wis. 2394; Minn. 60,18; Ore. 13,60. See also Art. 666.

Birth subjects children to the power and authority of their parents. The extent of this subjection, on the one hand, and authority, on the other, will be explained in its proper place: La. 26.

The power of the mother to bind her children, legitimate or illegitimate, ceases upon her subsequent marriage: Ore. 13,3. See also Art. 666.

The father has the right to custody of the person of his minor child: Cal. 5197; Dak. Civ. C. 90; Ga. 1793.

But he cannot transfer such custody or services to any other person except the mother without her written consent, unless she has deserted him, or is living separate from him by agreement: Cal., Dak.

And if the father be dead, the mother has such right: Me. 59,24; Cal.; Dak.; Ga. 1794.

So, if the father be unable, or refuse, or has abandoned his family: Cal., Dak.

The father has the right to the services and earnings of his minor child: Cal., Dak., Ga.

And so, if the father be dead, the mother: Me.

The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment: Cal. 5211; Dak. Civ. C. 102.

The wages of a minor employed in service may be paid to him, until the parent or guardian entitled thereto gives the employer notice that he claims them: Cal. 5212; Dak. Civ. C. 103.

A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper court to restrain a removal which would prejudice the rights or welfare of his child: Cal. 5213; Dak. Civ. C. 104.

A child, whatever be his age, owes honor and respect to his father and mother.

A child remains under the authority of his father and mother, until his majority or emancipation.

In case of difference between the parents, the authority of the father prevails: La. 215-6.

Fathers and mothers shall have, during marriage, the enjoyment of the estate of their children until their majority or emancipation.

The obligations resulting from this enjoyment shall be:—

1. The same obligations to which usufructuaries are subjected;

2. To support, to maintain, and to educate their children according to their situation in life.

The usufruct in case of separation from bed and board, shall take place *in toto*, in favor of either father or mother, who shall have obtained such separation, and shall be subjected to the conditions prescribed above.

This usufruct shall not extend to any estate which the children may acquire by their own labor and industry, nor to such estate as is given or left them under the express condition that the father and mother shall not enjoy such usufruct: La. 223-6.

Fathers and mothers owe protection to their children, and of course they may, as long as their children are under their authority, appear for them in court in every kind of civil suit in which they may be interested, and they may likewise accept any donation made to them.

Fathers and mothers may justify themselves in an action begun against them for assault and battery, if they have acted in the defence of the persons of their children.

Fathers and mothers are answerable for the offences or quasi-offences committed by their children, in the cases prescribed under the title: *Of Quasi-Contracts, and of Offences and Quasi-Offences*: La. 235-7.

§ 6603. **Duties of Parent.** It is declared to be the duty of the parent to provide for the maintenance (and education: Cal., Dak., Ga., La.; and protection: Ga.) of his children until they become of age (§ 6600): Cal. 5196; Dak. Civ. C. 89; Wy. 1879, 1,4; Ga. 1792; La. 257.

It is generally made a penal offence for a parent to abandon his minor children (or his wife) or neglect to support them: N.H. 1883,58; Mass. 1882,270,1 and 4; R.I. 245,22; Ct. 1882,30; 1885,20; N.J. 1884,2; Ind. 2133; Wis. 1885,422; Del. 48,15; 76,1; N.C. 970; Dak. Civ. C. 335-6; Wy. *ib.* 3. See also in Part III., *Paupers*.

If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the best of her ability: Cal., Dak.

If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities, and recover the reasonable value thereof from the parent: Cal. 5207; Dak. Civ. C. 98.

Where a child, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation in the absence of an agreement therefor: Cal. 5210; Dak. Civ. C. 101.



A parent is not bound to compensate the other parent or a relative for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause: Cal. 5208; Dak. Civ. C. 99.

A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, they are not liable to him for their support, nor he to them for their services: Cal. 5209; Dak. Civ. C. 100.

For the support of paupers by their relations, see in Part III.

§ 6609. **Duties of Child.** "The parents and children may mutually protect each other, and justify the defence of the person or reputation of each other:" Ga. 1796.

Neither parent nor child is answerable, as such, for the act of the other: Dak. Civ. C. 105.

A bastard is bound to support his parents who are unable to support themselves: Fla. 171.

As long as the child remains under the authority of his father and mother, he is bound to obey them in everything which is not contrary to good morals and the laws: La. 217.

A child under the age of puberty cannot quit the paternal house without the permission of his father and mother, who have a right to correct him, provided it be done in a reasonable manner: La. 218.

Fathers and mothers may, during their life, delegate a part of their authority to teachers, schoolmasters, and others to whom they intrust their children for their education, such as the power of restraint and correction, so far as may be necessary to answer the purposes for which they employ them. They have also the right to bind their children as apprentices: La. 220.

§ 6610. **Alimony.** A child has no right to sue either his father or mother for the purpose of obtaining a marriage settlement or other advancement: La. 223.

Children are bound to maintain their father and mother and other ascendants, who are in need; and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal.

They are also bound to render reciprocally all the services which their situation can require, if they should become insane: La. 229.

By *alimony* we understand what is necessary for the nourishment, lodging, and support of the person who claims it.

It includes the education, when the person to whom the alimony is due, is a minor.

Alimony shall be granted in proportion to the wants of the person requiring it, and the circumstances of those who are to pay it.

When the person who gives or receives alimony is replaced in such a situation that the one can no longer give, or that the other is no longer in need of it, in whole or in part, the discharge from or reduction of the alimony may be sued for and granted.

If the person, whose duty it is to furnish alimony, shall prove that he is unable to pay the same, the judge may, after examining into the case, order that such person shall receive in his house, and there support and maintain the person to whom he owes alimony.

The judge shall pronounce likewise whether the father or mother who may offer to receive, support and maintain the child, to whom he or she may owe alimony, in his or her house, shall be dispensed in that case from the obligation of paying for it elsewhere: La. 230-4.

§ 6611. **Emancipation from Parental Control.** (See § 6606.) (A) In a few states, the laws provide that the parental powers specified above are lost or relinquished (1) by voluntary contract or consent, releasing the right (a) to a third person: Kan. 67,5; Ga. 1793; or (β) to the child: Ga.,<sup>a</sup> La.; (2) by consenting to the adoption of the child: Ga.; (3) by consenting to the child's marriage: Ga., La.; (4) by failure to support the child: Ga.; or abandonment of the family: Ga.; (5) by cruel treatment: Ga.; (6) on the appointment of a guardian to the child; (7) on his attaining majority; (8) upon the marriage of the child (compare § 6601).

There are three kinds of emancipation:—

1. Emancipation conferring the power of administration;
2. Emancipation by marriage;

3. Emancipation relieving the minor from the time prescribed by law for attaining the age of majority : La. 365.

NOTE. — " This consent is revocable at any time.

**§ 6612. Of Emancipation conferring the Power of Administration.** The minor, although not married, may be emancipated by his father, or if he has no father, by his mother, when he shall have arrived at the full age of fifteen years.

This emancipation takes place by the declaration to that effect of the father or mother, before a notary public in presence of two witnesses : La. 366.

The minor may be emancipated against the will of his father and mother, when they ill-treat him excessively, refuse him support, or give him corrupt examples.

The account of the tutorship must be rendered to the emancipated minor assisted by a curator *ad hoc*, who shall be assigned to him by the judge.

The minor who is emancipated has the full administration of his estate, and may pass all acts which are confined to such administration, grant leases, receive his revenues and moneys which may be due to him, and give receipts for the same.

He cannot bind himself legally by promise or obligation for any sum exceeding the amount of one year of his revenue.

The minor who is emancipated has no right to claim a restitution on the plea of simple lesion against acts of simple administration.

He has no right either to claim a restitution for simple lesion against obligations or promises which do not exceed the amount of one year of his revenue.

If, however, he has contracted in the same year, towards one or more creditors, several obligations, each of which does not exceed the amount of one year of his revenue, but which together exceed that amount, these obligations may be reduced according to the discretion of the judge, whose duty it shall be in such case to take into consideration the estate of the minor, the probity or dishonesty of the persons who have dealt with him, and the utility and inutility of the expenses.

The emancipated minor can neither alienate, affect, or mortgage his immovables without the authority of the judge, which can only be granted with the advice of a family meeting and in case of absolute necessity or of a certain advantage.

The emancipated minor has no right to dispose of his movables or immovables by donation *inter vivos*, unless it be by marriage contract in favor of the person to whom he is to be married.

The minor who is emancipated otherwise than by marriage, cannot appear in courts of justice without the assistance of a curator *ad litem*, who is to be appointed for him specially by the judge for that purpose.

The emancipated minor who is engaged in trade, is considered as having arrived at the age of majority, for all the acts which have any relation to such trade.

The emancipation, whatever be the manner in which it may have been effected, may be revoked, whenever the minor contracts engagements which exceed the limits prescribed by law.

The revocation of emancipation places the minor under the same authority to which he was subject previous to his being emancipated.

But if he has been emancipated against the will of his father and mother, for excessive ill-treatment, refusal to support him, or corrupt examples given him, another tutor shall be appointed in the manner provided by law : La. 368-373.

**§ 6613. Of Emancipation by Marriage.** The minor, whether male or female, is emancipated of right by marriage.

The minor, emancipated by marriage, can appear in courts of justice without the assistance of a curator. The husband, who is a minor, can also authorize his wife to appear therein, whether she is a minor or of full age.

The minor, emancipated by marriage, may demand an account from his tutor and a settlement of the tutorship. The tutor is bound to pay him the balance ascertained to be due, and to deliver the property in his hands belonging to such minor.

The minor, emancipated by marriage, does not need the assistance of a curator in any act or proceeding.

This emancipation cannot be revoked.

In other respects, minors emancipated by marriage are bound by rules laid down in the preceding section : La. 379-384.

## **Art. 662. Children.**

§ 6620. **Legitimacy.** (See also §§ 6115, 6243.) Children are legitimate or illegitimate. Legitimate children are those who are born of a marriage lawfully contracted ; and illegitimate children are such as are born of an illicit union : La. 27.

Children are either legitimate, illegitimate, or legitimated : La. 178.

The law considers the husband of the mother as the father of all children conceived during the marriage.

The husband cannot by alleging his natural impotence, disown the child ; he cannot disown it even for cause of adultery, unless its birth has been concealed from him, in which case he will be permitted to prove that he is not its father.

The child capable of living, which is born before the one hundred and eightieth day after the marriage, is not presumed to be the child of the husband ; every child born alive more than six months after conception, is presumed to be capable of living.

The same rule applies with respect to the child born three hundred days after the dissolution of the marriage, or after the sentence of separation from bed and board : La. 184-7.

§ 6621. **Who may Dispute.** The presumption of legitimacy (§ 6623) can be disputed only by the husband or wife or the descendant of one or both of them : Cal. 5195 ; Dak. Civ. C. 88. In such case, illegitimacy may be proved like any other fact : Cal., Dak.

§ 6622. **Louisiana Law.** The legitimacy of the child born three hundred days after the separation from bed and board has been decreed, may be contested, unless it be proved that there had been cohabitation between the husband and wife since such decree, because it is always presumed that the parties have obeyed the sentence of separation.

But in case of voluntary separation, cohabitation is always presumed, unless the contrary be proved.

The presumption of paternity as an incident to the marriage is also at an end, when the remoteness of the husband from the wife has been such that cohabitation has been physically impossible.

The husband cannot contest the legitimacy of the child born previous to the one hundred and eightieth day of marriage, in the following cases : —

1. If he was acquainted with the circumstance of his wife being pregnant previously to the marriage.

2. If he was present at the registering of the birth or baptism of the child and signed the same, or if not knowing how to sign, he put his ordinary mark to it, in presence of two witnesses.

In all the cases above enumerated, where the presumption of paternity ceases, the father, if he intends to dispute the legitimacy of the child, must do it within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time, or within two months after the discovery of the fraud, if the birth of the child was concealed from him, or he shall be barred from making any objection to the legitimacy of such child.

If the husband die without having made such objection, but before the expiration of the time directed by law, two months shall be granted to his heirs to contest the legitimacy of the child, to be counted from the time when the said child has taken possession of the estate of the husband, or when the heirs shall have been disturbed by the child, in their possession thereof : La. 188-192.

§ 6623. **Of the Manner of Proving Legitimate Filiation.** The filiation of legitimate children may be proved by a transcript from the register of birth or baptism, kept agreeably to law or to the usages of the country.

If the register of births and baptisms is lost, or if no such register has been kept, it suffices for the child to show that he has been constantly considered as a child born during marriage.



The being considered in this capacity is proved by a sufficient collection of facts demonstrating the connection of filiation and paternity which exists between an individual and the family to which he belongs.

The most material of these facts are : —

That such individual has always been called by the surname of the father from whom he pretends to be born ;

That the father treated him as his child, and that he provided as such for his education, maintenance, and settlement in life ;

That he has constantly been acknowledged as such in the world ;

That he has been acknowledged as such within the family.

If there be neither register of birth or baptism, nor this general reputation, or if the child has been registered under a false name, or as born of unknown parents, also if the child has been exposed or abandoned, or if his condition has been suppressed, the proof of his legitimate filiation may be made either by written or oral evidence.

Proof against the legitimate filiation may be made by evidence that the plaintiff is not the child of the mother whom he pretends to be his, and the maternity being proved, that he is not the child of the husband of the mother : La. 193-7.

All children are presumed legitimate who are born in wedlock, or within the period of gestation (or within ten months : Cal.) thereafter : Cal. 5193-4 ; Dak. Civ. C. 86-7 ; Ga. 1786 ; La. 179.

But not if the marriage was dissolved or a divorce granted for pregnancy existing at the time of marriage : Ga.

The issue of a wife cohabiting with her husband (who is not impotent, in California) are indisputably presumed to be legitimate : Cal. 11962 (5) ; La. 184.

But the legitimacy of a child born in wedlock may be disputed : Ga. Where a possibility of access existed, the presumption is in favor of legitimacy, unless the parents were divorced from bed and board : Ga.

## Art. 663. Bastards.

§ 6630. **Who are.** A bastard is a child born out of wedlock : Ky. 7,1 ; Ga. 1797 ; La. 180.

And whose parents do not subsequently intermarry : Dak. Civ. C. 87 ; Ga. ; so, for other states, see § 6631.

A child, the issue of adulterous intercourse of the wife during wedlock, is also a bastard : Ga. ; see § 6243.

The mother of a bastard is entitled to the possession of the child (unless legitimated by the father) : Ga. 1799 ; see § 6633.

The father of a bastard is bound to maintain him : Ga. 1798. See § 6638. So of both the parents : Nev. 1883,73,2. This obligation is good consideration to support a contract by him : Ga.

There are two sorts of illegitimate children : —

Those who are born from two persons, who, at the moment when such children were conceived, might have legally contracted marriage with each other ; and those who are born from persons to whose marriage there existed at the time some legal impediment.

Adulterous bastards are those produced by an unlawful connection between two persons, who, at the time when the child was conceived, were, either of them or both, connected by marriage with some other person.

Incestuous bastards are those who are produced by the illegal connection of two persons who are relations within the degrees prohibited by law : La. 181-3.

Illegitimate children who have been acknowledged by their father are called natural children ; those who have not been acknowledged by their father, or whose father and mother were incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards : La. 202.

§ 6631. **Subsequent Marriage and Acknowledgment.** (For the effect of a divorce, etc., on the legitimacy of children, see § 6243.) (A) A child, illegitimate

when born, whose parents have since intermarried, is, in most states, legitimate (but for *inheritance*, see also below): Me.<sup>a</sup> 75,3; Pa. *Marriage*, 9; Ill. 17,15; Mich. 5775a; Io. 2200; Minn. 61,17; Cal. 5215; Ore. 10,5; Nev. 208; Wash. 2388; Dak. Civ. C. 87; Ida. 1876-7, p. 27, 21; Mon. G. L. 864; Fla. 11,5; N.M.<sup>b</sup> 1433. (B) But so, in others, only when the father<sup>a</sup> has acknowledged or recognized him as his child: N.H.<sup>c</sup> 180,15; Mass. 125,5; Vt. 2233; Ct.<sup>c</sup> 1875,14; 1885,110,198; O. 4175; Ind. 2476; Ill. 39,3; Wis. 2274; Neb. 1,23,31; Md. 47,29; Va. 119,6; W.Va. 66,6; Ky. 31,6; Mo. 2170; Ark. 2525; Tex. 1656; Col. 1045; Ida. Prob. C. 316; Wy. 42,7; Ga. 1786; Ala. 2742; Miss. 1275; La.<sup>c</sup>,<sup>d</sup> 198; Ariz. 1466. And see § 6632.

NOTES. — <sup>a</sup> If born since 1864. <sup>b</sup> Except as to the "right of primogeniture" which remains to the legitimate children born before such marriage. <sup>c</sup> Or, in the noted states, both parents. <sup>d</sup> Except those born from an adulterous or incestuous connection.

§ 6632. **Acknowledgment.** (A) In several states, the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such (with the consent of the wife, if married) into his family, and otherwise treating it as if legitimate, thereby renders it legitimate for all purposes: Cal. 5230; Nev. 1885,24,9; Dak. Civ. C. 116; Ida. 1879, p. 9,10. See also § 6631, B.

So, either or both parents, or the father with the consent of his wife and the mother with consent of her husband, may acknowledge an illegitimate child as their own, or his or her own; and such child is then legitimate, and is the legal heir of the parent by whom it is so acknowledged: Ariz. 1890.

The acknowledgment mentioned in § 6631 is made either by an authentic act before marriage or by the contract of marriage: La. 198.

So, if the father by writing executed, acknowledged, and recorded like deeds of real estate, but with the judge of probate, acknowledge such child, he is legitimate for all purposes: Mich. 5775a.

(B) Every illegitimate child is heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; but does not represent such person so as to inherit from his kindred, either lineal or collateral: Me.; Wis. 2274; Minn. 46,5; Neb. 1,23,31; Cal. 6387; Nev. 795; Wash. 3305; Dak. Civ. C. 780; Ida. Prob. C. 316; Mon. Prob. C. 536.

It seems such acknowledgment need not be in writing to make the child heir to such father: Uta. 1884,44,2,4.

Illegitimate children inherit from the father whenever (the paternity is proven during his life, in Iowa, or) they have been recognized by him by recognition general and notorious, or else in writing; and under such circumstances, if the recognition has been mutual, the father may inherit from them; but, in such case, the ordinary rule of inheritance is inverted, and the mother and her heirs have preference, the father having the same right of inheriting from an illegitimate child that the mother has from one legitimate: Io. 2466-8; Kan. 33,23-5.

(C) If the parents intermarry before the death of the child, and the father after such marriage acknowledges him or adopts him into his family, the child is legitimate, and inherits as if legitimate in all respects from all kindred: Me.; Ill. 39,3; Minn.; Cal.; Nev.; Wash.; Dak.; Mon. But only if the father has other children after such marriage: Minn.

The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it shall not have been made in the registering of the birth or baptism of such child: La. 203.

Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception: La. 204.

The acknowledgment made by the father without the concurrence or consent of the mother shall have effect only with respect to the father: La. 205.

§ 6633. **Legitimation of Bastards.** (A) In several states, the putative father of a bastard (if he was unmarried at its birth: N.C., Tenn., Ga., N.M.) has a process in court by which he may legitimate the child: N.C. 39; Tenn. 4385; Ga. 1787; Ala. 2743; Miss. 1496; N.M. 1079.

The effect of such legitimation (1) is to impose upon the father all the obligations of the fathers of lawful children: N.C. 40; Tenn. 4387; N.M. 1083; (2) to enable the child to inherit real or personal property from such father only: N.C., Ala.; (3) to make him the legal heir of the parents adopting: N.M.; "children legitimized by order of the supreme government of the nation become direct heirs in the absence of other legitimate children, and are in any case entitled to a subsistence from the property of the parents: N.M. 1434; (4) to cause his property to descend upon his death as if he were legitimate: N.C.; (5) to make the child legitimate for all purposes as if born in wedlock: Tenn. And upon the death of such child his property descends to those who would be his heirs and next of kin if he were born legitimate: N.C.

A natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses declaring that it is the intention of the parent making the declaration to legitimate such child or children. But only those natural children can be legitimated who are the offspring of parents who at the time of conception could have contracted marriage. Nor can a parent legitimate his or her natural offspring in the manner prescribed in this article, when there exists on the part of such parent legitimate ascendants or descendants: La. 200.

Legitimation may even be extended to deceased children who have left issue, and in that case it inures to the benefit of such issue: La. 201.

§ 6634. **Effect.** The child's name may be changed: Ala. 2744.

Children legitimate by a subsequent marriage have the same rights as if they were born during marriage: La. 199.

Illegitimate children, though duly acknowledged, cannot claim the rights of legitimate children. The rights of natural children are regulated under the title: *Of Successions*: La. 206.

Every claim set up by natural children may be contested by those who have any interest therein: La. 207.

§ 6635. **Rights of Parents.** If the mother is living, and wishes to retain the custody of the child, the father has not such right until the child reaches the age of ten, unless on petition it appear that the mother is not a suitable person: Ill. 17,13. See also in Part V., *Bastardy Process*.

§ 6636. **Proof of Descent.** Illegitimate children who have not been legally acknowledged may be allowed to prove their paternal descent.

In the case where the proof of paternal descent is authorized by the preceding paragraph the proof may be made in either of the following ways:—

1. By all kinds of private writings in which the father may have acknowledged the bastard as his child, or may have called him so;

2. When the father, either in public or in private, has acknowledged him as his child, or has called him so in conversation, or has caused him to be educated as such;

3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived.

The oath of the mother, supported by proof of the cohabitation of the reputed father with her out of his house, is not sufficient to establish natural paternal descent, if the mother be known as a woman of dissolute manners, or as having had an unlawful connection with one or more men (other than the man whom she declares to be the father of the child) either before or since the birth of the child.

In case of rape, whenever the time of such rape shall agree with the time of conception, the ravisher may, at the suit of the parties concerned, be declared to be the father of the child.

Illegitimate children of every description may make proof of their maternal descent, provided the mother be not a married woman.

But the child who will make such proof shall be bound to show that he is identically the same person as the child whom the mother brought forth.



The foundling whom persons from charity have received and brought up cannot be claimed by its father and mother unless they prove that the child was taken from them by force, fraud, or accident.

No other relation can claim a foundling without having first obtained the tutorship of the foundling, and given security in a sum sufficient for the reimbursement of the expenses which it has incurred : La. 208-213.

By the laws of Nevada, "the paternity of any illegitimate child shall be established by mutual agreement of the mother and any person whose relations have been sufficiently intimate with her to warrant the conclusion:" Nev. 1883,73,1. It may also be established by the confession or admission of the father when not denied by the mother: Nev. When not so established, it is susceptible of proof in such manner as the court may determine: Nev. The mother may be a witness in support of the complaint: Nev.

**§ 6637. Duties of Parents.** Fathers and mothers owe alimony to their illegitimate children when they are in need.

Illegitimate children owe likewise alimony to their father and mother, if they are in need and if they themselves have the means of providing it.

Illegitimate children have a right to claim this alimony, not only from their father and mother, but even from their heirs, after their death.

But in order that they may have a right to sue for this alimony they must —

1. Have been legally acknowledged by both their father and mother, or by either of them, from whom they claim alimony, or they must have been declared to be their children by a judgment duly pronounced in cases in which they may be admitted to prove their paternal or maternal descent.

2. They must prove in a satisfactory manner that they stand absolutely in need of such alimony for their support.

The obligation of giving such alimony ceases when the illegitimate child is able to earn his subsistence by labor, or whenever his father or mother has caused him to be instructed in an art, trade, or profession fit to procure him a sufficient livelihood, unless some continual sickness or infirmity prevents such child from working for his subsistence.

The debt of alimony ceases likewise to be due from the estate of the father or mother of the illegitimate child whenever either of them has provided during his or her life a sufficient maintenance for his or her illegitimate child, or have made to him donations or other advantages which may be sufficient for that purpose.

The other rules established respecting alimony to be granted to legitimate children take place likewise with respect to illegitimate children, except so far as they may be contrary to the foregoing provisions.

Alimony is due to bastards, though they be adulterous and incestuous, by the mother and her ascendants : La. 240-5.

**§ 6638. Bastardy Process.** The mother of an illegitimate child has, in most states, a process to compel the father to support it : See in Part V.

## **Art. 664. Adoption.**

**§ 6640. Who may Adopt.** Generally, any person being an inhabitant of the state, aged twenty-one : Mass., Vt., N.J., Ky., Nev., Ariz. ; aged forty : La. ; competent to make a will : Io. ; "any adult:" Cal. 5221 ; Dak. Civ. C. 107 ; Ida. ; if he have a wife<sup>a</sup> or husband, he or she must consent or join in the petition or other instrument, if competent : N.H. ; Mass. ; Me. ; Vt. ; R.I. ; Ct. ; N.Y. ; N.J. ; O. ; Ill. ; Mich. ; Wis. ; Minn. ; Del. ; Ky. ; Mo. ; Cal.<sup>a</sup> 5223 ; Ore. ; Nev. *ib.* 3 ; Col. ; Wash. ; Dak.<sup>a</sup> Civ. C. 109 ; Ida. *ib.* 3 ; Uta. *ib.* 6 ; La. ; Ariz. 1884 ; may adopt any other person (but such person must be younger than the person adopting : Mass., La.) ; and it seems such person must be a child : N.H., Me., R.I., Pa., Ill., Wis., Minn., Neb., Del., Mo., Ore., Nev., Col., Uta., Ala., Fla., La., N.M. ; a minor : Ct., N.Y., N.J., O., Io., Kan., N.C., Cal., Nev., Col., Wash., Dak., Ida., Wy., Uta., Ariz. (see also be-

low); as his or her (or, in New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, Connecticut, New York, New Jersey, Ohio, Illinois, Missouri, Colorado, and Nevada, when two married persons make the adoption, as their) child: N.H. 188,1; Mass. 148,1; Me. 67,32; Vt. 2536; R.I. 166,1; Ct. 14,4,1; 1880,29; 1884, 3; 1885,110,65-8; N.Y. 1873,830,2-3; N.J. App. *Infants*, 6; Pa. *Adoption*, 1; O. 3137; Ind. 823; Ill. 4,1; 1885, p. 17, § 1; Mich. 6379; Wis. 4021; Io. 2307; Minn. 124,26; Kan. 67,5-6; Neb. 2,796; Del. V. 17,612,1; N.C. 1; Ky. 31,17; Tenn. 4388; Mo. 599-600; Ark. 1885,28,1; Tex. 1; Cal. 5222; Ore. 13,61; Nev. 1885,24,1; Col. 1-2; Wash. 1667; Ida. 1879, p. 8,1; Wy. 2,1 and 2; Uta. 1884, 34,1; Ga. 1788,1790; Ala. 2745; Miss. 1496; Fla. 1885,3594; La. 214; N.M. 1079; Ariz. 1883.

No one can adopt his own wife or husband: Mass.; or his own child: Ill., Wis., Io., Minn., Wash.; or brother or sister: Mass.; whether of the whole or half blood: Mass.; or uncle or aunt: Mass.; nor his illegitimate children whom the law prohibits him from acknowledging: La. No Mongolian can adopt or be adopted: Nev. 1885,24,10.

In Illinois, it seems that only an orphan can be adopted, or a child both of whose parents have deserted it for at least one year: Ill. 4,3.

The person adopting must be at least fifteen years older than the person adopted; N.J. *ib.* 2; Ida. *ib.* 2; La.; and so, in others, at least ten years older: Cal. 5222; Nev.: Dak. Civ. C. 108.

The adoption may be made either for life or during the child's minority: N.C.

NOTE. — <sup>a</sup> Unless, in the noted states, such wife, etc., be lawfully separated from the husband.

§ 6641. **The Process** is (A) by petition in the Superior (or, in many, the Probate: N.H.; Mass.; Me.; R.I. 164,1; Ct.; N.J.; Mich.; Kan.; Del.; Ark.; Wash.; Dak.; Ida.; Wy.; Uta.; Ariz.; in New York, Pennsylvania, Illinois, Wisconsin, Nebraska, Oregon, Colorado, the County; in Rhode Island, the Municipal) Court: N.H. 188,1; Mass. 148,1; Me. 67,32; Ct.; N.Y. 1873,830,8; N.J. App. *Infants*, 6; Pa. *Adoption*, 1; Ind. 823; Ill. 4,1; Mich. 6379; Wis. 4021; Minn. 124,26; Kan. 67,5-6; Neb. 2,797; 1885,98; Del. V. 17,612,1; N.C. 1; Ky. 31,17; Ark. 1885,28,1; Cal. 5226, Amt.; Ore. 13,61; Col. 1885, p. 17, § 1; Wash. 1667; Dak. Civ. C. 112; Ida. *ib.* 6; Wy. 2,1; Uta. *ib.* 2; Ga. 1788; Miss. 1496; Fla.; Ariz. 1886. For citations, see also § 6640.

The petition must be brought in the county or district (1) where the child resides: N.H.; Ct.; Ind.; N.C.; Ark.; Ga. 1883, p. 59; Miss.; (2) where the petitioner resides: N.H., Mass., Me., R.I., N.Y., N.J., Pa., Ill., Mich., Wis., Minn., Neb., Del., Ky., Cal., Ore., Col., Wash., Dak., Ida., Wy., Uta., Miss., Ariz.; (3) where the parent resides: Kan., Wy.<sup>a</sup>

A person residing out of the State may petition to adopt a person resident in the State, in the county, etc., where the person to be adopted resides: Mass.

In any case, whether an order of adoption be granted is discretionary with the court: N.H. 188,3; Me. 67,34; R.I. 164,6; Ct. 14,4,2; N.Y.; N.J. *ib.* 8; 1882, 185; Pa.; O. 3139; Ind. 825; Ill. 4,3; Mich.; Wis. 4023; Minn. 124,30; Kan. 67,6; Neb. 2,799; Del. *ib.* 3; N.C. 2; Ky.; Tenn. 4389; Ark. 1885,28,3; Cal. 5227; Ore. 13,66; Nev. 1885,24,5; Dak. Civ. C. 113; Ida.; Wy. 2,3; Uta. *ib.* 3; Ga.; Miss.; Fla.; La. D. 2324; Ariz. 1887.

(B) But in other states, the adoption is effected also by a mere deed, stating the fact of adoption, signed (and sealed) by each party, acknowledged before the judge, and recorded with the clerk of probate (register of deeds: Pa., Io., Mo., Col., Wy.) for the county where the person adopting resides (or, if he live out of the State, where the person adopted resides): Pa. *Adoption*, 2; Mo. 599; Wy. 2,7-8; Ala. 2745; N.M. 1080-2. If the person adopted be not of full age, it must be so signed and acknowl-

edged by the parent or guardian (or, in Vermont, Iowa) if a married woman, by the husband : Vt. 2537-8,2541 ; Io. 2308-9.

The judge of the court must, however, make an order : *Ida. ib. 7.*

And the person adopting only signs the deed, which is recorded in the county where he resides : *Tex. 1.*

The judge must examine the parties : N.Y. 2873,830,9 ; N.J. ; Cal. ; Nev. ; Dak. ; *Ida. ib. 7.*

He must examine the wife apart from the husband, and refuse the decree unless satisfied of her free consent : N.Y. ; O. 3133 ; Col. 1885, p. 18, § 2 ; Wash. 1668.

If the person adopted have property, and no guardian, a bond is required from the person adopting as from a guardian : N.C. 4.

The decree will not be made unless the petitioner satisfies the court (1) that he is of sufficient ability to bring up the child : Me. ; R.I. ; N.J. ; O. ; Ill. ; Wis. ; Minn. ; Ore. ; Col. *ib. § 3* ; Wash. 1669 ; Ariz. ; (2) that such adoption is generally fit and proper : Me., R.I., Ct., Ill., Mich., Wis., Minn., Ore., Col., Wash., Wy. 2,5 ; (3) that the interests of the child will be promoted : Ct. ; N.Y. ; N.J. ; Pa. ; Ind. ; Neb. ; Cal. ; Nev. ; Dak. ; *Ida. ; Uta. ib. 4* ; Miss. ; Ariz. ; (4) that the person adopting is of good moral character : N.J. ; Kan. ; Del. *ib. 2* ; N.C. ; Ariz.

NOTE. — <sup>a</sup> If such parent be the petitioner.

§ 6642. **The Consent of the Child** or other person to be adopted must, in most states, be obtained (1) if such person be over fourteen : N.H. 188,2 ; Mass. 148, 2-3 ; Me. 67,33 ; R.I. 164,5 ; Ct. 1880,29 ; 1885,110,65 ; N.J. *App. Infants*, 6 ; O. 3137 ; Ill. 4,4 ; Wis. 4021 ; Minn. 124,28 ; Neb. 2,797 ; Ore. 13,65 ; Col. 1885, p. 17, § 1 ; Wash. 1667 ; *Uta. ib. 2* ; Miss. 1496.

(2) Over twelve : N.Y. 1873,830,4 ; Cal. 5225 ; Nev. 1885,24,4 ; Dak. Civ. C. 111 ; *Ida. ib. 5* ; Ariz. 1885 ; (3) over twenty-one : Ga. 1790 ; (4) over seven : Mich. 6379 ; (5) of any age : Kan. 67,6. See also § 6640 for citations.

Whatever the age of the person to be adopted, the consent is required <sup>i</sup> (1) of the parents : N.H. ; <sup>e</sup> Mass. ; <sup>b, c, d, e, f, g, h</sup> Me. ; <sup>a, c, e, g, k</sup> R.I. <sup>c, d, e</sup> 164,2-3 ; Ct. ; N.Y. <sup>c, e, g, j, k</sup> *ib. 5-6* and 11 ; N.J. ; <sup>c, e, g</sup> Pa. ; O. ; <sup>c, e, g</sup> Ind. 827 ; Ill. <sup>e</sup> 4,2 ; Mich. ; Wis. <sup>e</sup> 4022 ; Io. <sup>k</sup> 2308 ; Minn. <sup>e</sup> 124,27 ; Kan. 67,6 ; Neb. Del. V. 17,612,2 ; N.C. 2 ; Ark. <sup>n</sup> 1885,28,5 ; Cal. <sup>c, g, j, k</sup> 5224 ; Ore. <sup>c, d, e</sup> 13,62-63 ; Nev. <sup>c, g, j, k</sup> 1885,24, 4 ; Col. ; <sup>c, e, g</sup> Wash. ; <sup>c, g, k</sup> Dak. <sup>c, g, j, k</sup> Civ. C. 110 ; *Ida. c, g, j, k ib. 4* ; Wy. <sup>e</sup> 2,1 and 2 ; 1879,1 ; *Uta. ; Ga. m* 1788 ; Miss. ; La. D. 2328 ; Ariz. 1885 ; (or in New Hampshire, Massachusetts, New York, Wisconsin, Minnesota, California, Nevada, Dakota, Idaho, Arizona, if the child be illegitimate, of the mother only ; and if the parents are divorced, of the one having custody of the child only : Mass., Me., N.Y., Io. ; and so if they are living separate).

(2) Of her husband, if the person to be adopted is a married woman : Mass. It seems the adoption may be made after notice to the parents and hearing, even although they do not consent : R.I. 164,4 ; Ore. 13,64.

(3) Of the guardian of the child, if any : N.H. ; <sup>a</sup> Mass. ; Me. ; <sup>a</sup> R.I. ; <sup>a</sup> Ct. ; <sup>a</sup> N.Y. <sup>a</sup> *ib. 7* ; N.J. ; <sup>a</sup> Pa. ; <sup>a</sup> O. ; <sup>a</sup> Ill. ; <sup>a</sup> Mich. ; <sup>a</sup> Wis. ; <sup>a</sup> Minn. ; <sup>a</sup> Kan. ; <sup>a</sup> Neb. ; <sup>a</sup> N.C. ; <sup>a</sup> Ore. ; <sup>a</sup> Col. ; <sup>a</sup> Wash. ; <sup>a</sup> Wy. ; <sup>a</sup> Miss. ; <sup>a</sup> La. D. 2325 ; Ariz. <sup>a</sup> (4) If no guardian or parents, of the next of kin in the State : N.H., Me., R.I., Ill., <sup>a</sup> Mich., <sup>a</sup> Wis., <sup>a</sup> Minn., <sup>a</sup> Ore., <sup>a</sup> Uta. <sup>a</sup> And so always if neither parent is living : R.I.

(5) And if no guardian or next of kin by a next friend appointed by the court : N.H., Me., R.I., N.J., Pa., Wis., Ore., Wash.

(6) If no parents nor guardian, the mayor of the city or clerk of the superior court for the county must consent : Io. So, the chairman of the county commissioners : Minn. The county commissioners : Wy. 2,9. Any other person having custody of the child : Neb. A next friend is appointed by the court : O., Col. In case of a second adoption of the same person, the consent of the person previously adopting is required : Mass. <sup>b</sup> (7) The consent of the



selectmen in the town where the child resides is necessary (a) if the child be an orphan : Ct. (β) if the child be a foundling under one year old, and they have charge of it : Ct. (8) The consent of the overseers of the poor is required, there being no guardian or next friend, if the child be an orphan : Pa., Mich. (9) And if the child has been supported (for a year) by any charitable institution, such institution must consent : Pa., Mich., Neb. So, in many other states, if the child is an inmate of such institution.

NOTES. — <sup>a</sup> But the consent of such guardian or next friend is in New Hampshire only required when neither parent is living ; or when the consent of the parent is dispensed with for cause of desertion, etc., as in the following notes. <sup>b</sup> Such parent's consent is not required when the person adopted is of age. <sup>c</sup> Such parent's consent may be dispensed with if he or she be insane : Mass. ; Me. ; R.I. ; N.Y. ; N.J. ; O. ; Ore. 13,63 ; Nev. ; Col. (or, in Rhode Island, under guardianship ; or, in N.Y., Cal., Dak., Ida., "deprived of civil rights.") <sup>d</sup> So, if he or she be imprisoned in the penitentiary (and, in Massachusetts, Rhode Island, three years of his sentence remain unexpired at the time of the petition for adoption). <sup>e</sup> So, if he has wilfully deserted and neglected to provide proper maintenance for the child (and such desertion is continued for two years preceding : Mass. ; three years : N.H. ; one year : R.I., Ill., Ore.). <sup>f</sup> So, if he has suffered such child to be supported for more than two years previously by a charitable institution, or as a pauper. <sup>g</sup> So, if he has been convicted of being a common drunkard <sup>h</sup> or a night-walker or lewd person, and has failed to provide proper care and maintenance for the child. <sup>i</sup> The fact that a person's consent is required by this section does not prevent his being the person adopting. <sup>j</sup> A parent's consent may be dispensed with when he or she has been divorced for adultery or cruelty ; <sup>k</sup> or when he or she has been judicially deprived of the custody of the child. <sup>l</sup> In these states, he need only be a party of record to the proceeding. <sup>m</sup> But in Georgia it seems the consent of the mother is not necessary, unless the father be dead or has abandoned his family. <sup>n</sup> When his residence is unknown.

§ 6643. **Form of Consent.** (A) Such consent must be evidenced by writing ; N.H. 188,2 ; Mass. 148,2 ; Me. 67,33 ; R.I. 164,2 ; N.J. *App. Infants*, 6 ; O. 3137 ; Wis. 4022 ; Neb. ; Cal. <sup>a</sup> 5226, Amt. ; Ore. 13,62 ; Nev. <sup>a</sup> 1885,24,7 ; Col. 1885, p. 17, § 1 ; Wash. 1667 ; Ida. <sup>b</sup> 1885, p. 25 ; Wy. <sup>a,b</sup> 2,6 ; Uta *ib.* 2 ; Ariz. 1886.

The writing must be duly acknowledged : N.J. *ib.* 6 ; Neb. ; Cal. ; <sup>a</sup> Nev. <sup>a</sup> Or witnessed : Neb., Uta.

(B) In others, the parents and the child adopted must appear in court to give consent : Ind. ; Kan. 67,6 ; Neb. ; Ark. ; Cal. ; Nev. 1885,24,2 ; Dak. ; Ida. *ib.* 6 ; Wy. 2,2 ; Uta. So the person adopting : Cal., Neb., Dak., Ida. So, of the child : Wis. So the persons whose consent is necessary : Cal., Neb., Dak. All must sign the petition or agreement : Ct., N.Y., Cal., Dak., Ida.

A giving up in writing of a child for the purpose of adoption to a charitable institution operates as a consent to any adoption subsequently decreed : Mass. 148,3 ; Col.

And in many states, the parties whose consent is necessary (1) must all sign a recorded instrument : Io. 2309 ; Neb. 2,797 ; Mo. 601. See § 6641, B. (2) They must be parties to the proceeding (see § 6642, note <sup>1</sup>) : N.C. 6 ; Miss.

NOTE. — <sup>a</sup> If the parties are out of the State, or out of the county.

§ 6644. **Appeal.** The petitioner for adoption, or the person adopted, by next friend, may appeal to the Superior or Supreme Court from the decree of adoption : N.H. 188,7 ; Mass. 148,11 ; Me. 67,36 ; R.I. 164,9 ; Ore. 13,69.

And if any person is adopted while a minor, he may dissent within one year after coming of age, and the adoption thereupon becomes void : Vt. 2542.

The order of adoption may be revoked at any time for cause : Me. 67,38 ; Ct. 14,4, 3 ; N.C. 5.

A parent not having had notice may have the decree reversed at any time within a year, if any of the allegations in the petition are disproved : Vt. 2539 ; R.I. 164,10 ; Ore. 13,70.

§ 6645. **Effect of Adoption: Status.** (A) The name of the person adopted may be changed by the decree, deed, etc., to that of the person adopting : N.H. 188,6 ; Mass. 148,6 ; Me. 67,32 ; Vt. 2536 ; R.I. 164,1 and 11 ; N.Y. 1873,830, 10 ; N.J. *ib.* 1 ; Pa. *Adoption*, 1 ; O. 3137 ; Ind. 825 ; Ill. 4,1 ; Mich. ; Wis. 4023 ;

Io. 2308; Minn. 124,30; Kan. 67,7; Neb. 2,800; Del. V. 17,612,3; N.C. 1885, 390; Tenn. 4391; Cal. 5228; Ore. 13,61 and 73; Nev. 1885,24,6; Col. 1885, p. 17, § 1; Wash. 1667; Dak. Civ. C. 114; Ida. *ib.* 8; Wy. 2,10; Uta. *ib.* 5; Ga. 1788; Ala. 2745; Miss. 1496; Ariz. 1887.

So (when the adoption is made by simple deed) it may be so changed by decree of the Probate Court or County Court: Mo. 602.

(B) The general effect of adoption (with certain exceptions as to successions, etc.; see §§ 6646,6647) is to put the parties in the relation of parent and child, with all the legal consequences: N.H. 188,4; Mass. 148,6; Me. 67,34-5; Vt. 2541; R.I. 164,6-7; 1885,110,66; Ct. 14,4,2; N.Y. 1873,830,1 and 10; N.J. 1882,185; Pa.; Ind. 826; Ill. 4,3 and 5; Mich. 6379; Wis. 4024; Io. 2310; Minn. 124,31; Kan. 67,6; Neb.<sup>c</sup> 2,800; Del.; N.C.<sup>b</sup> 3; Ky. 31,18; Tenn.<sup>a</sup> 4390; Mo. 601; Ark. 1885,28,4; Cal. 5226, Amt.; 5228; Ore. 13,67; Nev. 1885,24,2 and 6; Col. *ib.* § 3; Wash. 1669,1670; Dak. Civ. C. 112 and 114; Ida. *ib.* 8; Wy. 2,4; Uta.<sup>c</sup> *ib.* 5; Ga. 1788; Miss.; Fla.; N.M. 1083; Ariz. 1888.

(C) And so the natural parents are divested of all legal rights in respect to the child: N.H. 188,5; Me. 67,35; Vt. 2541; R.I. 164,8; N.Y. 1873,830,12; N.J. 1882,185; O. 3140; Ill. 4,8; Wis.; Minn. 124,32; Kan. 67,5; Neb. 2,797; Cal. 5229; Ore. 13,68; Nev.; Col. *ib.* § 4; Wash. 1670; Dak. Civ. C. 115; Ida. *ib.* 9; Wy. ;Uta. *ib.* 2; Ariz. 1889.

So, in detail, they are relieved from all legal duties: N.Y.; N.J. *ib.* 9; Nev.; Col.; Wash.; Ida.; Uta. *ib.* 7; Ariz. They lose the right of custody or control: Uta., Ariz. And the right to the child's earnings or services: Uta.

(D) And the child adopted is relieved of all duties as to his natural parents. In detail, he is freed (1) from all legal obligations of maintenance in respect to them: N.H., Me., Vt., R.I., O., Ill., Wis., Minn., Ore., Col., Wash.; or (2) of obedience to them: N.H., Me., Vt., R.I., N.J., O., Ill., Wis., Minn., Ore., Col., Wash.

NOTES. —<sup>a</sup> But in these states the parties may stipulate otherwise in the agreement. <sup>b</sup> The parties may stipulate whether the adoption shall endure for life or only during minority. <sup>c</sup> Only when so stipulated in the agreement.

§ 6646. **Limitations.** But adoption does not change the laws concerning marriage or sexual crimes with the original kindred of the party adopted: Mass. 148,6. Nor is the party adopted, if of full age, relieved from his liability to support his parents: Mass.

This provision (§ 6645) does not extend to other parties, but only to those making the adoption: Mo. 602. As to all persons except the person adopting, the child stands related as if no act of adoption had been taken: Ga. 1788.

§ 6647. **Inheritance.** (A) The person adopted becomes the heir of the person or persons adopting, as if he were their child, in most states, in all respects (except as below): N.H.<sup>a</sup> 188,4; Vt.<sup>a</sup> 2536,2541; Ct. 1885,110,66; N.J.<sup>a</sup> *ib.* 9; 1882,185; Pa. *Adoption*, 1; O. 3140; Ind. 825; Io. 2310; Mich. 6379; Wis.<sup>a</sup> 4024; Kan. 67,7; Neb.<sup>c</sup> 2,797; Ky. 31,17; Tenn.;<sup>b</sup> Tex. 2; Nev. 1885,24,2; Col. *ib.* § 4; Wy.<sup>b</sup> 2,10; Uta.<sup>c</sup> *ib.* 5; Fla. 1885,3594; La. 214; N.M. 1083; Ariz. 1887.

(B) But he is regarded as the child of the adopting parents only so far as to inherit from them (and from their descendants) such property as they might have devised; but they can inherit from no collateral kindred of the adopting parents: Mass. 148,7.

So, he inherits from the adopting parent or parents as in A, except that he does not take, by representation, from their kindred, lineal or collateral: Me.<sup>a, f, g, h</sup> 67,35; R.I.<sup>a</sup> 164,7; Ill.<sup>a</sup> 4,5; N.C.<sup>b, c, h</sup> 3; Ore.<sup>a</sup> 13,67; Ga. 1788; Ala. 2745.

The adopted and natural children can inherit from and through each other as if all were natural children of the same parent: N.J., Pa. The adoption of a child by a person having legitimate issue may not interfere with the rights of the forced heirs (Art. 310): La. 214; D. 2326.

No person, by being adopted, loses the right of inheritance from his natural parents or kindred : <sup>a</sup> Mass. ; Minn. 1885,75.

(C) And, in a few, adoption has no effect whatever upon the rights of inheritance, either of the person adopted or of any other person : N.Y. 1873,830,10 ; Minn. 124,31.

The person adopted does not take as a child of the person adopting under deeds, wills, or settlements of property, real or personal : N.Y.

But he does lose the right of inheritance from his natural parents and kindred : Ct.

“Whenever it shall be desirable, the person adopting may by stipulation in the writing bestow upon the adopted child equal rights and privileges of legitimate children :” Uta. If the adopter have at any time a legitimate child, the person adopted cannot inherit more than one-fourth of such parent's estate : Tex.

NOTES. — <sup>a</sup> But he cannot take property limited to the heirs of the body of the adopting parent or parents. <sup>b</sup> See § 6525, note (a). <sup>c</sup> Only when the adoption was for life. <sup>d</sup> Only when there are other children, if the parent die intestate ; but if there be a will, and such adopted child is not mentioned, he cannot share under §§ 2842-4. <sup>e</sup> See § 6645, note c. <sup>f</sup> But such right of inheritance only exists in adoptions made since February 24, 1880. <sup>g</sup> The adoption of a child made in another state according to its laws has the same force and effect as it had in such state, in case the person adopting die domiciled in the home State. <sup>h</sup> And it may be otherwise expressly provided in the decree.

§ 6648. **Devises.** The word *child* or its equivalent, in a deed or will, is held to include adopted children, unless the contrary intention plainly appear in the instrument : Mass.<sup>a</sup> 147,8 ; Minn. 1885,75.

But if such deed or will is not executed by the person adopting, the adopted child will not take under the instrument unless such intention plainly appear : Mass., Minn.

NOTE. — <sup>a</sup> Only when the deed or will is executed by the adopting parent.

§ 6649. **Inheritance from Persons Adopted.** (A) In a few states, if a person adopted dies intestate, his property acquired by himself goes to his adopted parents or their kin : Mass. 148,7 ; Ct. 1885,110,66 ; Minn. 1885,75.

(B) So his property acquired by gift, devise, or descent, from his adopting parents or their kin, if he dies intestate and without issue (or wife : Ind., Ill., Wis., Tex.) goes back to them and their heirs : Mass. ; N.J. *ib.* 9 ; O. 3140 ; Ind. 1883,55 ; Ill. 4,6 ; Wis. 2272a ; Minn. ; Tex.<sup>a</sup> 1647 ; Col. ; Wash. 1670.

But property given to him or inherited by him from his natural kindred, goes to his natural kindred as if no adoption had taken place : Mass., Ill.

But the adopted father (1) can never inherit from the child : Tenn. 4390 ; Ga. 1788. (2) The person adopting does not inherit if the adopted child have descendants or brothers or sisters : Ariz. 1888.

(3) The adopted person's natural kin inherit from him, except as above, as if no adoption had been made, and *vice versa* : Col. So, probably, in other states where the laws are silent.

**Wills.** The adopted child cannot, before arriving at the age of twenty-one, make any testamentary disposition of his estate in favor of the person adopting : Ariz.

§ 6650. **Foreign Adoption.** An inhabitant of another state, adopted according to the laws thereof, is in the home State entitled (1) to the same rights as to succession to property that he would have enjoyed in the state where adopted (so far as they do not conflict with the provisions of this article) : Mass. 143,9. (2) Upon filing the record of adoption, it has effect within the State, and the child has the same rights under the State laws as if the adoption were made therein : Ind. 829.

§ 6651. **Second Adoption.** In case of a second adoption, all the legal consequences of the first terminate, except as to property already vested in the child : Mass. 143,10.

## Art. 666. Apprentices.

All the states and territories have statutes concerning apprentices, binding out poor or deserted children, etc. The subject has not been thought of sufficient general impor-



tance to be inserted in the present edition. As a general rule, the parent or guardian, or overseers of the poor, may bind the child, or the child may bind himself if over 14; the apprenticeship must terminate at 21, or 18 if a female, or at her marriage. Any consideration paid must be secured to the benefit of the apprentice. The indenture must be in two parts; provision is made for the education and maintenance of the apprentice; and he will be freed by the master's death. See N.H. Ch. 187; Mass. Ch. 149; Me. 59,23; Vt. Ch. 126; R.I. 169,1-20; Ct. T. 14, Ch. 6; N.Y. 2,8,4, Art. 1; N.J. *Apprentices*; Pa. *Apprentices*; O. 3118-3135; Ind. Ch. 82; Ill. Ch. 9; Mich. Ch. 241; Wis. Ch. 110; Io. T. 15, Ch. 6; (§§ 2280-2306); Minn. Ch. 60; Kan. Ch. 5; Md. Ch. 54; Del. Ch. 79; Va. Ch. 122; W.Va. Ch. 123; 1882,61; N.C. Ch. 3; Ky. Ch. 74; Mo. Ch. 76; Ark. Ch. 4; Tex. T. 5; Cal. 5264-5276; Ore. Ch. 13, T. 3; Nev. 1879, Ch. 93; Col. §§ 6-12; 1885, p. 20; Dak. Civ. C. 140-158; S.C. Ch. 78; 1882,98; Ga. 1871-1884; Fla. Ch. 4; La. D. 70-84; Civ. C. 170-4; N.M. 1069-1078.

## CHAPTER VI. — PERSONS INSANE.

(See in Probate Code, Part IV., Div. I.)

### Art. 670. General Principles.

§ 6700. **Definitions.** The terms "insane persons," "persons of unsound mind," etc., include idiots, lunatics, and insane or deranged persons: N.H. 1,17; Mass.; Me. 1,6; Vt. 7; R.I. 24,6; O. 4947; Ind. 1285,2544; Ill. 131,1; Mich. 2; Wis. 4971; Io. 45; Minn. 4,1; Kan. 104,1; Del. 5,1; Va. 15,9; W.Va. 1882,143,17; Ky. Civ. C. 732; Tenn. 48; Mo. 5836; Ark. 6357; Tex. 2472; Ore. 13,35; Col. 3141; Dak. Civ. C. 13; Mon. G. L. 145; 3,3; Ga. 5; Ala. 1; Ariz. 3. See § 1023.

Persons of insane mind are those who do not enjoy the exercise and use of reason, after they have arrived at the age at which they ought, according to nature, to possess it, whether the defect result from nature or accident. This defect disqualifies those who are subject to it from contracting any species of engagement, or from managing their own estates, which are for this reason placed under the direction of curators.

Persons who by reason of infirmities are incapable of managing their own affairs, have their persons and estates placed under the direction of curators.

Persons laboring under the disabilities stated in the two preceding paragraphs, are not, on this account, deprived of any right or advantages which, notwithstanding such infirmity, they can enjoy. They retain their estates, their capacity for inheriting, and such branches of the paternal power as are compatible with their situation: La. 31-3.

§ 6701. **Powers.** Generally, all contracts of insane persons are void (see § 4111): Ind. 2554; Ga. 2735.

So, specially, of conveyances of real estate: Ind. 2917.

And in many states his contracts are declared void after the finding of lunacy: Cal. 5038; Dak. Civ. C. 20. See Probate Code.

They retain all the rights of citizens which they are capable to enjoy and which are compatible with their situation: Ga. 1658.

A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family.

A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code.

After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration

to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined: Cal. 5038-5040; Dak. Civ. C. 20-2.

A lunatic may contract during lucid intervals: Ga.

§ 6702. **Louisiana Law.** The contract entered into by a person of insane mind is void as to him for the want of that consent which none but persons in possession of their mental faculties can give. It is not the judgment of interdiction, therefore, that creates the incapacity; it is evidence only of its existence; but it is conclusive evidence; and from these principles result the following rules:—

1. That, after the interdiction, no other evidence than the interdiction itself is necessary to prove the incapacity of the person, and to invalidate any contract he may have made after the day the petition for interdiction was presented, and that no evidence to show that the act was made during a lucid interval, or to contradict the judgment of interdiction, can be admitted.

2. As to contracts, made prior to the application for the interdiction, they can only be invalidated by proving the incapacity to have existed at the time the contracts were made.

3. But in order to prevent imposition, it is not enough to make the proof mentioned in the last rule; it must also, in that case, be shown that the person interdicted was known by those who generally saw and conversed with him, to be in a state of mental derangement, or that the person who contracted with him, from that or other circumstances, was acquainted with his incapacity.

4. That, except in the case of death hereafter provided for, no suit can be brought, nor any exception made, to invalidate a contract on account of insanity, unless judgment of interdiction be pronounced before bringing the suit, or at least applied for before making the exception.

5. That if the party die within thirty days after making the act or contract, the insanity may be shown by evidence, without having applied for the interdiction; but if more than that time elapse, the insanity cannot be shown to invalidate the act or contract, unless the interdiction shall have been applied for, except in the case provided for in the following rule:—

6. That if an instrument or other act of a person deceased shall contain in itself evidence of insanity in the party, then it shall be declared void, although more than thirty days have elapsed between the time of making the act and the death of the party, and although no petition shall have been presented for his interdiction.

7. In the case mentioned in the preceding rule, other proofs of insanity may be offered by the party who alleges the incapacity, or may be required by the judge.

8. That, where insanity is alleged to avoid a donation or other gratuitous contract, it is not necessary to show that the incapacity was generally known; it will be sufficient to show that it existed, and if the party be dead, without having been interdicted, it is not necessary in this case to show that the interdiction was applied for.

9. That evidence of general and habitual insanity, in order to avoid a contract, may be rebutted by showing that the contract or act was made during a lucid interval; but where general insanity, even with some intervals, is shown, the burden of showing that the particular act in dispute was made during such an interval, is thrown on the party who supports the validity of the act or contract.

10. That insanity may be alleged and proved to invalidate a testament, although no interdiction have been applied for, nor in that case is it necessary to prove that the insanity was notorious.

11. The allegation in a testament that the testator was of sound mind, cannot prevent proof of the contrary being given in evidence, even by the witnesses to the will.

12. That when these rules refer to the time of presenting the petition for interdiction, as a period which is to determine the validity of a contract or other act, such petition is meant as has not been withdrawn or dismissed.

13. That while the judgment of interdiction is in force, it is conclusive evidence of incapacity; but that it may be annulled whenever the insanity ceases, but it can only be annulled by a judgment.

A temporary derangement of intellect, whether arising from disease, accident, or other cause, also creates an incapacity pending its duration, provided the situation of the party and his incapacity were apparent: La. 1788-9.

§ 6703. **Liabilities.** A person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful: Cal. 5041; Dak. Civ. C. 23,24.

Necessaries furnished to insane persons may be recovered upon the same proof as if furnished to infants: Ga. 2735.

§ 6704. **Drunkards.** An habitual drunkard is defined to be one whose mind has become so impaired by the use of intoxicating liquors or drugs that he is incapable (1) of taking care of himself or property: Tex. 2473; (2) of conducting his affairs and taking care of his estate: Ark. 3767.

A drunkard, when actually intoxicated to such an extent as to deprive him of reason, can make no valid contract with any one cognizant of the fact of his condition. If the party contracting was at all instrumental in producing the state of intoxication, the contract is invalid, however partial the intoxication may be: Ga. 2737.

**Spendthrifts** are persons liable to be put under guardianship for excessive drinking, gaming, idleness, or debauchery: N.H. 1,18; Mass. 3,3; Vt. 2435; Ill. 131,1; Minn. 4,1; Neb. 1,34,40; Ore. 13,35; and see in the Probate Code.



## A D D E N D A.

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[The laws for 1885 of Missouri, and of the Extra Session in Tennessee, were procured by the author since the body of this work was stereotyped.]

### THE SYSTEM OF JUDICATURE.

#### Art. 55. The Courts.

§ 557. **Special Courts.** There is a Recorder's Court in Kalamazoo, and a Police Court in Detroit: Mich. 1885,34 and 161.

§ 558. **The Municipal Court.** In Indiana, there are City Courts in cities over 6000 population: Ind. 3204.

In Iowa, there may be Superior Courts in cities having 5000 inhabitants: Io. 1876,143.

§ 566. **Courts of Record.** In Arkansas, the supreme, superior, probate, and county courts have a seal; so, in Idaho, of the three former, and in Indiana of the superior courts only: Ind.\* 1320; Ark.\* 1406,1458; Ida.\* C. Civ. P. 52.

### OF ESTATES IN LAND.

#### Art. 134. Chattel Interests.

§ 1341. **Creation.** Irredeemable ground-rents are in future prohibited, whether by grant or reservation: Pa. 1885,128.

And the time allowed or provided for extinguishment may not exceed twenty-one years, or lives in being: Pa.

If there be no principal sum fixed for the extinguishment of a ground-rent, in the deed, it may be extinguished by the payment of such a sum as will produce a yearly interest equal in amount to the annual rent, at the legal rate of interest: Pa.

### FORMALITIES OF CONVEYANCING.

#### Art. 157. Acknowledgment.

§ 1585. **Amending Acts.** Add to the first paragraph two states, viz.: Wis. 1885,335; Del. V. 17,615.

Add to the Minnesota citations later laws, viz.: 1885,232 and 239.

In the first line on p. 209, add after "Minn. 1881, Ex. Sess." the two following citations: Minn. 1885,266; Wy. 1877, p. 74.

In the second paragraph read—All deeds acknowledged or recorded before 1872 are valid, notwithstanding any defect in the execution, acknowledgment, etc.: Io. 1967; Ark. 684 (1883); Mich. 5727; Ore. (1878); Nev. 314 (1871); N. M. 2773 (1874). So all deeds acknowledged before 1880, although the officer omitted a seal in appending the certificate: Io. 1968; Minn. 123,15; 1885,266; Md. 44,25 (1878); W.Va.;<sup>a</sup> Ark. (1883).

## USES AND TRUSTS.

**Art. 171. Creation of Trusts.**

§ 1710. **Form.** Add to paragraph (B.) the following citations: Neb. 1,32,18; Cal.\* 6135; Dak.\* Civ. C. 634; Mon. G. L. 161; Uta. 1010; Ariz. 2134.

## MORTGAGES, TRUST-DEEDS, AND LIENS.

**Art. 190. Performance and Discharge.**

§ 1907. **Mortgagee Deceased.** So (4) when the mortgagor has been in uninterrupted possession for twenty years after the expiration of the time limited in the mortgage for performance and . . . (γ) When no suit has been commenced on the mortgage within fifteen years after it was due: Mich. 1885,225; or when the mortgagee has obtained possession of the bond or notes for which the mortgage was given by payment in full thereof: Mich.

**Art. 192. Foreclosure.**

§ 1924. **Power of Sale.** All sales under a power in a mortgage or trust deed must be made in the county where the land sold is situated, after twenty days' notice by publication: Mo. 1885, p. 209.

**Art. 196. Mechanics' Liens.**

By a statute of 1885, all the local New York laws were repealed and a general statute enacted. See page 282 of this book.

§ 1968. **Record.** The subcontractor must file a notice within sixty days, not thirty as in (C): Mo. 1885, p. 195.

## LANDLORD AND TENANT.

**Art. 205. Termination.**

§ 2054. **Non-Payment of Rent.** Generally, in all cases of neglect or refusal by any tenant to pay rent, his estate may be determined by the landlord, and he may re-enter . . . (5) on seven days' notice: N.H. 250,2; Mich. 1885,162;

## TRANSFERS AND LIENS.

**Art. 450. Gifts.**

§ 4508. **Record.** Conveyances of personal property in favor of minor children where the control and visible possession is suffered by the donor to remain with the father or mother, vests an absolute estate in such father and mother in favor of their creditors or purchasers without notice, unless recorded within three years in the county where such father or mother resides: Ala. 2175.

**Art. 486. Weights and Measures.**

A bushel of flax seed weighs 56 lbs.: Ida. 1882-3, p. 64.

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# AMERICAN STATUTE LAW

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## FIRST SUPPLEMENT

CONTAINING THE REPEALS, AMENDMENTS, AND ADDITIONS  
MADE IN ALL THE STATES AND TERRITORIES BY  
THE ANNUAL LAWS OF 1886 AND 1887, AND  
PRESENTING THE LAW AS

IN FORCE JANUARY 1, 1888

BY

FREDERIC J. STIMSON

BOSTON

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Law Publisher

1888



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## P R E F A C E.

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SINCE the original edition of "American Statute Law," six states and territories have adopted new authoritative codes or revisions, namely, Connecticut, Nevada, Alabama, Idaho, Wyoming, and Arizona. Montana has also adopted a new revision, but it was too lately published to make possible its incorporation in the present Supplement. A new edition of the code has also appeared in West Virginia (Warth's Code); but it has not seemed advisable to the author to change the citations to accord with it, in anticipation of a coming general revision which has been provided for by statute in that state. Sixty-two volumes of annual or biennial or extra session laws have appeared, all of which, so far as they modify or relate to the matters contained in the first volume of "American Statute Law," have been duly incorporated in this Supplement, bringing the original edition down to the 1st of January, 1888.

Where the new revision, in the six states or territories above enumerated, or the new Florida constitution, has left the former provision unchanged, the reader will find no mention in the *text* of this Supplement. For all such cases, where merely the citation should be changed to that of the new revision, and the law, as set forth in the original edition of "American Statute Law," remains unchanged, see the Table of Changed Citations at the end of this volume. But all cases where the law itself is changed will be found in their proper order in the text.

The author has usually endeavored to state briefly the nature of these changes, so that this volume may be intelligible without reference to the original edition; and the full and exact shape of the new statute may always be found, if the reader will make the exact changes herein indicated in his copy of "American Statute Law." Had the author gone farther than this, it would have necessitated reprinting in this volume a large portion of the original work; and the Supplement would have been extended to an unmanageable length, without gaining in clearness what it lost in conciseness.

The three sizes of type used in the original work, to indicate the degree of universal adoption of any statute, could have no meaning in a volume in which only the law of one state has been set forth at a time; and it has therefore been abandoned in this Supplement. It has seemed best to print the changes in the

order in which they fall when inserted in the original work; it has therefore been unnecessary to adhere to the usual order of citing the states and territories. The word "reference" in this volume is commonly used of the state or territory cited, as "Fla.," "Florida;" the word "citation" is confined to the number and chapter only. Thus, where the *citation* has changed, but not the *reference*, it means that the same law exists in the state referred to, but it is now to be found in a new revision or volume. Where the *reference* is to be stricken out, it means that the provision has, in the state referred to, been repealed.

Besides the Index, the reader desirous of ascertaining what changes have been made in any particular state should refer to the List of Changes in the Law, which immediately precedes the ordinary Index.

The prediction contained in the preface to the original work that the changes made by the annual statutes in important, substantive law would in any one state be few in number, has been fully justified. The only laws which have in many states been subject to amendment during the past two years are those relating to marriage, divorce, aliens, married women's property and other rights, and mechanics' liens. In marriage and divorce the tendency has been conservative, rather towards stricter laws; but in the other three subjects it has been notably radical, many western states, in particular, having enacted alien laws entirely prohibiting the ownership by aliens of real estate.

BOSTON, January 2, 1888.



## VOLUMES OF STATUTES

### INCORPORATED IN THE FIRST SUPPLEMENT TO AMERICAN STATUTE LAW.

ALABAMA. Code of 1886, cited by continuous section number; Biennial Laws of 1887.

ARIZONA. Revised Statutes of 1887, cited by continuous section number, and containing also a Penal Code, cited *P. C.* This new revision copies many Texas and California statutes.

ARKANSAS. Biennial Laws of 1887.

CALIFORNIA. Laws of 1886, Ex. Sess., and 1887.

COLORADO. Biennial Laws of 1887, containing a new Civil Code.

COLUMBIA, DISTRICT OF. U. S. Statutes, 1886, 1887.

CONNECTICUT. General Statutes of 1887, cited by continuous section number.

DAKOTA. Biennial Laws of 1887.

DELAWARE. Vol. 18, Part I.; cited, 1887.

FLORIDA. Constitution of 1885; Biennial Laws of 1887.

GEORGIA. Biennial Laws of 1886.

IDAHO. Revised Statutes of 1887, cited by continuous section number. These are in the main a copy of the California Codes.

ILLINOIS. Biennial Laws of 1887.

INDIAN TERRITORY. See U. S. Statutes.

INDIANA. Biennial Laws of 1887.

IOWA. Biennial Laws of 1886.

KANSAS. Special Session, 1886; Biennial Laws of 1887.

KENTUCKY. Biennial Laws, 1886.

LOUISIANA. Biennial Laws, 1887.

MAINE. Biennial Laws, 1887.

MARYLAND. Biennial Laws, 1886.

MASSACHUSETTS. Annual Laws, 1886 and 1887.

MICHIGAN. Biennial Laws, 1887.

MINNESOTA. Biennial Laws, 1887.

MISSISSIPPI. Biennial Laws, 1886.

MISSOURI. Biennial Laws, 1885 and 1887.

MONTANA. A new revision, the Compiled Statutes of 1887, has been enacted; but was published too late to be incorporated in this Supplement.

NEBRASKA. Biennial Laws, 1887.

NEVADA. General Statutes of 1885; Annual Laws of 1887.

NEW HAMPSHIRE. Biennial Laws of 1887.

- NEW JERSEY. Annual Laws, 1886 and 1887.  
NEW MEXICO. Biennial Laws of 1887.  
NEW YORK. Annual Laws of 1886 and 1887.  
NORTH CAROLINA. Biennial Laws of 1887.  
OHIO. Annual Laws of 1886 and 1887.  
OREGON. Biennial Laws of 1887.  
PENNSYLVANIA. Biennial Laws of 1887.  
RHODE ISLAND. Annual Laws of 1886 and 1887 (four sessions).  
SOUTH CAROLINA. Annual Laws of 1886 and 1887.  
TEXAS. Biennial Laws of 1887.  
UNITED STATES. Statutes, 1886 and 1887.  
UTAH. Biennial Laws of 1886.  
VERMONT. Biennial Laws of 1886.  
VIRGINIA. Biennial Laws, 1885-6 ; Extra Session, 1887.  
WASHINGTON. Biennial Laws, 1885-6.  
WEST VIRGINIA. Biennial Laws, 1887 ; Extra Session, 1887.  
WISCONSIN. Biennial Laws, 1887.  
WYOMING. Revised Statutes of 1887, cited by continuous section number. Title 38 is the Code of Civil Procedure, copied from that of Ohio.

# AMERICAN STATUTE LAW.

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## FIRST SUPPLEMENT.

1886, 1887.

§ 10. **Freedom.** FLORIDA. The new Constitution leaves out the provision that men are by nature free and independent. Strike out *Fla. C. Decln. Rts. 1* in the 6th line.

§ 11. **Equality.** The new Constitution of FLORIDA leaves out the provisions that men are by nature equal, and in lieu thereof provides that they are equal before the law. Strike out the word *three* in the 5th line of § 11, and the words *Fla. C. Decln. Rts. 1* in the 6th line, and for the word *one* in the 6th line, and also for the word *three* in the 5th line, insert *two*. After *Ark. C. 2,3* in the 7th line insert *Fla. C. Decln. Rts. 1*.

§ 21. **Color Distinction.** FLORIDA. The civil rights provisions are left out in the new Constitution. Strike out *Fla. C. 14,1* in the 6th line, and *Fla. C. 16,28* in the 9th line; for *four* in the 5th line read *three*; and for *three* in the 6th line, *two*.

§ 22. **Exceptions.** FLORIDA. By the Constitution of 1885, white and colored children shall not be taught in the same public schools, and the intermarriage of white persons with negroes or mulattoes is forbidden. In detail, strike out the word *seven* in the 4th line and insert *eight*, and add *Fla. C. 12,12* at the end of the 6th line. Strike out the word *two* in the 3d line of the 4th par. and substitute *three*, and to the last line of the same par. add *Fla. C. 16,24*. Strike out note<sup>c</sup> to this section.

§ 23. **Sex Distinctions.** Add at end of section: *So also in Wisconsin; see § 240, G.*

RHODE ISLAND. In Rhode Island a constitutional amendment was proposed March 5, 1886, and rejected in 1887, that *women shall have the right to vote in the election of all civil officers and on all questions in all legal town, district, or ward meetings, subject to the same qualifications, limitations, and conditions as men: R.I. 1886, Jan. Sess. laws, p. 233; 1887, 615.*

§ 26. **Property.** FLORIDA. At end of section insert the following: *A married woman's separate real or personal property may be charged in equity and*



*sold, or the uses, rents, and profits thereof sequestrated for the purchase-money or for any money due on her written agreement for the benefit of her separate property ; or for the price of any property purchased by her or for the labor or materials used with her knowledge in erections, improvements, or repairs, or farm labor thereon : Fla. C. 11,2.*

In the 5th line of 2d par. change *five* to *six*. Insert after *Miss.*, in the 8th line of the 2d par., *Fla. C. 11,3*. The new Constitution requires the legislature to provide for the protection of married women's separate property.

§ 31. **Compensation for Slaves.** FLORIDA. The new Constitution omits the provision concerning contracts relating to slaves. Strike out *Fla. C. 16,26* at the end of the section ; and for *two states* read *one state*.

§ 44. **State Support.** FLORIDA. The principal provision is inserted in the new Constitution. In detail, insert in the 5th line *Fla. C. Decln. of Rts. 6*, between *Miss.* and *La.*, and also *Fla.* at the end of the line between *Ga.* and *La.*

§ 50. **General Right.** FLORIDA. The provision contained in the 1st par. is omitted in the new Constitution. For *twenty* in the 1st line read *many*, and strike out *Fla. C. 8,1* in the 3d line.

§ 52. **Time of Holding.** FLORIDA. The provision requiring schools to be held at least three months a year is omitted in the new Constitution. Strike out *Fla. C. 8,8* in the 5th line.

§ 53. **Age of Scholars.** NEVADA. An amendment was proposed to this provision in the laws of 1887, p. 168.

FLORIDA. The prescribed age of scholars is changed to between the ages of six and twenty-one by the new Constitution. Insert *Fla. C. 12,7* after *Col.* in the 3d line ; and strike out the last sentence.

§ 56. **Universities.** FLORIDA. The provision concerning a state university is omitted in the new Constitution. Strike out *Fla. C. 8,2* in the 4th and 5th lines. But provision is made for normal schools ; insert *Fla. C. 12,14* at the end of the 3d par.

§ 62. **Arms.** FLORIDA. Insert *and Florida* after the words *but in Georgia* in the 5th par.

§ 65. **Immigration.** FLORIDA. The provision concerning immigration is omitted in the new Constitution. Strike out *Fla. C. 7,9* in the 2d line, and *Fla.* at the end of the 3d par.

§ 70. **General Rights.** FLORIDA. The provisions of this section are adopted in the new Constitution. In detail, insert *Fla. C. Decln. of Rts. 4* at the end of the 1st par., and insert *Fla.* after *Miss.* in the 3d line of the 2d par., and also in the 3d line of par. (B).

§ 73. **Exceptions.** FLORIDA. The new Constitution provides that the jury may not, however, be less than six men.

In CONNECTICUT, by statute, a jury of six men is allowed in cases involving \$20, but not more than \$100 : Ct.\* 726.

§ 74. **Waiver.** FLORIDA. The principal provision is omitted in the new Constitution. Change *eleven* in the 1st line to *ten*, and strike out *Fla. C. Decln. of Rts. 3* in the 4th line.

ARIZONA. The citation should be 2 instead of 82.

§ 77. **Law Previously in Force.** FLORIDA. The provisions of this section are omitted in the new Constitution. Strike out *Fla. C.* 15,2 at the end of the 1st par., and the 1st sentence in the 2d par.

§ 84. **Exceptions.** The provision of the 1st par. is adopted by the new Constitution; change the word *four* in the 2d line to *five*, and insert *Fla. C.* 10,4 at the end of the 1st sentence.

§ 87. **Duration.** FLORIDA. It is provided in the new Constitution that the homestead shall inure to the benefit of the widow and heirs. In detail, change the word *three* in the 2d line of par. (B) to *four*, and insert *Fla. C.* 10,2 at the end of the par. The last line in the section should read *inures to the heirs*, for *accrues to the heirs*, and the old citation, *Fla. C.* 9,3, be stricken out.

§ 90. **General Principles.** FLORIDA. Strike out the word *Florida* in note <sup>b</sup>.

§ 91. **Taking for Public Use.** FLORIDA. The provision of par. (A) is adopted in the new Constitution. Insert *Fla. C.* 16,29 after *Miss.* in the last line of the par.

§ 92. **Taking by Private Parties.** FLORIDA. The provision of par. (B) is adopted by the new Constitution. For *eleven* in the 1st line of this par. read *twelve*, and insert *Fla. C.* 16,29 at the end of the par.; and also insert *Fla.* at the end of par. (D), after *S.C. C.* 12,3.

§ 93. **Compensation.** FLORIDA. The principal provision is adopted by the new Constitution. Insert *Fla.<sup>b</sup> C.* 16,29 at the end of the 1st par., between *Miss.* and *La.*

§ 94. **Jury Trial.** FLORIDA. The new Constitution provides that the amount of compensation for property so taken must be determined by the jury in cases of taking by private parties or corporations. Add *Fla. C.* 16,29 at the end of par. (3).

§ 95. **The Amount of Compensation.** FLORIDA. The provision that the amount of compensation must be determined without any reference to any benefit conferred is adopted in the new Constitution. Insert *Fla. C.* 16,29 at the end of the 1st par.

§ 102. **Aliens' Rights.** FLORIDA. The new Constitution provides that foreigners shall have the same rights as to ownership and disposition of property as citizens of this state. For the word *Kansas* in the 1st line read *two states*, and add at the end of the par., *Fla. C. Decln. of Rts.* 18. The provision in par. (C) is omitted in the new Constitution of Florida. For *twelve* in the 1st line of the par. read *eleven*, and strike out *Fla. B. of Rts.* 17 at the end of the par.

§ 121. **To hear Accusation.** FLORIDA. The provision that persons accused of crime have a right to hear the nature and cause of accusation is adopted in the new Constitution: *Fla. C. Decln. of Rts.* 11. They are to have a copy of the indictment furnished them.

§ 126. **Habeas Corpus.** FLORIDA. By the new Constitution *habeas corpus* is declared a writ of right grantable speedily and without cost. In detail, change the word *two* in the 3d line to *three*, and after *Texas* in the 4th line insert *Fla. C. Decln. of Rts.* 7.

§ 127. **Suspension of Habeas Corpus.** FLORIDA. Strike out the two lines beginning with (F) at the end of the section.

§ 128. **Indictment.** FLORIDA. Insert *Fla.* after *N.Y.* in the 1st line of the 5th par. The exception concerning petit larceny is omitted; strike out *Fla.* at the end of the 9th par.

§ 131. **Jury Trial.** FLORIDA. The new Constitution adopts the provision that in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury. Insert *Fla. C. Decln. of Rts.* 11 after *Ga.* in the 1st par.

§ 133. **Venue.** FLORIDA. The new Constitution provides that the jury shall be of the county where the crime was committed. Insert *Fla. C. Decln. of Rts.* 11 after *Miss.* in the 1st par.

§ 135. **Witnesses.** FLORIDA. The new Constitution provides that the accused shall have the right to have compulsory process for the attendance of witnesses in his favor and to meet the witnesses against him face to face. Insert *Fla. C. Decln. of Rts.* 11 after *Miss.* in the 1st par., and also insert *Fla.* after *Miss.* in par. (B).

IDAHO. The provisions of this section appear to be left out of the Rev. Stats.

§ 140. **Fines and Costs.** FLORIDA. The new Constitution provides that no person shall be compelled to pay costs except after conviction on the final trial. Change citation in the 1st par. to *Fla. C. Decln. of Rts.* 8; change the word *two* in the 1st line of the 3d par. to *three*; and in the 2d line insert *Fla. C. Decln. of Rts.* 14 after *Ga.*

§ 141. **Punishments.** FLORIDA. By the new Constitution indefinite imprisonment is also forbidden.

§ 142. **Ex Post Facto Laws.** FLORIDA. And conversely, by the new Constitution, the repeal or amendment of any criminal statute does not affect the prosecution or punishment of any crime committed before: *Fla. C.* 3,32.

§ 143. **Corruption of Blood.** FLORIDA. The new Constitution provides that no conviction for *treason* shall work corruption of blood or forfeiture of estate: *Fla. C. Decln. of Rts.* 23.

§ 151. **Duelling.** There is a defect in the last line of this section in the stereotyped plate: the citation after *Ark.* should be *Ga. C.* 2,4,2.

§ 152. **Bribery.** FLORIDA. The provisions in this section are omitted in the new Constitution.

§ 157. **Embezzlement.** FLORIDA. The provision in the 1st par. of this section is omitted in the new Constitution.

§ 158. **War Exemption.** FLORIDA. The provision of this section is omitted in the new Constitution.

§ 160. **Pardon Power.** CONNECTICUT. The new revision provides that not more than two of the Board of Pardons shall belong to the same political party. Change citation to *Ct.* 3169-3172.

§ 163. **Reprieves.** FLORIDA. Strike out the reference in the case of Florida to note c.

§ 164. **Fines and Forfeitures.** FLORIDA. By the new Constitution, the governor may suspend the collection of fines and forfeitures. Insert *Fla. C.* 4,11 after *N.J.* in the 2d par.; change the word *one* to *two*.

§ 186. **Representation.** FLORIDA. All the provisions of this section are omitted in the new Constitution.



§ 191. **Allegiance.** FLORIDA. The provision of the 1st par., that the state shall always remain a member of the Union, is omitted in the new Constitution ; the provision in the 2d par. remains unchanged.

§ 192. **Secession.** FLORIDA. The provision in the 1st par. remains unchanged in the new Constitution, but that in the 2d par., that all attempts at secession should be resisted by the state, is omitted.

§ 201. **Political Constitution.** FLORIDA. Under the new Constitution the legislature consists of the senate and house of representatives : Fla. C. 3,1.

§ 202. **Executive.** FLORIDA. Under the new Constitution there is no provision for a "cabinet." Strike out the 3d par. Under the new Constitution there is a commissioner of agriculture, who also keeps the Bureau of Immigration : Fla. C. 4,26. Strike out the words *a commissioner of immigration* : Fla. ; in the last par. of division (A). In division (B) change the citation to Fla. C. 4,20. Strike out in the 2d par. the words *and in Florida all but the lieutenant-governor are so appointed and confirmed.*

NEVADA. An amendment was proposed by the laws of 1887, p. 167, repealing the office of lieutenant-governor.

§ 204. **Special Qualifications for Senators.** FLORIDA. The new Constitution provides that a state senator must be resident in his senatorial district, and if he ceases to be resident therein forfeits the office. Insert Fla. C. 3,8 after *Ga.* in the last line of the 1st par. of division (C). Change the citation in the end of the same division to Fla. C. 3,4.

§ 205. **Special Qualifications for Representatives.** FLORIDA. The new Constitution provides that a representative ceases to be such if he ceases to reside in the district ; and also that he must be a qualified elector of the district at the time of his election. Insert Fla. C. 3,8 after *Ala.* in the last part of division (C).

§ 207. **Special Qualifications for Governor.** FLORIDA. By the new Constitution the governor must have been a citizen of the United States for ten years. Strike out the words *In one, nine years* : Fla. C. 5,3 ; 16,22 in the 3d line of the 2d par., and change the word *four* to *five* ; and insert Fla. C. 4,3 after *Ala.* in the 4th line. He must have been resident in the state five years. Strike out Fla.<sup>d</sup> in the 5th line of par. (B), and change the word *eight* to *nine*, and insert Fla.<sup>d</sup> after *Cal.* in the 6th line. By the new Constitution, the governor is not eligible for re-election ; change the word *seven* to *eight* in the 1st line of par. (D), and add Fla. C. 4,2 at the end of the 3d line.

§ 208. **Special Qualifications for other Executive Officers.** NEVADA. See § 202 above.

§ 209. **Pay of the State Legislature.** NEVADA. In the laws of 1887, p. 166, an amendment was proposed that the pay of the members of the legislature could not be increased or diminished during the term for which they are elected.

§ 210. **Appointment.** FLORIDA. In par. (E), (2) insert Fla. C. 8,6 after *Miss. C. 5,21.* The new Constitution also provides that county treasurers, county clerks, assessors, and county surveyors are to be elected by the people.

§ 212. **Tenure.** FLORIDA. The new Constitution incorporates the provision of par. (B) that "all officers shall continue to discharge their duties until their successors are duly appointed." Insert Fla. C. 16,14 after *Col.* in the 5th line

of the par. Strike out *Fla. C. 5,2* in the 8th line, and *Fla. C. 5,17* in the last line.

§ 214. **Pay.** FLORIDA. The provision that all officers are to receive a reasonable compensation, etc., is omitted in the new Constitution. Strike out *Fla. C. 16,4*.

§ 216. **Extra Pay.** FLORIDA. The principal provision forbidding extra pay granted by the legislature is incorporated in the new Constitution. Insert *Fla. C. 16,11* after *Ala.* in the 1st par.

§ 219. **Election of United States Officers.** FLORIDA. By the new Constitution no person can receive credentials as a member of Congress who has not been five years a resident of the state, and ten years of the United States, and who is not a qualified voter: *Fla. C. 16,20*.

§ 220. **Plurality of Office.** FLORIDA. The principal provision that "no person can hold more than one lucrative state office" is adopted in the new Constitution. Insert *Fla. C. 16,15* after *Ala.* in the 5th line. So also are the provisions that no person holding a lucrative state office is eligible for the legislature: insert *Fla. C. 3,7* after *Ga.* in the last line of the 3d par.; that no member of the legislature can be elected or appointed during his term to any office of profit which may be created, etc.: insert *Fla. C. 3,5* after *Miss.* in the 4th line on p. 51; that no person holding a United States office can also hold a state office: insert *Fla. C. 16,15* after *Ala.* in the 5th line of par. (B); that no person holding a United States office is eligible for the legislature: insert *Fla. C. 3,7* after *Ga. C. 3,4,7* in the middle of p. 51; that no person holding an office under a foreign power can hold a state office: insert *Fla. C. 16,15* after *Nev.* in the 4th line of par. (C), and insert *Fla.* after *Tex.* in the 6th line.

§ 221. **Age and Citizenship.** FLORIDA. The provision that no person can hold office who is not a registered voter is omitted in the new Constitution, as is also the provision that he must have resided in the state one year. Strike out the 1st sentence of the 2d par. of division (B), the 1st sentence of division (D), and the words *Fla. C. 16,22* in the 2d line of division (C).

§ 223. **Disqualifications: Insanity.** FLORIDA. Strike out *C. 4,9* after *Fla.* in par. (E), *C. 14,4* after *Fla.* in par. (F), the words *Fla. C. 4,9* in the following par., and the word *Fla.* after *W. Va.* in the last line but three in the same division.

§ 224. **Oath of Office.** FLORIDA. Strike out *Fla. C. 5,2* in par. (B).

§ 234. **Election Day.** OHIO. By a late statute the general election day is changed to the first Tuesday after the first Monday in November annually. Insert *Ohio\** 1836, p. 35, after *Pa.* in par. (3), and strike out the 4th par.

§ 236. **Registration.** FLORIDA. The new Constitution provides that the legislature shall enact such laws as shall preserve the purity of the ballot. Insert *Fla. C. 6,9* after *Ala.* in the 5th line.

§ 240. **Citizens.** WASHINGTON. A male of foreign birth must declare his intention to become a citizen six months before the election, or he may not be entitled to vote: *Wash.\** 1886, p. 114.

NEVADA. The right of suffrage is withdrawn from Mormons: *Nev.\** 1887, 110.

COLORADO. Insert at the end of par. (G) *So also in Col.; see § 23.*

§ 241. **Residence Qualifications.** WASHINGTON. A voter must have been resident in the county sixty, and in the ward, precinct, or election district thirty, days: Wash.\* 1886, p. 114.

RHODE ISLAND. By the 6th Const. Amt., proposed March 10, 1886, and adopted in April, all soldiers and sailors of foreign birth, citizens of the United States who served in the army or navy of the United States from this state in the late civil war, and who were honorably discharged, have the right to vote on all questions, in all legally organized town, district, or ward meetings, upon the same conditions and under the same restrictions as native-born citizens: R.I. 1886,551.

WYOMING. The term of residence in the territory required of voters is changed to six months. Strike out reference and citation in par. (B), (1), and insert *Wy.\* 1102* after *Uta.* in the 1st line of p. 160; and also insert *Wy.\** before *Mon.* in the 4th line of par. (C).

ARIZONA. So, six months and ten days respectively. Insert *Ariz.\* 1599* after *Uta.* in the 1st line of p. 60, and *Ariz.\** after *Minn.* in the 3d line of par. (D); and strike out *Ariz.\* 1412* in the 6th line of p. 60, and *Ariz.* in the 3d line of par. (C).

§ 243. **Army and Navy.** A reference should have been made at the end of this section to § 241.

§ 244. **Property Qualifications.** FLORIDA. By the new Constitution the legislature has power to make the payment of the capitation tax a prerequisite for voting. Insert *Fla. C. 6,8* after *Tenn.* in par. (B), (2).

§ 245. **Educational Qualifications.** FLORIDA. There is no provision for educational qualifications in the new Constitution. Change the word *two* in the 4th line to *one*, and strike out the words (1) after 1880: *Fla. C. 14,7*, in the 5th and 6th lines.

§ 260. **By Impeachment.** FLORIDA. For the members of the cabinet in the 4th par. read *administrative officers of the executive department*. Strike out *Fla.* in the last line but one of p. 63, and insert *Fla.* after *Ala.* in the last line.

§ 266. **Removal by the Governor.** FLORIDA. By the new Constitution, officers not liable to impeachment may be removed by the governor with the concurrence of the senate: *Fla. C. 4,15*. The causes of removal are incompetency, malfeasance in office, and neglect of duty. For the words *appointed by the governor* in the 1st and 2d lines of par. (B), read *not liable to impeachment*.

§ 270. **General Provisions.** FLORIDA. Under the new Constitution there is no lieutenant-governor in Florida.

NEVADA. See § 202.

§ 275. **Journals.** FLORIDA. The yeas and nays, under the new Constitution, are only to be entered on the journal at the request of five members of either house.

§ 277. **Time of Session.** FLORIDA. The regular session meets on the first Tuesday after the first Monday in April in the odd year: *Fla. C. 3,2*. The citation at the bottom of p. 70 should be changed to *Fla. C. 4,8*. Under the new Constitution no special session convened by the governor shall exceed 20 days in length.

CONNECTICUT. The legislature meets on the first Wednesday after the first Monday in January: *Ct.\* 1887,5,13*.



NEVADA. An amendment was proposed in the laws of 1887, p. 165, providing that the legislature shall meet on the third Monday in January.

COLORADO. The allowed length of session is extended to ninety days: Col. C. Amt. 3.

WYOMING. Strike out the reference to Wyoming in the last line but one of the 3d par.

ARIZONA. The annual session now begins on the third Monday in January.

§ 280. **Duties of the Governor.** ARIZONA. The references and citations to Arizona should be omitted.

§ 282. **The Lieutenant-Governor.** FLORIDA. Under the new Constitution there is no lieutenant-governor. Upon the death, etc., of the governor, the president of the senate succeeds, and after him the speaker of the house: Fla. C. 4,19.

NEVADA. By an amendment proposed in the laws of 1887, p. 167, the office of lieutenant-governor is abolished, and the president of the senate, and after him the speaker of the house, succeeds the governor.

§ 291. **The Militia.** FLORIDA. Change citation to *Fla.<sup>b</sup> C. 14,1*. Insert the words *and Florida* after *Oregon* in the 2d line.

§ 303. **Reading of Bills.** FLORIDA. Insert (A) at the beginning of the 1st par. By the new Constitution sixty days' notice must be given of a private or local bill in the locality affected before its introduction in the legislature: Fla. C. 3,21.

§ 304. **Voting.** FLORIDA. Insert *Fla.* after *Ala.* in par. (B).

§ 309. **When Acts take Effect.** FLORIDA. The new Constitution provides that all acts shall take effect sixty days from the end of the session, unless it is expressly provided in the bill that they shall go into effect sooner: Fla. C. 3,18. Change citation in the 2d par. to *Fla. C. 16,6*.

§ 311. **The General Appropriation Bill.** FLORIDA. The provisions of this section are omitted in the new Constitution.

§ 312. **Other Appropriation Bills.** FLORIDA. The provision of par. (A), that appropriation bills may contain no provisions on any other subject, is adopted by the new Constitution; insert *Fla. C. 3,30* after *Ala. C. 4,32*.

§ 322. **Private Appropriations, Claims, and Debts.** FLORIDA. The provision that no money can be paid on any claim the subject-matter of which is not provided for by pre-existing laws is adopted by the new Constitution. Insert *Fla.<sup>c</sup> C. 16,11* after *Col. C. 5,27 and 28* in the 6th par.

§ 332. **Exemptions.** FLORIDA. Strike out *Fla.<sup>b</sup> C. 12,1* in par. (E). Insert *Fla.<sup>b</sup>* after *Ala.* in (G), (5). By the new Constitution there is exempt from taxation \$200 worth of property to every widow who has a family dependent upon her, and to every person who has lost a limb or been disabled in war or by misfortune: Fla. C. 9,9.

§ 334. **Valuation and Assessment.** FLORIDA. By the new Constitution the legislature shall prescribe such laws as shall secure a just valuation: Fla. C. 9,1.

§ 338. **Poll-Tax.** FLORIDA. The poll-tax is applied exclusively to school purposes.

§ 342. **Prescribed Purposes.** FLORIDA. By the new Constitution counties must levy a tax for schools of not less than three and not more than five mills per dollar: Fla. C. 12,8.

§ 345. **Loans of Credit.** NEW HAMPSHIRE. Insert *Amt.* 1877 in the 3d line after *N.H. C.* 2,5.

§ 360. **Temporary Loans.** ARIZONA. Strike out reference and citation ; repealed.

§ 361. **Other Debts.** FLORIDA. By the new Constitution state bonds can be issued only for the purpose of repelling invasion, suppressing insurrection, and redeeming and refunding bonds already issued. Insert *Fla. C.* 9,6 after *Ala.* in the 1st par., and *Fla.* after *Ala.* in the 2d par., and strike out *Fla. C.* 12,7 and the 2d clause of the 3d par.

§ 364. **Limitations on the State's Power to Contract Debts : Rebellion Debts.** SOUTH CAROLINA. By an amendment, state bonds must be not less than \$100 each and payable in fifty years : S.C. *Amt.* 1886,286.

FLORIDA. The provision in this section is left out of the new Constitution. Strike out the last sentence of the 1st par.

§ 371. By a defect in the stereotyped plates the note signature <sup>c</sup> is omitted before the 3d note.

§ 393. **Laws Impairing Contracts.** FLORIDA. By the new Constitution no law can be passed lessening the time in which a civil action may be commenced on any cause of action existing at the time of its passage : Fla. C. 3,33.

§ 394. **Laws to be General.** Insert the words *can or before may be* in the 3d line.

FLORIDA. The principal provision is omitted by the new Constitution ; strike out *Fla. C.* 4,18 at the end of the 1st par.

§ 395. **Local or Special Laws.** FLORIDA. Several changes in this section are made by the new Constitution : Fla. C. 3,20. By it, local or special laws are forbidden which provide for the sale of real estate belonging to minors, estates of decedents, and persons under legal disability ; which give effect to informal deeds or wills ; which provide for the adoption of children ; which relieve minors from legal disabilities ; which regulate the charter or license of ferries ; which regulate the jurisdiction or duties of any class of officers, except municipal officers ; which provide for the summoning and empanelling grand and petit juries, or for the fees or salaries of officers ; which regard elections, or the practice in the courts, except municipal courts. The other provisions, enumerated in the old Constitution, are also retained in the new.

§ 396. **Laws to be Uniform.** FLORIDA. The citation to read *Fla.<sup>b</sup> C.* 3,21 ; and add to the notes <sup>b</sup> *As to the laws in the cases enumerated in § 395 only.*

§ 406. **Record of Conveyances.** FLORIDA. By the new Constitution deeds and mortgages which have been proved and recorded, according to law, are to be taken as *prima facie* evidence in the state courts without requiring proof of execution ; and so of a certified copy of the record, if the original is not within the control of the person offering it : Fla. C. 16,21.

§ 408. **Lands.** FLORIDA. For *one hundred and sixty acres* to the settler, in par. (C), read *eighty acres.*

§ 415. **Drains.** FLORIDA. By the new Constitution the legislature may provide for the drainage of the land of one person over or through that of another, upon just compensation therefor to the owner : Fla. C. 16,28.

§ 441. **Creation.** FLORIDA. Strike out *Fla. C.* 4,22 in the 2d line of par. (B).

§ 442. **Laws may be Repealed.** IOWA. Special acts creating corporations and private corporations may be repealed, in Iowa. Insert *Io.* after *Wis.* in 2d par.

§ 464. **Free Passes.** FLORIDA. The new Constitution forbids railroads or other transportation companies to grant a free pass or discount the fare to any member of the legislature or salaried officer of the state: Fla. C. 16,31.

§ 465. **Discrimination.** FLORIDA. By the new Constitution the legislature is given power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers or performing other services of a public nature, under adequate penalties: Fla. C. 16,30.

§ 510. **Regulation of Sale.** RHODE ISLAND. There is a constitutional amendment forbidding the manufacture and sale of intoxicating liquors to be used as a beverage: R.I. C. Amt. 5.

§ 511. **Local Option.** FLORIDA. The new Constitution provides that the county commissioners, not oftener than once in two years, upon application of one fourth of the registered voters of the county, shall call for a special election to determine whether the sale of intoxicating liquors shall be prohibited therein, to be determined by a majority vote; *provided* that such liquor shall not be sold in any district which may vote against it at such election: Fla. C. 19,1.

§ 522. **Lien.** FLORIDA. By the new Constitution the legislature shall provide for giving to mechanics and laborers an adequate lien in the subject-matter of their labor: Fla. C. 16,22.

§ 551. **General Chart of the Courts.** IOWA. The system of District and Circuit courts is done away with, and superseded by the District Court only: Io. 1886,134.

RHODE ISLAND. District Courts with minor civil and criminal jurisdiction have been established: R.I. 1886,597.

COLORADO. To the citation should be added *Col. C. Amt. No. 4, Laws of 1887, p. 488.*

§ 553. **Jurisdiction, Special Provisions: The Supreme Court.** MASSACHUSETTS. Divorce jurisdiction has been removed from the Supreme Court; strike out *Mass.* in the 5th par.

COLORADO. Insert *C. Amt. No. 4, 1887, p. 483* after the citation in the 2d line of par. (C)

WYOMING. The Supreme Courts have appellate jurisdiction in law and equity. Insert *Wy.\* 3128*, after *Mon.* in the 2d par. of p. 116.

The letter (A) should be inserted before the 1st par. in the 1st line of § 553; and the letter (B) should replace (A) at the beginning of the 4th par.

§ 554. **The Superior Courts.** MASSACHUSETTS. Insert 1887,246 after the other citations to Massachusetts in par. (B), (4).

IOWA. The circuit courts in Iowa are abolished: Io.\* 1886,134; strike out the sentence concerning circuit and district courts in the middle of par. (D).

ARIZONA. Strike out the note sign °.

§ 557. **Special Courts.** NEW YORK. A police court is established in Poughkeepsie: N.Y.\* 1886,109.



WISCONSIN. There is a superior court in Milwaukee having the civil jurisdiction of the former county court: Wis.\* 1887,125.

MICHIGAN. The superior court of Detroit is abolished: Mich.\* 1887,13.

KENTUCKY. Common Pleas Courts have been established in Grant, Clark, and Montgomery Counties: Ky. 1886,586 & 1034.

FLORIDA. Criminal Courts may be established by the Constitution in any county: Fla. C. 5,24.

ARIZONA. The County Courts appear to be abolished by the new Rev. Stats.

§ 558. **The Municipal Courts.** RHODE ISLAND. The municipal courts have minor civil and criminal jurisdiction: R.I.\* 1886,597,23; 598.

FLORIDA. So, in Florida: Fla. C. 5,17.

NEW YORK. Add 1886,28 to the citation on the 4th line of p. 123.

§ 559. **Justices of the Peace.** WYOMING. Strike out *Wy.\* 1877, p. 74, § 1*, in the 4th par. on p. 124.

FLORIDA. Justices of the peace are conservators of the peace, and have jurisdiction accordingly. Insert *Fla. C. 5,36* after *Miss.* in the last line of the 3d par. on p. 124.

NEW YORK. Justices have minor criminal jurisdiction in special cases; insert *N.Y. C. Crim. P. 56*; 1886,28 after *R.I.* in the 1st line of the 2d par. of p. 124.

§ 560. **Judges: Appointment.** FLORIDA. By the new Constitution judges are elected by the people of the state. Insert *Fla. C. 5,2* at the end of par. (A), and strike out *Fla. C. 6,3* in par. (D). Judges of the county courts are elected by the people of the county. Add *Fla. C. 5,16* after *Col. C. 6,22* towards the end of p. 126, and strike out *Fla. C. 6,9* two lines beyond. Justices of the peace are elected by the people of the districts. Insert *Fla. C. 5,21* after *Miss.* near the top of p. 127. Strike out *Fla. C. 6,15* towards the end of the section.

RHODE ISLAND. In Rhode Island judges of the district courts are elected by the legislature in joint convention: R.I.\* 1886,597,3.

§ 561. **Judges: Term of Office.** FLORIDA. Judges of the supreme court hold office for six years: Fla. C. 5,2. Judges of the superior court hold office for six years, justices of the peace for four years: Fla. C. 5,8 and 21; and strike out *Fla. C. 6,3* in par. (C) (13), and *Fla. C. 6,7* in par. (D) (6).

MICHIGAN. Judges of the supreme court hold office for ten years: Mich.\* 1887,6. Strike out *Mich. C. 6,2* in clause (C) (6).

COLORADO. Add *Amt. 4,1887, p. 488* after *Col. C. 6,12* in par. (D).

RHODE ISLAND. Judges of the district courts hold office for four years: R.I. 1886,597,3.

IDAHO. Justices of the peace hold office for two years: Ida.\* 466.

So in WYOMING.

§ 562. **Qualifications.** FLORIDA. Change citation in the first par. to *Fla.<sup>b</sup> C. 5,3*. The new Constitution provides that judges of the Supreme and Circuit Courts must be attorneys at law.

§ 566. **Courts of Record.** COLORADO. The supreme courts are declared courts of record. Insert *Col.\* Civ. C. 412* after *Nev.* in par. (A). So, of the District and County courts. Strike out the citation *Civ. C. 406* in par. (B).

RHODE ISLAND. The District Courts are courts of record, and they have a seal : R.I.\* 1886,597,18 & 14.

MAINE. Insert 1887,2 after *Me.* 77,70 in par. (B).

IDAHO. Insert *Ida.\** 3873 after *Minn.* 49,1 in par. (B), and *Ida.\** after *Wash.\** 2126, and *Wash.\**, in the same par.

WYOMING. Strike out the reference and citation in the 3d line of p. 130.

§ 604. **Disqualifications.** FLORIDA. The provision that members of the jury must be qualified electors seems omitted in the new Constitution. Strike out *Fla. C.* 4,23 in the 2d line; and strike out the word *Fla.* in the 3d, 5th, and 6th clauses of the 2d par.

§ 610. **Limitations.** FLORIDA. The provision leaving the time of the civil war out of the period of limitations is omitted in the new Constitution. Strike out the last sentence of § 610.

§ 990. **Amendments. How Proposed in the Legislature.** FLORIDA. By the new Constitution amendments must be ratified by three fifths of the elected members of each house. Insert the word *Florida* at the end of clause (B) (2). Strike out the whole of clause (B) (10).

NEVADA. An amendment was proposed by the laws of 1887, p. 170, requiring the assent of two thirds instead of a majority of each house of two successive legislatures.

§ 993. **Restrictions.** FLORIDA. By the new Constitution, if two or more amendments are submitted at the same time the electors must vote on each separately : *Fla. C.* 17,1.

§ 994. **General Revision.** FLORIDA. By the new Constitution a convention for the general revision of the Constitution is called whenever two thirds of the elected members of each house so vote, instead of the majority of two successive legislatures. Strike out *Florida<sup>a</sup>* in the 4th line of the section, and the note sign <sup>a</sup> of the citation *Fla.<sup>a</sup> C.* 17,2 in the last par.

§ 996. **Amendments to the United States Constitution.** FLORIDA. The provision that amendments to the United States Constitution may not be ratified by any convention or assembly of the state which was not elected after such amendment was submitted is adopted in the new Constitution : *Fla. C.* 16,19. For the word *Tennessee* in the 2d line read *two states*.

§ 1001. **Language and Form of Proceedings.** COLORADO. Law unchanged. The citation in the 1st par. should be *Col. Civ. C.* 411.

§ 1003. **The Common Law.** WYOMING. Strike out the 1st sentence of the last par., omitted in the new Rev. Stats.

§ 1020. **Meaning of Words.** WYOMING. The principal provision seems to be left out of the new Rev. Stats.

§ 1021. **Liberal Construction.** COLORADO. The citation to the new civil code should be § 443.

ARIZONA. The provision that the code shall be liberally construed, to promote its objects, etc., is adopted. Insert *Ariz.* 2931 at the end of the 1st par., and *Ariz.* after *Uta.* in the 2d par.

§ 1022. **Ambiguities and Contradictions.** WYOMING. The provision that when a general and particular provision are inconsistent the latter is paramount, etc., is adopted in the code of civil procedure. Add *Wy. † C. Civ. P.* 10 at the end of the 9th par., after *Mon.*

§ 1023. **Special Phrases.** WYOMING. The provision that the present tense includes the future is adopted in the new Rev. Stats. Insert *Wy.*† 2337 after *Mon.* at the end of the 4th line. *And* may be read *or*, and *or*, and : *Wy.*† 2339. Strike out the 3d par. on p. 139, and the citation in the 3d par. of p. 140.

WYOMING, COLORADO. The terms *sheriff*, *constable*, *coroner*, or other words used for executive officers, etc., include his deputies or agents: *Col. Civ. C.* 442; *Wy.*†

COLORADO. In the 1st par. the citation to the new civil code should be 420. The citation *Civ. C.* 405 should be struck out at the end of the 5th par. on p. 139. Numerals are sufficient to express dates and amounts: insert *Col.* after *Ore.* in the next par. That the terms *sheriff*, *constable*, etc., include their agents, see above. Strike out the word *Col.* in the last par. but one on p. 139.

CONNECTICUT. The citation at the top of p. 139 should be to § 1 of the new revision. The word *Connecticut* should be struck out in the 1st line of the last par. but two on p. 139.

ARIZONA. When any act is to be done on a particular day which falls on Sunday, the next one shall be deemed intended, etc.; and the time is computed by excluding the first day and including the last. Insert *Ariz.* 2069 at the end of the 7th par. on p. 140, and *Ariz.* 2070 at the end of the 8th par. Insert *Arizona* and WYOMING, ALABAMA after *Idaho* in the 7th par., providing that if the last day be a Sunday, it shall also be excluded.

The references at the end of the 8th par. should be to §§ 4135, 4727 of the book.

§ 1040. **Statutes take Effect.** CONNECTICUT, NEVADA, ARIZONA. A special time may be mentioned upon which any act of the legislature shall take effect. Insert *Ct.* after *R.I.* in the 2d par. on p. 142, and *Nev., Ariz.* after *Cal.* Strike out the whole of clause (16).

IDAHO. Statutes take effect on the sixtieth day after enactment: *Ida.* 155.

§ 1041. **Publication.** Provision is always made for the publication of laws in some newspaper in all states and territories; generally this paper is an official state paper, which is not always one of general circulation.

§ 1042. **Repeal.** CONNECTICUT. The new revision provides that the repeal of the statute does not affect acts and proceedings previously had, or offences done or penalties incurred prior to the repeal: *Ct.* 1. The provision that every law repealing or amending a previous law must recite the law so amended is omitted. Strike out *Ct.* 1877, 2 in the 3d par.; and for *two states* in the 1st line of the par. read *Arkansas*.

IDAHO. Change the citation in the 1st par. to *Ida.*<sup>a</sup> 17. The provision making time already run part of the new period of limitation is adopted. Insert *Ida.*<sup>a</sup> 9 after *Dak.* in the 3d line of p. 143.

WYOMING. Repeal of a statute by the new revision does not affect acts and proceedings had, or actions, or penalties incurred prior thereto. Insert *Wy.*<sup>a</sup> 4270 after *Mon.* in the 1st par.; and *Wy.*<sup>a</sup> after *Mon.* in the 4th.

ALABAMA, ARIZONA. So, in effect, in these. Insert *Ala.*<sup>a</sup> 10; *Ariz.* 2934, 3131, 3264 after *Wy.* in the 1st par., and *Ala.*<sup>a</sup> after *Wy.* in the 4th. Add *Ariz.*<sup>a</sup> 3265 to the 1st par. on p. 143.



§ 1043. **Re-enactment.** CONNECTICUT, IDAHO, WYOMING, ARIZONA. By the new revision all public laws except such as by particular provision are continued in force are repealed. Insert *Ct.* 3837; *Ida.* 17; *Wy.* 4270; *Ariz.* 2933,964 in the last par.

ARIZONA. The provision is also adopted that the new revision shall be deemed a continuation, not a re-enactment: insert *Ariz.*<sup>a</sup> 3129 at the end of the 3d par.

§ 1044. **Laws not Retroactive.** ARIZONA, IDAHO. No part of the new revision is retroactive unless expressly so declared: *Ida.* 3; *Ariz.* 2930,3259.

§ 1047. [New Section.] **New Revisions** have been provided for in the following states: *Md.* 1886,302; *Va.* 1887,331; *W.Va.* 1887, p. 232; *Dak.* 1887,83; *Ct.*<sup>a</sup> 3837; *Wy.*<sup>a,b</sup> 1886,59; *Ala.*<sup>a,b</sup> 1887,7; *Code*, 10; *Ida.*<sup>a</sup> 19; *Ariz.*<sup>a,b</sup> 3128.

NOTES. <sup>a</sup> In these states the new revisions appear to have been already adopted, and <sup>b</sup> in these the prior codes or revisions repealed. See also § 1043.

§ 1062. **Mode of Transfer.** IDAHO. Add *Ida.* 2903 to the end of the section. The California code is followed.

§ 1105. **Who may Convey.** In connection with this section see also § 6058.

§ 1110. **Settlers.** ARKANSAS. Overflowed and swamp lands may be sold at \$1.25 an acre. Insert 1887,122 after the first citation in the 3d line of par. (P). Forfeited lands may be donated to heads of families in tracts of 160 acres: *Ark.* 1887,138.

TEXAS. Any person may purchase public lands not exceeding 640 acres at \$2 per acre: *Tex.* 1887,80.

NEVADA. By a new statute the provision that no person can purchase more than 320 acres is omitted: *Nev.* 326,335,337; 1887,24. Agricultural lands may be purchased on payment of one fifth down, balance in twenty-five years with interest at six per cent: *Nev.* 331.

LOUISIANA. Persons who have improved and cultivated public lands have the right of pre-emption by filing a declaration in the Land Office: *La.* 1887,21.

§ 1116. **Squatters.** WYOMING. The provision that the claim must be staked out is omitted in the *Rev. Stats.*, as also that neglect to occupy is an abandonment. Strike out *Wy. ib.* 3 and *Wy. ib.* 4 in the last par. but one.

IDAHO. Various amendments are made to this section by the new *Rev. Stats.*, following generally the Wyoming code. In detail: insert *Ida.* 4556 in the citations to the 1st par.; strike out the reference and citation in the 2d par.; insert *Ida.* 4553 after *Nev.*, *Ida.* 4554 after *Nev.* 80, and *Ida.* 4555 after *Nev.* 81 in the 6th par.

§ 1140. **General Principles.** WYOMING. The new statutes provide that the right of eminent domain remains in the State. Insert *Wy.* 499 before *Ga.* in the 4th line.

ARIZONA. The California code is followed. Insert *Ariz.* 1761 at the end of the 2d par.

§ 1141. **Purposes.** WYOMING. The right of eminent domain can only be exercised for purposes of public utility, as for the use of the State, or for water-works. Insert *Wy.* after *Cal.* in the 2d line, and after *Mon.* in the 5th line; and *Wy.* 500 at the end of clause (3).

ARIZONA. Follows the California code. Insert *Ariz.* 1762 after *Uta.* throughout the whole section.

§ 1142. **Compensation.** MISSISSIPPI. A new statute provides that a just and equitable compensation must be paid in all cases of taking, and that final order of condemnation does not issue until damages are paid, and that, except in cases of taking by the State, the damages must be determined by a jury. Insert *Miss.* 1886,26,3 after *Uta.* in the 3d line; *Miss.* 1886,26,5 & 8 after *Uta. C. Civ. P.* 1120 at the end of the 3d par.; and *Miss.* after *W. Va.* in the last line but two.

ARIZONA. The California code is followed. Insert *Ariz.* 1772 after *Uta.*, as before.

§ 1143. **What may be Taken.** ARIZONA. The California code is followed. Insert *Ariz.* 1764 after *Uta.*, as before.

§ 1144. **Estate Taken.** ARIZONA. Insert *Ariz.* 1763 after *Uta.*, as before.

§ 1145. **The Process.** MISSISSIPPI, ARIZONA. Land can only be taken under eminent domain by petition to court: *Miss.* 1886,26,2; *Ariz.* 1767.

§ 1146. **The Reasons for Taking.** MISSISSIPPI, ARIZONA. The use must be one authorized by law. Add *Miss.* 1886,26,2; *Ariz.* 1765 to par. (A); and insert *Ariz.* after *Uta.*, as before.

§ 1151. **Escheat of Real Property in Cases of Intestacy.** OREGON. Law unchanged. Insert 1887, p. 65 after the citation in par. (A).

NEW MEXICO. Law unchanged. Insert 1887,32,12 after the citation in par. (A).

§ 1153. **Disposition of Estate.** NEW MEXICO. The estate escheated goes to the common school fund. Insert *N.M.* 1887,32,12 after *Uta.* in par. (A).

OREGON. So, in Oregon. Insert *Ore.* 1887, p. 67 after *Cal.* in the same par.; and strike out *Ore.* 16,7 in par. (D).

§ 1154. **Subsequent Claims by Heir.** OREGON. The heir or other person entitled may claim the estate escheated, or its proceeds, with interest at any time within ten years after the sale. Insert *Ore.*<sup>b</sup> 1887, p. 67 at the end of clause (9).

ARIZONA. So, at any time, without limitation. Add *Ariz.*<sup>b</sup> 1796 to clause (1).

IDAHO. Strike out clause (19), and insert *Ida.* 5716 after *S.C.* in clause (16).

§ 1156. **Other Cases of Escheat.** ARIZONA. Process for escheat may be brought when the owner, etc., has disappeared for seven years. Strike out *Ariz.*<sup>a</sup> 3552 in par. (A), and insert *Ariz.*<sup>a</sup> 1793 after *Tex.* in the 2d par. See, for aliens' lands, § 6013.

§ 1157. **Escheat of Personal Estate.** NEW MEXICO. Add to the citation 1887,32,12.

§ 1159. **Subsequent Claim.** ARIZONA. The proceeds may be claimed as in § 1154. Insert *Ariz.* at the end of the 1st par., and strike out *Ariz.* 3557 in par. (5).

IDAHO. Insert *Ida.* after *Del.* in clause (6).

§ 1161. For § 1156 note <sup>b</sup>, in note, read note <sup>a</sup>.

§ 1162. **Attainder.** NEW YORK. Provisions in this section concerning forfeiture for felony repealed: N.Y. 1886,593. Strike out *N.Y.* 4,1,7,22 in the 3d par.

§ 1170. **Support.** IDAHO. Add *Ida.* 2884 to the 1st par. on p. 159; the California code is followed.

§ 1171. **Water Rights.** IDAHO. The California code is followed throughout. Insert *Ida.* 3158 after *Cal.* 6413 on p. 160.

WYOMING. The right to use the water of a stream may be acquired by appropriation: *Wy.* 1334. See § 1179.

ALABAMA. Any person diverting a stream is liable in damages. Add *Ala.* 1463 to par. (D).

ARIZONA. Insert (E). The common-law doctrine of riparian water rights shall not obtain or be of any force or effect: *Ariz.* 3198.

All rivers and streams of running water are declared public and applicable to irrigation and mining purposes as hereinafter (§ 1179) provided: *Ariz.* 3199.

§ 1178. **Levees and Ditches.** MISSOURI. Add to the citation 1887, p. 208.

§ 1179. **Irrigation.** KANSAS. A general law providing systems of irrigation has been enacted: *Kan.* 1886, 115. In the following states, the new citations should be: *Cal.* 1887, 34; *Col.* 1887, pp. 291, 295-316; *Dak.* 1887, 74.

And in DAKOTA there is a general law providing for artesian wells: *Dak.* 1887, 4.

§ 1300. **Real Estate.** WYOMING. Pews are declared real estate. Insert *Wy.* 19 after *Vt.* in the 3d par. The provision naming mining rights in real estate is omitted in the new Rev. Stats. Strike out *Wy. Civ. C.* 654 in the 3d par.

IDAHO. The new Rev. Stats. adopt the provisions of the California code: that real estate consists of (1) lands, possessory rights to land, ditch, and water rights; and mining claims; (2) that which is affixed to land; (3) that which is appurtenant to land. Insert *Idaho* after *Dakota* in the 3d line; insert *Ida.* after *Col.* and also after *water rights* in the 3d line of the 3d par., and before *Uta.* in the following line; and also after the citation to *Dak.* in par. (C). For *California and Dakota* in par. (C) read *a few states*. Insert (*except in Idaho*) between *and* and *that* in the 2d line of par. (C). Strike out note <sup>b</sup> and the note signs <sup>b</sup> throughout the section.

§ 1301. **Land.** WYOMING. So, strike out *Wy. Civ. C.* 654 in par. (B) of this section.

§ 1332. **Waste.** OHIO. A tenant for life is liable for actual and permissive waste, and forfeits the estate to the remainder-man or reversioner in any case of waste. Insert *O.* 1887, p. 134 after *N.J.* in par. (A); and *O.* 4177; 1887, p. 134 after *N.J.* in par. (B).

ARIZONA. The provisions relating to waste appear to be left out of the new Rev. Stats., and, consequently, repealed.

§ 1333. **Repairs.** IDAHO. Insert *Ida.* 2885 after *Dak.* in each par.; the California code is followed in the new Rev. Stats.

§ 1341. **Chattel Interests: Creation.** NEVADA. Law unchanged; the citation to the new Gen. Stats. should be 2647.

§ 1350. **Future Estates.** IDAHO. The Rev. Stats. adopt the definitions of the California code. Insert *Ida.* 2830-1 after *Dak. Civ. C.* 135-7 in the 5th par.; and *Ida.* 2835 after *Dak.* in the last par.; and *Ida.*\* 2850 after *Dak.* in the 3d par.

§ 1352. **Grants of Remainders and Reversions.** IDAHO. Insert *Ida.* 2875 after *Dak.* in the 1st and 3d pars.; *Ida.* 2876 after *Dak.* in the 2d par.; and *Ida.* 2877 after *Dak.* in the 6th and 8th pars.

§ 1353. **Waste.** IDAHO. Insert *Ida.* 2880 after *Dak.* in the 2d par. on p. 169; following the California code.



§ 1360. **Conditions.** MASSACHUSETTS. When the title or use of real estate is affected by conditions or restrictions unlimited as to time, they shall be construed as being limited to the term of thirty years from the date of the deed or the probate of the will creating them, except only in cases of gifts or devises for public, charitable, or religious purposes. This does not apply to existing conditions or restrictions or to such as may be contained in a state grant, nor shall it defeat restrictions for a term of years certain: Mass. 1887,418.

§ 1367. **Performance.** IDAHO. The provisions of the California code concerning conditional estates are adopted. Insert *Ida.* 2931 after *Dak. Civ. C.* 633 in the 3d par., and *Ida.* 2932 after *Dak.* in the 4th par.

§ 1371. **Joint-Tenancy.** WASHINGTON, ARIZONA. Joint-tenancy is declared severed by the death of one of the tenants, and it is to be partitioned as if held in common. Insert *Wash.* 1886, p. 165 and *Ariz.\** 1469 after *Col.* in the 3d line of p. 172.

IDAHO. The California code is followed by the new Rev. Stats.; and every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, or acquired as community property: *Ida.* 2828,2907. And add *Ida.\** to pars. (B), (7) and (8).

The reference to § 3010 in the 5th line of p. 172 should be to § 2630.

§ 1377. **Waste.** ARIZONA. The provisions appear to be repealed; compare § 1332.

§ 1401. **By Person Disseized.** ARIZONA. The principal provision (par. A) appears not to be retained in the new Rev. Stats.: strike out *Ariz.* 2278.

§ 1402. **Tortious Conveyances.** IDAHO, ARIZONA. The provision of par. (B), that no conveyance of a tenant for life or years shall work a forfeiture, etc., is adopted in the new Rev. Stats. Insert *Ida.* 2930; *Ariz.* 216 in the citations in par. (B).

§ 1403. **Forfeitures.** IDAHO, ARIZONA. The provisions of the California code, that no future estate is defeated by any alienation, etc., of the prior owner, are adopted. Insert *Ida.\** 2838; *Ariz.* 216; after *Dak.* in the 2d line of p. 175; and *Ida.\** after *Dak.* in par. (B); and *Ariz.* after *Miss.* in par. (E).

§ 1404. **Descent Cast.** IDAHO, ARIZONA. The provision of par. (A) does not appear to be retained in the new Rev. Stats.

§ 1406. **Shelley's Case.** IDAHO. The rule is abolished. Insert *Ida.* 2855 after *Dak.* in the 3d line of p. 176.

§ 1410. **Who may Convey.** NEVADA. All persons of lawful age, their agents or attorneys, may convey real estate: Nev. 2569.

§ 1415. **"Dying without Issue."** MARYLAND. The provision that "dying without issue" shall mean dying without issue living at the death, both in wills and deeds, is adopted in Maryland. Insert *Md.* 49,9; 1886,236 after *Minn.* 45,22, and strike out *Md.* 49,9 in the 2d par.; and for *in a few states* in the same line read *one state*.

§ 1420. **What may be Conveyed.** IDAHO. Future estates pass by succession, will, and transfer, like present interests; and the California code is followed throughout. Insert *Ida.* 2834 after *Dak.* in par. (B); and insert *Idaho* after

*California* in the 1st line of p. 178; and *Ida.\** 2900 after *Dak.* in the 2d line; and *Ida.\** 2901 after *Cal.* in the 3d par.

§ 1421. **Estates in Futuro.** ARIZONA. Any estate may be created to commence *in futuro*. Add *Ariz.* 222 at the end of the 1st par.

§ 1422. **Life Estates.** IDAHO. The provisions of the California code as to successive estates for life are adopted in the Rev. Stats. Insert *Ida.* 2852 after *Dak.* in the 1st par.; and *Ida.* after *Dak.* in the 4th par.

§ 1423. **Future Estates.** IDAHO. Two or more future estates may be created to take effect in the alternative, etc. Insert *Ida.* 2832 after *Dak.* in the 2d par. A future estate may vest after a power if not exercised. Insert *Ida.* 2856 after *Dak.* at the end of the section.

§ 1424. **Remainders.** IDAHO. The provision of the California code concerning remainders after successive estates for life is adopted in the Rev. Stats. Insert *Ida.* 2853 at the end of par. (C).

§ 1426. **Contingent Remainders.** IDAHO. So, insert *Ida.\** 2839 after *Dak.* in par. (B); and *Ida.* 2854 after *Dak.* in par. (C).

Art. 144, see also § 1360.

§ 1440. **General Rule.** WISCONSIN. By a new statute two lives in being and twenty-one years thereafter is declared the period of the rule against perpetuities: Wis. 1887,551. Strike out *Wis.* 2039 in par. (A); see, however, § 1446.

IDAHO. The Rev. Stats. adopt the provisions of the California code. Insert *Ida.\** 2836 after *Dak.* in par. (B); and *Ida.\** 2851 after *Dak.* in par. (E).

ARIZONA. Strike out the 2d par. on p. 180; repealed.

§ 1454. **Estoppel.** IDAHO. Insert *Ida.* 2929 after *Dak. Civ. C.* 629 in par. (A).

ARIZONA. The provision of par. (B) is omitted in the new Rev. Stats.

§ 1461. **Covenants running with the Land.** IDAHO. Whatever remedies the lessor has against his immediate lessee for the breach of any agreement in the lease or for recovery of the possession, he has against the assignees of the lessee for any cause accruing while they are such assignees, except as in § 1352 specified: *Ida.* 2876.

§ 1470. **Feoffment Unnecessary.** NEVADA, IDAHO. Strike out *Nev.* 228, and *Ida.* 1874-5, p. 596,1 in par. (B).

§ 1474. **Special Words.** ARIZONA. The principal provision is followed in the new Rev. Stats. Add *Ariz.* 217 to the end of the 1st par.

§ 1475. **Construction.** IDAHO. The new Rev. Stats. follow the California code. Insert *Ida.* 2926 and *Ida.* 2934 after *Dak. Civ. C.* 627 and 631 in clauses (2), (3), and (4) of par. (D).

ARIZONA. The provision of par. (A) is followed. Add *Ariz.* 227 at the end of par. (A).

§ 1480. **Prescribed Forms.** Statutory forms for conveyances have, in the last two years, been enacted in Colorado, Kansas, Arizona, and Washington T.

ARIZONA. Add *Ariz.* 219 after *S.C.* in the 3d par.

§ 1482. **Forms to Convey the Whole Estate.** In Colorado, Kansas, Arizona, and Washington the following forms have been declared equivalent to a deed of fee simple:—

J. S., of D., for and in consideration of \$—— in hand paid, conveys [and war-

rants]<sup>a</sup> to J. W., of V., the following described real estate [description] situated in the county of —, in the state of Illinois.

Dated this — day of — A.D., 18 —.

J. S. [L. S.]

(Ill. 30,9;) Wash. 1886, p. 173.

J. S. conveys [and warrants]<sup>a</sup> to J. V. [description] for the sum of [consideration].

(Ind. 2927; Mich. 5723;) Kan. 1887,157.

In Arizona, the Texas form is followed. Add *Ariz.* 218 after clause (6).

Know all men by these presents that I — for the consideration of — dollars, to be paid, hereby sell and convey to — the following real property situated in — county, state of Colorado, to wit —, with all its appurtenances, [and warrant the title to the same]<sup>a</sup> —. Signed and delivered this — day of — 188 —.

Col. 1887, p. 226.

NOTE.<sup>a</sup> If a warranty is desired.

§ 1483. **Quitclaim Deed.** And the following forms have been declared equivalent to a quitclaim deed in Kansas, Colorado, and Washington : —

A. B. quitclaims to C. D. [description], for the sum of [consideration].

(Ind. 2928; Mich. 5729;) Kan. 1887,151.

J. S., of D., for the consideration of \$1,000, conveys and quitclaims to J. V., of V., all interest in the following described real estate [description], situated in the county of —, in the state of —.

Dated this — day of —, 18 —.

J. S. [L. S.]

(Ill. 30,10;) Wash.<sup>b</sup> 1886,173.

Take the general form (§ 1482, respectively) and substitute *quitclaims* for *conveys* and *warrants*: (Wis. 2208;) Col. 1887, p. 227, § 3.

NOTE.<sup>b</sup> Does not pass after acquired title, unless so expressed.

§ 1484. **Mortgages.** So, forms have been adopted equivalent to a valid mortgage to the grantee, etc., and warranty against all previous incumbrances and covenant of quiet possession, in Kansas and Colorado; or to a mortgage of real estate merely, in Washington.

(1) A.B. mortgages [and warrants]<sup>a</sup> to C. D. [description], to secure the repayment of [sums, notes, and time due].

Kan. 1887,151; Wash. 1886, p. 179.

(7) Know all men by these presents that I — hereby mortgage to — to secure the payment of — dollars, due as follows — the following described real property, situated in — county, state of Colorado, to wit, — with the appurtenances and [warrant title to the same].<sup>a</sup> Signed and delivered this — day of — 188 —.

Col. 1887, p. 227, § 4.

§ 1489. **Sheriff's Deed.** WISCONSIN. For sheriffs' deeds and foreclosures of mortgages, etc., see Wis. 1887, p. 327.

§ 1500. **Implied Covenants.** IDAHO. Insert *Ida.* 2935 after *Ore.* in par. (A). (No covenant is implied in any conveyance of real estate.)

§ 1501. **Special Phrases.** KANSAS, COLORADO. The principal provision of par. (B) is adopted, that the general form of a warranty deed, as in § 1482, effects an express covenant to the grantee, his heirs or assigns of seisin, and against all



incumbrances; and also, in Kansas, of quiet enjoyment and right to convey: Kan. 1887, 151; Col. 1887, p. 226.

ARIZONA. So, the words *grant* or *convey* effect a covenant of special warranty, or general warranty, unless limited by express words: Ariz.<sup>a</sup> 223.

ALABAMA. "Unless limited by express words." Insert the note sign <sup>a</sup>.

WASHINGTON. The provision of par. (D) is adopted, that the term *warrants* amounts to covenants of seisin, right to convey, quiet enjoyment, against incumbrances and of warranty: Wash. 1886, p. 178.

§ 1502. **Incumbrances.** IDAHO, ARIZONA. The California code is followed. Add *Ida.* 2936; *Ariz.* 224 after *Dak.*

§ 1504. **Special Warranty.** COLORADO. The words *warrant the title against all persons claiming under me* amount to a special warranty, as in par. (A) (2). Col. 1887, p. 227, § 2.

§ 1550. **Definitions.** NEVADA. Land, real estate, or the term *estate* or *interest in land*, is defined to include every freehold or chattel, legal or equitable, present or future, vested or contingent, in land; and also to include lands, tenements, and hereditaments and mining claims: Nev. 2643.

ARIZONA. It includes mining claims: Ariz. 228.

§ 1551. **Deeds.** WYOMING. Add after the 1st par. on p. 196 (7) *certificates which show that the purchaser has paid the consideration and is entitled to a deed for the lands, and contain a promise or agreement to furnish said deed at some future time: Wy.* 24.

ARIZONA. Strike out *Ariz.* 2280 in par. (1), and *Ariz.* throughout the last par. on p. 195; repealed.

§ 1560. **Deeds in Writing.** NEBRASKA. Law unchanged; add 1887, 61 after the citation 1,73,1 in the 1st par.

ALABAMA. Insert *Ala.* after *Uta.* in the 5th par.

NEVADA. Insert *Nev.* after *Ore.* in the last par. but two; the new revision providing that an agent making deeds of real estate must have written authority.

§ 1564. **Seal.** COLORADO. Add after clause (B) (2) the citation *Col.* 1887, p. 228, § 5; this new law providing that the word *seal*, or the letters *L. S.*, is unnecessary to an instrument.

IDAHO, ARIZONA. All distinctions between sealed and unsealed instruments are abolished. Insert *Ida.* 3227; *Ariz.*<sup>c</sup> 2784 after *Ore.* in clause (B) (6).

ARIZONA. So, add *Ariz.* 2783 at the end of pars. (B) (2), and (B) (4).

§ 1565. **Form of the Seal.** WASHINGTON. Law unchanged; add 1886, p. 165 to the citation in the 1st par.

IDAHO. Insert *Ida.* after *Ore.* in line 8, p. 198.

§ 1566. **Witnesses.** ARIZONA. Witnesses (two) are necessary when there is no acknowledgment to the deed. Add *Ariz.* 220 to par. (B), and insert *Ariz.* after *La.* in the 2d par. of (C), line 3.

§ 1567. **The Attestation.** ARIZONA. It is sufficient if the grantor *acknowledge* that he executed the deed, in the witnesses' presence. Add *Ariz.* 220 to par. (B).

WYOMING. Add *Wy.* after *Ore.* in par. (A) (1).

§ 1568. **Foreign Deeds.** WYOMING. The Revised Statutes provide that deeds executed in a foreign state or country may be executed according to the

laws of the territory, or of such state or country. Add *Wy.* 12 and 14 at the end of the 2d par., and insert *Wy.* after *Ore.* in the 2d line.

§ 1570. **Necessity for Acknowledgment.** WASHINGTON. A deed which is not duly witnessed must, it seems, be acknowledged in order to have any effect whatever, even as between the parties: Wash. 1886, p. 177.

NEVADA. Strike out *Nev.* 246 in par. (A).

§ 1572. **Effect.** COLORADO. Though an acknowledgment or proof of a conveyance is good in evidence, it is not conclusive, but may be rebutted. Insert *Col.* 1887, p. 231 after *Ark.* in the 2d par.

ARIZONA. Strike out references and citations; repealed.

§ 1573. **Manner.** ARIZONA. The Texas statute is followed. Add *Ariz.* 2579 at the end of the section.

§ 1574. **Form.** ARIZONA. The Texas statute is followed. Insert *Ariz.* 2596 after *Nev.*

§ 1577. **Form of Certificate.** WYOMING. It must be sealed, if the officer have a seal: *Wy.* 8.

§ 1578. **Content of Certificate.** COLORADO. Law unchanged. Add 1887, p. 228, § 6 after the citation *Col.* 212 in the 1st par. But the new statute provides that the certificate must state that the identity of the person making the acknowledgment was known or proved to the person taking it, only when the deed conveys a homestead.

IDAHO. Strike out *Ida. ib.* 8 in the 3d par., and *Ida.* in the 2d clause of par. (B).

§ 1579. **Statutory Forms.** WASHINGTON. The form of acknowledgment prescribed by the laws of Illinois in par. (6) is also adopted in Washington: Wash. 1886, p. 179.

IDAHO. The California form is adopted. Insert *Ida.* 2958 after (2).

ARIZONA. Add the words *and Arizona* after *Nevada* in form (2).

§ 1580. **Effect.** COLORADO. The certificate of a notary made anywhere in the United States is *prima facie* evidence that the deed was acknowledged or proved before the proper officers: *Col.* 1887, p. 231.

§ 1581. **Foreign Acknowledgments.** CONNECTICUT. Strike out note <sup>c</sup>, the doubt implied by the act of 1884 having been removed by the new code.

NEBRASKA, WYOMING. The principle of par. (A) (1) that foreign acknowledgments or proofs of conveyances may be made either according to the laws of the home state or of the foreign state is adopted: *Neb.* 1887, 6, 1; *Wy.* 11, 12. Strike out *Neb.* 1, 73, 4; *Wy.* 1882, 1, 9 in par. (A) (3).

§ 1582. **The Officer.** CONNECTICUT. Add *Ct.* before *N.J.*, 1885, 133, at the end of par. (A) (5). The new revision provides that acknowledgment can be made before the clerk of the Court of Common Pleas.

ARKANSAS. Law unchanged; add the citation 1887, 91 after *Ark.* 651 in par. (A) (1).

COLORADO. Add citation 1887, p. 229 after *Col.* 210 in par. (A) (1). The new civil code provides that acknowledgment may be made before the judge of any court of record. Insert *Col. Civ. C.* 409 after *Cal.* in par. (A) (3). Add 1887, p. 230<sup>a</sup> after *Col.* 218 in par. (B). Strike out *Col.*<sup>a</sup> in par. (B) (5), par. (B) (14), and par. (B) (15).

NEW JERSEY. Acknowledgments may be made before any surrogate. Add *N.J.* 1886,214 at the end of par. (A) (8). And acknowledgments may be made in foreign countries before any diplomatic or commercial or consular agent of the United States as in par. (C) (3). Insert *N.J.* 1886,214, after *N.Y.*

OHIO. Strike out par. (A) (13). Insert *O.* after the word *auditor* in par. (14).

NEBRASKA. Acknowledgments may be made before any county recorder. Insert *Neb.* 1887,30,32 after *Kan.* in par. (A), (15).

WYOMING. By the new Rev. Stats. acknowledgments may be made in foreign countries before any United States consul, as in par. (C) (2). Insert *Wy.* 14 after *Mon.* in par. (C) (2). Acknowledgment in the territory may be made before any court commissioner. Add *Wy.* 10 after *Minn.* in the 1st line of the 3d par. of (A) (3).

DELAWARE. Law unchanged; add citation 1887,212, after *Del. V.* 13, *C.* 28, in par. (C) (1).

IDAHO. By the new Rev. Stats., power to take acknowledgments and proofs of deeds affecting land within the territory is given to all judges and clerks of courts of record in the United States, and to judges of such courts in foreign countries, and also to any person authorized to take acknowledgments by the laws of a foreign state or country. Change the citation in par. (A) (2) to *Ida.*<sup>a,e,f</sup> 2950-1; insert *Idaho*<sup>a,f</sup> after *Dakota* in the 2d line of par. (A) (3), and *Ida.*<sup>a,f</sup> after *Dak.* in the 3d line; strike out *Idaho*<sup>g</sup> and *Ida.*<sup>g</sup> in the following paragraph; insert *Ida.*<sup>f</sup> after *Wash.* in the 1st and 3d lines of par. (A) (4); strike out 1874-5, p. 563, § 22 in the 2d line of p. 205; change the citation in par. (B) (2) to *Ida.*<sup>f</sup> 2952; insert *Ida.*<sup>f</sup> after *Dak.* in par. (B) (4), and also in both clauses of par. (B) (5); strike out *Ida.*<sup>g</sup> in both places in par. (B) (6); insert *Ida.*<sup>f</sup> after *Dak.* in both places in par. (B) (17); change the citation in par. (C) (1) from *Ida.* to *Ida.*<sup>f</sup> 2953; insert *Ida.*<sup>f</sup> after *Dak.* in par. (C) (12); and strike out *Ida.*<sup>g</sup> in par. (C) (13).

ARIZONA. Strike out *Ariz.*<sup>g</sup> in the 6th line of par. (A) (3), in par. (B) (6), and (16); and insert *Ariz.*<sup>g</sup> in the 3d line of par. (B) (5), and *Ariz.*<sup>f</sup> in par. (C) (3).

§ 1583. **Double Certificate.** IDAHO. If a justice of the peace's certificate is used out of his county, it must be certified by the county recorder: *Ida.* 2963.

NEVADA. Strike out the reference *Nev.* in the last line of the section.

§ 1584. **Miscellaneous.** IDAHO. Insert *Ida.* 2954 after *Cal.* 6184; the California code being followed.

§ 1585. **Amending Acts.** NEBRASKA. Insert citation *Neb.* 1887,61,4 after *Kan.* 22,31 in the 1st par.

ARKANSAS. Add citation 1887,98 after *Ark.* 679-682 in the 1st par.

NEW YORK. Add *N.Y.* 1886,448 after *Ct.* in the 2d par.

CONNECTICUT. All deeds heretofore executed and acknowledged by the grantors before a person authorized to take acknowledgment that they had executed the same are valid as if the grantors had acknowledged the same to be their free act and deed: *Ct.* 1886,3.

ARIZONA. The legality of the execution, etc., is determined by the laws in force at the time; and all deeds heretofore executed with a scroll instead of seal are valid. Add *Ariz.* 2620 at the end of the 4th par., and *Ariz.* 2619 at the end of the 5th.



§ 1592. **Process.** WYOMING. Proof is made before a justice of the peace of the county where the land lies or before a court of record: Wy. 15.

§ 1593. **Method.** IDAHO. Insert *Ida.* 2964 after *Cal.* in par. (C).

ARIZONA. Insert *Ariz.* after *Col.* and *Tex.* in the 2d and 3d lines of par. (B) (2), and after *Uta.* in the 3d line on p. 211; and strike it out in the last line but one. The Texas statute is now followed.

§ 1595. **Witnesses Dead.** IDAHO. The Rev. Stats. follow the California code. Change the citation in par. (A) (1) to *Ida.*<sup>a,b,d</sup> 2967; and insert *Ida.*<sup>a,b,d</sup> after *Ore.* in par. (B) (3), after *Dak.* in par. (B) (3), and at the end of pars. (B) (4) and (B) (7).

ARIZONA. So, in Arizona, the Texas statute is followed. Change the citation in par. (A) (1) to *Ariz.*<sup>a,b,c,d</sup> 2587; and add *Ariz.*<sup>a,b,c,d</sup> at the ends of clauses (B) (1), (B) (2), (B) (3) (after *Miss.*), (C) (4), and (C) (5); and add the note signs <sup>a,b,c,d</sup> to *Ariz.* in the last line on p. 211.

§ 1597. **Method.** IDAHO. Add *Ida.* after *Dak.* in par. (C) (3).

ARIZONA. Add *Ariz.* 2590 at the end of clause (A) (1); strike out *Ariz.* 2254 in clause (A) (2); add *Ariz.* 2589 after clause (B); strike out *Ariz.* 2258 in par. (C); and add *Ariz.* at the end of par. (C) (3).

§ 1599. **Certificate.** NEVADA, WYOMING, ARIZONA. A certificate must be appended. Add the citations, *Nev.* 2582; *Wy.* 15; *Ariz.* 2590, after *Ore.* in the 1st par.

§ 1600. **Form.** ARIZONA. Add *Ariz.* 2590 after *Tex.*

§ 1601. **Content.** IDAHO. Strike out the citation and references to Idaho in the 2d and 3d pars., and also in pars. (B) (7), (8), and (11). Insert *Ida.* after *Dak.* in pars. (B) (6) and (10).

§ 1604. **Statutory Forms.** ARIZONA. The Texas form is adopted. Add *Ariz.* 2586 after *Tex.* 4316, form (1).

§ 1606. **Proof by Action.** IDAHO. The Rev. Stats. follow the California code. Insert *Ida.* 2971 after *Dak.* 667, and *Ida.* 2972 after *Dak.* 667 at the end.

§ 1611. **Unrecorded Deeds.** NEBRASKA. Law unchanged; add the citation 1887,30,16 after *Neb.* 1,73,16 in par. (A), and add the citation 1887,30,16 to *Neb.* in par. (B).

NEW MEXICO. A new statute provides that unrecorded deeds are void as against purchasers without notice for value whose deed is duly recorded first, as in par. (A) (1): N.M. 1887,10.

IDAHO. Insert *Ida.* after *Dak.* in par. (B) (2).

ARIZONA. Strike out the references and citation in par. (B).

§ 1614. **Place of Record.** ALABAMA, ARIZONA. A deed is always recorded in the county where the land lies. Add *Ala.* 1796; *Ariz.* 2602 after par. (A).

§ 1615. **Time of Record.** ALABAMA. The provision in par. (F) concerning conveyances of conditional estates or mortgages, etc., is changed so as to make it necessary to record them within thirty days of their date instead of three months: Ala. 1810-1812.

§ 1617. **Effect of Filing.** NEBRASKA. Law unchanged; add to the citation 1887,30,15 & 16.

ARIZONA. The principal provision is adopted. Add *Ariz.* 2603 to the 1st par.

§ 1618. **Entry and Receipt.** NEBRASKA. Law unchanged; add the citation 1887,30,4 in par. (2), and 1887,30,7 & 24 in the 3d par.

OREGON. The recorder must note the date, hour, and minute of filing a deed in the index or entry-book, as in par. (2). Add *Ore.* 1887, p. 62 after *Tex.* in par. (2). Insert *Ore.* after *Tex.* in par. (3) (1).

NEW MEXICO. So, in New Mexico. Insert *N.M.* 1887,10,4 after *Wy.* in par. (2); and insert *N.M.* after *Wy.* in par. (3) (1).

ARIZONA. Strike out *Ariz.* 134 in par. (1); and add *Ariz.* 2570 after *Miss.* at the end of p. 218.

§ 1619. **Manner of Record.** WASHINGTON. The certificate of acknowledgment or proof must be recorded with the deed. Insert *Wash.* 1886, p. 162, after *Cal.* in the 5th par.

ALABAMA. Deeds are to be recorded at length. Add *Ala.* 1792 to the 4th par.

MINNESOTA. All deeds must be numbered by the recorder consecutively in the order of receipt, and such number is *prima facie* evidence of priority of record: Minn. 1887,199.

§ 1620. **Indexes.** NEBRASKA. Law unchanged; insert 1887,30,6 after *Neb.* in the 1st par.; 1887,30,9,10 after *Neb.* in par. (B); 1887,30,13 in par. (B) (1) below.

OREGON. The records of all deeds must be indexed alphabetically in both grantor's and grantee's index: *Ore.* 1887, p. 61.

DAKOTA. This same statute is passed in Dakota: *Dak.* 1887,134. A separate index or entry-book is kept for mortgages.

NEW MEXICO. But in New Mexico they are indexed in the entry-book under grantees' names only: *N.M.*<sup>b</sup> 1887, 10,4.

NEW YORK. A new statute makes provision, in New York City only, for the recording and indexing of conveyances according to numbered blocks: *N.Y.* 1887,718.

MINNESOTA. Add the citation 1887,199,2 in the 2d par.

IDAHO. Insert *Ida.* in clause (6) of chattel mortgages.

ARIZONA. The new Rev. Stats. provide that there shall be separate indexes or entry-books for deeds, (1) mortgages, (3) mechanics' liens, (4) attachments and execution sales, (6) chattel mortgages, (7) releases of mortgages, (8) powers of attorney, (9) leases, (10) marriage certificates, (11) assignments of mortgages, (12) wills, (13) official bonds, (14) notices of *lis pendens*, (15) transcripts of judgments, (16) married women's property, and (17) pre-emption claims, as in California.

§ 1621. **Books of Record.** NEW MEXICO, IDAHO. Separate books are kept for the record of mortgages. Insert *Ida.* 2999; *N.M.* 1887,10,5 after *Ga.* in the 1st par.

ARIZONA. Every class of instruments must be recorded in a separate book: *Ariz.* 546.

NEBRASKA. Law unchanged; insert 1887,30,8 after *Neb.* 1,18,83; and 1887,30,12 after *Neb.* 1885,41,10 in par. (2).

§ 1622. **Custody of the Deed.** OREGON. After record, the deed is to be delivered to the person entitled to it. Insert *Ore.* 1887, p. 62 after *Cal.* 4242.

WYOMING. The recorder must make a minute in the entry-book of the person to whom the deed was delivered. Add *Wy.* at the end.

§ 1624. **What may be Recorded.** NEW MEXICO. All trust deeds and mortgages must be recorded. Insert *N.M.* 1887,10,1 after *Fla.* in the 1st par. Add *N.M.* at the end of par. (2). Insert *N.M.* after *Ala.* in par. (21).

IDAHO. Add *Ida.* 2990 at the end of (2); insert *Ida.*<sup>m</sup> 2992 after *Dak.* in (21), and *Ida.*<sup>m</sup> 2993 after *Tenn.* in the last sentence but one of clause (21). Put *Ida.*<sup>m</sup> 2991 for *Ida.* in the 3d line of p. 223.

ARIZONA. Add *Ariz.* after *Cal.* in the 3d line of the 2d par., after *Fla.* in the 6th line of par. (2), after *La.* in par. (6), and after *Ida.* in par. (14); and add *Ariz.* 1601 after *Tex.* in par. (2), *Ariz.* 2600 after *D.C.* in par. (4) (a), *Ariz.* 2601 after *S.C.* in par. (11), *Ariz.*<sup>m</sup> 2599 after *Ala.* in par. (21), *Ariz.* 549,2606 after *La.* in par. (26), and *Ariz.* after *Cal.* in p. 223, line 5.

ALABAMA. Insert *Ala.* 1801 after *Uta.* 621 in clause (10).

NEBRASKA. Add the citation 1887,30,18 after Neb. citations in clause (12), and 1887,30,25 in clause (21), and 1887,30,19 in clause (26).

NEW JERSEY. By a new statute only leases for more than ten years need be recorded; change word *two* in par. (3) to *ten*, and make the citation in this par. *N.J.* 1887,164.

NEVADA. Insert *Nev.*<sup>b</sup> 352 after *Ore.* in the 3d line, and *Nev.*<sup>b</sup> after *Ore.* in the 5th line of par. (21).

CONNECTICUT. Insert the citation *Ct.* 845 before *Pa.* in par. (26).

MINNESOTA. Add *Minn.* 1887,206 at the end of par. (17).

§ 1625. **Effect of Record.** NEW MEXICO. A deed duly recorded or filed for record is notice to all the world. Insert *N.M.* 1887,10,2 after *Uta.* in the 5th line of the par. at the bottom of p. 223.

IDAHO. Strike out the references, with citations, in par. (B), and the 2d par. of (C); change the citation in par. (C) to 5998; and also strike out *Ida. ib.* 25 in the last par. on p. 223; and insert *Ida.* 3000 for *Ida.* in the last line but two of the page.

ALABAMA. A deed recorded is notice. Insert *Ala.* 1797 after *Uta.* 618-9 in the last par. on p. 223. Change § 162 in note <sup>a</sup> to § 1631.

ARIZONA. Add *Ariz.* 1875 at the end of par. (A); strike out *Ariz.* 2275 in the 2d par. of (C), and *Ariz.* 2276 in the next par., and strike out *Ariz.* in the last line and the last line but two on p. 223.

§ 1626. **Amending Statutes.** KANSAS. Add citation 1887,15; 1887, p. 183 to *Kan.* in the 2d par.

MISSOURI. By the statute of 1887, p. 183, all instruments recorded now or hereafter are valid, and certified copies are evidence at any time after they have been recorded one year.

WYOMING. See §§ 56-69 of the Rev. Stats.

ALABAMA. Add citation *Ala.* 1887,75 after *S.C.* in the last par. of the section.

ARIZONA. Add *Ariz.* 2624 at the end of the 3d par.

§ 1631. **Provisional Record.** NEBRASKA. Law unchanged; add citation 1887,30,14 to *Neb.* 1,73,11.

§ 1653. **Creation.** Insert *Ida.* 6007-8 after *Dak.* in the 3d par. A power may be created by deed or will.

ARIZONA. The provision seems to be omitted in the Rev. Stats.

§ 1659. See also § 6506.



§ 1670. **Execution.** OHIO. Law unchanged; add 1887, *p.* 133, to the citation in par. (B).

NEBRASKA. Add 1887,30,26 to the citation in par. (A). A duly authenticated copy of the record of the power of attorney is evidence, if unrevoked: Neb. 1887,30,27. Insert *Neb.* after *Mich.* in the last par. but one of the section.

IDAHO. Strike out the whole citation and reference in par. (A); and insert *Ida.* 2995 after *Col.* in par. (B). A power to execute a mortgage must be signed, acknowledged, or proved, and recorded like powers for deeds: *Ida.* 3357.

ARIZONA. The provisions of this section seem to be omitted in the Rev. Stats.

§ 1672. **Acknowledgment.** IDAHO. The California form is adopted. Insert *Ida.* 2961 after (1).

§ 1673. **Revocation.** OHIO. The provision of the 2d par., that no power which has been duly recorded is deemed revoked until the revocation is recorded, is adopted. Insert *O.* 4132; 1887, *p.* 134, after *N.Y.* The power of attorney to convey lands may be revoked by the grantor at any time before the conveyance: *O.* 4109; 1887, *p.* 133.

NEBRASKA. Add to the citation in the 2d par. 1887,30,12.

ARIZONA. The provisions of this section seem to be omitted in the Rev. Stats.

§ 1675. **Form of Deed by Attorney.** IDAHO. The attorney executing a deed of real estate under a power must sign both his principal's name and his own as attorney in fact: *Ida.* 2925.

§ 1676. **Amending Statutes.** CONNECTICUT, MINNESOTA. For amending statutes in the case of old deeds by an attorney, see also *Ct.* 1886,43; 1887,151; *Minn.* 1887,152.

§ 1702. **The Statute of Uses.** ALABAMA. Insert *Ala.* 1832 at the end of par. (G).

§ 1710. **Form.** ARIZONA. The provisions of this section seem to be omitted in the Rev. Stats.

§ 1721. **Rights of Creditors.** ARIZONA. Strike out the whole 2d par.; repealed.

§ 1850. **Definitions.** IDAHO. The new Rev. Stats. adopt the definitions of mortgage in the California code. Insert *Ida.\** 3353 after *Dak.* in the 1st par., and *Ida.\** 3350 after *Dak.* in the 4th par.

§ 1852. **Nature.** IDAHO. So, insert *Ida.\** 3352 after *Dak.* in the last par.

§ 1853. **What may be Mortgaged.** MISSISSIPPI. All the provisions concerning mortgages on growing crops in the 3d par. have been repealed: *Miss.* 1886,77.

MINNESOTA. No mortgage on crops, before seed sown, for more than one year in advance, is valid: *Minn.* 1887,176.

IDAHO. Add *Ida.* 3375 after *Dak.* in the 5th par.

In connection with this section see also §§ 4542, 4546.

§ 1855. **Extent of the Lien.** IDAHO. The new Rev. Stats. follow the California code. Insert *Ida.\** 3355 after *Dak.* in the 1st par., and *Ida.\** 3356 after *Dak.* in the 2d par.

§ 1856. **Creation.** COLORADO. In Colorado, the fact that a deed is a mortgage in effect may be proved by parol testimony: *Col. Civ. C.* 261.

IDAHO, Rev. Stats., follows the California code. Insert *Ida.\** 3354 after *Dak.\** in line 3, p. 261.

§ 1858. **Execution.** IDAHO. A mortgage must be executed like a deed. Insert *Ida.* 3351,3377 after *Dak.* in the 1st par.

§ 1860. **The Defeasance.** IDAHO. The new Rev. Stats. follow the California code. Insert *Ida.* 3376 after *Dak.* in line 2 of p. 262, and *Ida.* after *Dak.* in line 4 of p. 262.

§ 1863. **The Condition.** See also § 4815.

§ 1864. **To Secure Purchase-Money.** IDAHO. A mortgage given for the price of real property at the time of the conveyance has priority over all other liens created against the purchaser, not recorded. Insert *Ida.* 3336 after *Dak.* in clause (2).

§ 1870. **Form of.** DELAWARE. One witness is sufficient to the assignment of a mortgage: Del. 1887,213.

IDAHO. The California code is followed. Insert *Ida.* 3358 after *Dak.* in the 4th par., and *Ida.* 3359 after *Dak.* in the last par. but one.

§ 1871. **Effect.** IDAHO. Insert *Ida.\** 3360 after *Dak.* in the 1st par.

§ 1882. **Right of Possession.** OREGON. Law unchanged; change the citation from 323 to 261.

COLORADO. The provision that a mortgage is not deemed a conveyance so as to enable the mortgagee to get possession without foreclosure does not apply to trust deeds with power of sale.

IDAHO. Insert *Ida.\** 4523 after *Dak.* in line 4, p. 265.

§ 1892. **Trust Deeds.** ARIZONA. They may be foreclosed like mortgages. Add *Ariz.* 2358 after *Mo.*, and for *Missouri* in line 1, p. 266, read *two states*.

§ 1901. **Discharge by the Mortgagee.** WASHINGTON. The principal provision, that when a mortgage is satisfied that the mortgagee is bound, upon request of the mortgagor, to execute and acknowledge a sufficient re-conveyance, is adopted: Wash. 1886, p. 117. He must do so within sixty days.

IDAHO. Add *Ida.\** after *Dak.* in clause (2) on p. 267; and strike out *Ida.* in the 2d line on the page.

§ 1902. **Penalty.** WASHINGTON. If he fail to do so he is liable to the mortgagor in a penalty of \$25. The mortgagor may enforce such discharge at any time after the mortgage has been satisfied: Wash. 1886, p. 117.

§ 1905. **Mode of Release.** NEBRASKA. Law unchanged; add to the citation 1887,30,21. In par. (B) add the citation 1887,30,22, and to the 2d line on p. 268 add 1887,30,23.

WASHINGTON. The provision of par. (A), that a mortgage or trust deed may, in most states, be discharged and released by entry upon the margin of the record, is adopted: Wash. 1886, p. 117; or it may be by a certificate of the mortgagee, duly acknowledged or proved, as in par. (B).

CONNECTICUT. Insert *Ct.* 2886 after *R.I.* in par. (D). A mortgage may be discharged by separate deed of release.

MISSOURI, WYOMING. Reference must, in case of a separate deed of release, be made by the recorder from the original record to it: Mo. 1887, p. 224; Wy. 31.

§ 1906. **Form and Effect.** MISSOURI. If satisfaction is acknowledged by an

assignee, the note secured must be produced and cancelled in the presence of the recorder, who shall note and attest such fact upon the record; and if the note has been lost or destroyed, the assignee shall make affidavit to such fact and that he is the lawful owner thereof, which affidavit shall also be recorded: Mo. 1887, p. 226.

§ 1907. **Mortgagee Deceased.** MICHIGAN. A process has been provided for the discharge of the mortgage when fifteen years have elapsed since the debt secured became due and payable: Mich. 1887,3.

§ 1924. **Power of Sale.** NEW YORK. In par. (E) add the citation 1887,685.

WYOMING. Append the note sign <sup>a</sup> to the Wyoming citation on p. 271, line 6; and also in (E), last line but one of 1st par., last line of 2d par. Add *Wy.* after *N.Y.* in the last par. but one of the section. And append *Note <sup>a</sup> As to foreclosures of powers of sale by advertisement, there being no express provision in the mortgage as in (A).*

ARIZONA. Foreclosure under a power of sale is now expressly authorized. Add *Ariz.\** 2359 after the 1st par. But the sale may, at the option of the mortgagee, be made as in ordinary cases (§ 1925): *Ariz.\** 2358.

§ 1925. **By Action.** NEVADA. All the land may be sold if necessary or beneficial. Insert *Nev.\** after *Cal.* in par. (J).

COLORADO. Law unchanged; change the citation in par. (A) from 229 to 252. All the land may be sold under order of the court if necessary or beneficial; but generally only so much shall be sold as is necessary to satisfy the mortgage, interest, and costs. Insert *Col. Civ. C.* 254 after *Cal.* 10728 in par. (J), and *Col.* after *Neb.* in the 2d clause of par. (J).

WYOMING. Foreclosure of a mortgage by action is made in a court of law. Insert *Wy.\** 2663 in par. (A) (1). All the land may be sold under order of the court if necessary or beneficial. Insert *Wy.\* C. Civ. P.* 323 after *Cal.* in par. (J). Strike out the citation *Civ. C.* 381 in par. (B).

CONNECTICUT. The court may, on motion, decree a sale in lieu of such "strict foreclosure" in mortgages made since May 12, 1887: Ct. 1887,109,1. Notice of the sale must be given as the court direct: Ct. 1887,109,2. The sale is made by some person appointed by the court. All the land may be sold under order of the court if necessary or beneficial: Ct. 1887,109,2. If the property sell for less than the appraised value, no judgment is rendered in that suit or in any other for a deficiency (§ 1926); nor can the unpaid portion of the debt be collected until one half the difference between the selling and the appraised value is credited upon the debt as of the date of the sale; and when there are two or more debts, it shall be apportioned between them: Ct. 1887,109,6. The appraisement is made before the sale by three disinterested persons appointed by the court: Ct. 1887,109,4. The officer making the sale delivers a deed to the purchaser when the terms are fully complied with: Ct. 1887,109,4.

IDAHO. An affidavit that all taxes are paid must be attached to the complaint, except in case of a purchase-money mortgage: *Ida.\** 4524.

ARIZONA. The sale is made as in execution by the sheriff. All the land may be sold if necessary. Add *Ariz.\** 797 after the 1st par. of (H), *Ariz.\** after the 3d par. of (H), *Ariz.\** 798 after the 1st par. of (J), and *Ariz.\** after the 2d par. of (J).



§ 1926. **The Proceeds.** CONNECTICUT. The proceeds of the sale are paid into court for the benefit of the persons entitled, as in the 2d par. Insert *Ct.*<sup>a</sup> 1887,109,5 before *N.Y.*

If the proceeds of the sale are not sufficient to cover the amount, execution issues for the residue against other property of the mortgagor as in the 4th par. Insert *Ct.*<sup>a</sup> 1887,109,5 before *N.Y.*

NEVADA. The proceeds of the sale are to be applied to the satisfaction of the debt, as in the 1st par. Insert *Nev.\** 3270 after *Ore.* in the 2d line of the par. If there be a surplus it is to be paid to the mortgagor. Insert *Nev.\** 3271 after *Cal.* below in same par. If the proceeds of the sale are not sufficient to cover the amount, execution issues for the residue against other property of the mortgagor, as in the 4th par. Insert *Nev.\** after *Ore.*

COLORADO. Law unchanged; change the citation in the 1st par. from 230 to 253.

§ 1927. **Effect.** CONNECTICUT. The purchaser at a foreclosure sale takes the same estate as would have vested in the mortgagee had the mortgage been foreclosed. Insert *Ct.* 1887,109,4 before *N.Y.* in par. (A) (2). His conveyance is valid as against the mortgagor, mortgagees, parties to the action, and their privies.

§ 1929. **For Instalments Due.** NEVADA AND COLORADO. A mortgage may be foreclosed in the same manner for any instalment due, as in par. (1). Insert *Nev.\** 3272 and *Col.* after *Ore.* in the 1st par. Change the citation of *Col.* in the 2d par. from 231 to 254.

§ 1931. **Pending Foreclosure.** COLORADO. The court may, for cause shown, grant an injunction restraining waste by the person in possession pending foreclosure. Insert *Col. Civ. C.* 262 after *Wis.*

ARIZONA. The provisions of this section seem to be omitted in the Rev. Stats.

§ 1932. **Concurrent Remedies.** CONNECTICUT. In par. (D) insert the citation *Ct.* 1887,109,6 before *N.Y.* While foreclosure is pending, no action for debt can be brought.

§ 1936. **Parties.** COLORADO. Law unchanged; change the citation from 229 to 252.

§ 1937. [New Section.] **Scire Facias.** PENNSYLVANIA. In Pennsylvania, where a mortgage has been due one year or more, and any dispute has arisen as to the amount due, the mortgagor may compel the mortgagee to determine the amount by *scire facias*, before other foreclosure proceedings are had: *Pa.* 1887,156.

§ 1944. **General Principles.** WASHINGTON, IDAHO. The principle of par. (A) is adopted that redemption after a foreclosure sale under power or otherwise is allowed, as in the case of sales of lands upon execution. Insert *Wash.* 1886, p. 116; *Ida.\** 4520 after *Col.*

IDAHO. Strike out both the reference and citation to Idaho in par. (C).

ARKANSAS. The provision that the right of redemption after foreclosure may be waived by the mortgagor by special clause is repealed: *Ark.* 1887,23. Strike out the last par. but two.

§§ 1950-1953. **Vendors' Liens.** IDAHO. All the provisions of the California

code regarding liens of vendors and purchasers of real estate are adopted in the new Rev. Stats. Insert *Ida.* 3440 after *Dak.* in the 4th par. of § 1950, *Ida.* 3440 and *Ida.* 3441 after *Dak.* in the two paragraphs of § 1951 respectively, *Ida.* 3444 after *Dak.* in § 1952, and *Ida.* 3442 after *Dak.* in § 1953.

ARIZONA. The provisions concerning vendors' liens seem not to be retained in the Rev. Stats.

§ 1954. **Lien on Crops.** ALABAMA. Law unchanged; add the citation 1887,112 & 113 & 120 & 127. Strike out the note sign <sup>a</sup> after *Ala.*

LOUISIANA. The order of liens on crops is as follows: (1) the privilege of the laborer, (2) of the lessor, (3) the overseer, (4) pledges, in their order of record, (5) privileges of the furnisher of supplies or money and the physician: *La.* 1887,89.

WASHINGTON. Farm laborers have a lien on the crops, superior to the landlord's: *Wash.* 1886, p. 115.

FLORIDA. They have the ordinary mechanics' lien (Art. 196): *Fla.* 1887 3747,3.

Add to this section *Note* <sup>a</sup> *The law applies to certain counties only.*

**Art. 196. Mechanics' Liens.**

There is no subject in the statute-book upon which there is more general and frequent amendment and revision than this. Since the original edition of this work nearly half the states in the Union have either patched up their old statutes or adopted entirely new ones, all of which are complex, elaborate, and far from clear. It seems hardly worth while to occupy much space with a detailed statement of these changes, which, after all, concern a subject of merely local importance. The author has, therefore, deemed it best only to make the requisite corrections for the original edition of his work, leaving it to the reader to make them on the pages of his copy of "American Statute Law" if he deem it worth while.

NEW YORK. The general mechanics' law being ch. 342 of the Acts of 1885, as amended by ch. 420 of the Acts of 1887 makes the following changes:—

§ 1960. **The Lien.** Strike out all the old citations, and substitute *N.Y.* 1885, 342,1. (For others, see below.)

PENNSYLVANIA. Law unchanged; add to the citation 1887,59 & 273; add *Pa.* after *enlarging* in par. (2).

OHIO. Law unchanged; add to the citation 1887, p. 6.

MICHIGAN. Law unchanged; change the citation to 1887,270,1. Strike out *Mich.* in the 4th line of par. (2).

MARYLAND. Law unchanged; add to the citation 1886,52.

CALIFORNIA. Law unchanged; add the citation 1887,137,1. Add *Cal.* after *enlarging* in par. (2).

WYOMING. There is a special lien law for Laramie County: *Wy.* 1517–1540. Strike out *Wy.* after *improving* and add *Wy.* after *removing* in the 2d par.

FLORIDA. Law unchanged; add the citation 1887,3747,1 & 4.

§ 1961. **Persons Entitled.** NEW YORK. Strike out all the laws of New York incorporated in this section, all of them having been repealed.

WISCONSIN. Law unchanged; insert *Wis.* 1887,442 after the word *archi-*

*sects* in the 5th line; and add at the foot of the section (29) *Civil engineers or surveyors: Wis.*

CALIFORNIA. Add the citation 1887,137,4 in clause (24).

DAKOTA. The mechanics' lien is expressly withheld from persons furnishing lightning rods: Dak. 1887,99.

FLORIDA. Insert *Fla.* 1887,3747,6 & 9 in clause (1) concerning mechanics; and also insert *Fla.* in clause (2) after *Ga.*, in clause (7) after *Mon.*, and *Fla.* 1887,3747,3 after *Ga.* 1975 in clause (16), and *Fla.* after *Wis.* in clause (27).

ARIZONA. Insert *Ariz.* after *La.* in clause (1); after *Mon.* in clauses (3) and (6); after *Fla.* in clause (10). Strike out *Ariz.* in clause (5) and the note sign <sup>a</sup> to *Ariz.* in clause (24).

§ 1962. **Nature of Improvement.** NEW YORK. Add the citation *N.Y.* 1885, 342,1 after *bridges* in the 3d line. Strike out the 2d sentence in clause (1); all the old *N.Y.* citations in clause (2); all the note signs to *N.Y.* in clause (3). Insert *N.Y.* after *Me.* in clause (22). Strike out all the note signs to *N.Y.* in clauses (27), (28), (29), (30), and the reference and citation to *N.Y.* in clauses (37) and (38). Strike out also notes *c,d,e,f,g,h,i,j,k,l,m,n*; all these local laws being superseded.

OHIO. Strike out the reference *O.* in clauses (14), (20), (27), (33). Add the reference *O.* in clause (31) relating to oil wells, and add the words *gas wells and all other wells: O.* at the end of clause (31).

FLORIDA. Add the citation 1887,3747,2 after *Uta.* in clause (2). Insert the citation *Fla.* after *Miss.* in clause (6), and *Fla.* after *Mon.* in clause (12), and after *S.C.* in clause (37); and change clause (33) to read as follows: *telegraph or telephone lines: Fla.* Add also a new clause (40) *distilleries: Fla.*

ARIZONA. Strike out the reference *Ariz.* in clauses (1), (2), and (14), and add *Ariz.* to clause (39).

IDAHO. Strike out the reference *Ida.* in clause (17), and add *Ida.* in clause (20).

WYOMING. Strike out the reference *Wy.* in clauses (5), (7), (21); and add *Wy.* in clause (22).

§ 1963. **Conditions.** NEW YORK. Strike out all that relates to *N.Y.* in this section; all these laws having been repealed.

PENNSYLVANIA. Change \$50 in the last line but two to \$20; and insert the citation 1887,59.

NEBRASKA. Add the citation 1887,30,29.

§ 1964. **Contract.** NEW YORK. Strike out the note sign <sup>e</sup> in the 4th line, the citation *N.Y.* 1880,486,1 in par. (A) (2), the whole of the last line in division (A), all the note signs to New York in division (B), and the references and citations to New York in pars. (C) and (D); these laws having been repealed.

PENNSYLVANIA. Insert *Pa.*<sup>c</sup> after *N.Y.* in the 1st par., and *Pa.*<sup>c</sup> after *N.J.* in the 1st par. in division (B); and add *Note* <sup>c</sup> *In case of a lien for repairs or additions only.*

MICHIGAN. Add the citation 1887,270,1 after *Mich.* in par. (2), and add *Mich.* after *N.Y.* in the 3d par. of division (B).

FLORIDA. Add the citation 1887,3747,1 to the citation in par. (A), and add *Fla.* after *Ala.* in pars. (B) (1), (B) (3).



WISCONSIN. Add the citation 1887,466 in the 4th line of p. 285.

WYOMING. Add *Wy.* after *Ida.* in par. (A) (1).

§ 1965. **Notice to the Owner.** PENNSYLVANIA. Add to the citation 1887,59.

MICHIGAN. Law unchanged; change the citation in par. (C) to 1887,270.

FLORIDA. Strike out *Fla.* 1885,3611,2 in par. (C).

§ 1966. **Sub-contractors.** NEW YORK. Law unchanged; change the citation to 1885,342,20; 1887,420; and strike out all that relates to New York in the last par. of p. 285; all these laws having been repealed.

PENNSYLVANIA. Add the citation 1887,275 after the citation to Pennsylvania in the last par. of p. 285.

OHIO. Add the citation 1887, p. 49 to the citation in the last par. on p. 285.

ILLINOIS. Add the citation 1887, p. 220 to the Illinois citation of the same par.

MICHIGAN. Change the citation to 1887,270 in the same par., and insert *Mich.* before *W.Va.* in line 2 on p. 286.

WISCONSIN. Insert *Wis.* 1887,535 in the last line but one of p. 285. Strike out the 1st sentence of p. 286.

TENNESSEE. Law unchanged; change the citation in the last line of p. 285 to 2746; 1887,85.

UTAH. Add the citation *Uta.* 1886,27 at the end of p. 285.

FLORIDA. Add the citation 1887,3747,1 after *Miss.* in the last par. on p. 285.

WYOMING. Add *Wy.* to the end of p. 285.

A reference should also be made from this section to § 1980, for sub-contractors' liens.

§ 1967. **Notice.** NEW YORK. Strike out all note signs, and change the citation in the 3d line to 1885,342,4; and insert *N.Y.* before *Mich.* in the 2d par., and also in the last line but one of p. 286. Strike out *N.Y.* before *Ida.* in the middle of the 3d par. of this section, and strike out the note signs and the old citations after *N.Y.* in the 4th par.

PENNSYLVANIA. Insert *Pa.* 1887,275 after *N.J.* in the 3d line of the section.

MICHIGAN. Insert *Mich.* 1887,270,3 after *Ill.* in the 4th line of the section; and change the citation in the 5th par. from *Mich.* 8380 to 1887,270,4; strike out 8378 after *Mich.* in the 2d par., and *Mich.* 1885,216,3 in the 4th par., and strike out the citation 8380 in the 1st par. of p. 287.

NEBRASKA. Insert the citation 1887,30,28 after the Nebraska citation in the 4th line of the section.

TENNESSEE. Add the citation 1887,85 after the Tennessee citation in the 6th line of the section; add *Tenn.* after *W.Va.* in the 2d line of the 3d par. Strike out *Tenn.*<sup>c</sup> in clause (8) of the 3d par. Strike out *Tenn.* 2746 in the 4th par.

UTAH. Add the citation *Uta.* 1886,27 after *R.I.* in the 1st line of the 3d par. Strike out the whole of clause (13) in the 4th par.

OHIO. Add the citation *O.* 1887, p. 48 before *Kan.* in clause (6) in the 3d par.

FLORIDA. In Florida any contractor or sub-contractor must furnish the owner with a correct list of all sub-contractors or material-men, or the lien will be lost except as against wage-workers: *Fla.* 1887,3747,8.

ALABAMA. Insert *Ala.* 3026 after *Uta.* in the 1st par., and *Ala.* after *Uta.* in the 5th par.

ARIZONA. Strike out *Ariz.* in the 2d par., and in the middle of the 3d par.

WYOMING. Strike out *Wy.* in the 3d par., clauses (4) and (12), and the old citation in the 4th par.; and add *Wy.* after *Mon.* in the 5th par.

IDAHO. Strike out *Ida. ib.* 2 in the 3d par., and *Ida.* in the last line of p. 286; and add *Ida.* after *Ark.* in the 5th par.

§ 1968. **Record.** NEW YORK. Strike out all the citations in par. (A) (2), and substitute *N.Y.* 1885,342,4. Strike out the citations to New York and the note signs in pars. (B) (3), (B) (5), (B) (7), (C) (2), (C) (5), and (C) (7). The note signs <sup>ks</sup> to *N.Y.*, pars. (B) (6), (C) (8), are also to be stricken out.

PENNSYLVANIA. Add *Pa.* 1887,275 before *Ind.* in clause (C) (7).

MICHIGAN. Law unchanged; change the citation in par. (A) to 1887,270,3. Strike out *Mich.* in clause (B) (2), and insert *Mich.* after *Ind.* in clause (B) (5); strike out *Mich.* in clause (C) (14).

NEBRASKA. Insert the citation *Neb.* 1887,30,28 & 29 after *Minn.* in par. (A) (1).

TENNESSEE. Insert the citation *Tenn.* 1886,85 after *Mo.* in par. (A) (1); and insert *Tenn.* after *Va.* in clause (C) (5).

NEVADA. Law unchanged; change the citation in par. (A) (1) to 3812 for the new Gen. Stats.

FLORIDA. Strike out the citation *Fla.* 143,4 in clause (A) (3). Insert the citation *Fla.* 1887,3747,1 after *Ga.* in clause (A) (8). Add, at the end of par. (B), (15) *within six months after demand for payment : Fla.*; and at the end of par. (C), (15) *within six months after demand for payment : Fla.*

ILLINOIS. Insert citation *Ill.* 82,4; 1887, p. 219 before *Wis.* in clause (A) (8); and also the citation *Ill.* 82,28; 1887, p. 219 after *O.* in clause (B) (7).

NORTH CAROLINA. Insert the note sign <sup>s</sup> after *N.C.* in clause (A) (8); and add the citation 1887,67.

WYOMING. Insert *Wy.* 1511 after *Mon.* in clause (B) (6). Strike out all of clauses (B) (12) and (C) (3).

ALABAMA. Strike out *Ala.*<sup>a</sup> in clause (B) (8); and add the note sign <sup>a</sup> to *Ala.* in clause (C) (5), and *Ala.* after *Mo.* in clause (C) (10).

ARIZONA. Add *Ariz.* to clause (B) (5); and strike out *Ariz.* throughout par. (C).

A new note should be added to this section: <sup>s</sup>*Such record is unnecessary after notice given by the head contractor according to § 1972.*

§ 1969. **Effect.** MICHIGAN. Law unchanged; change the citations in this section to 1887,270,3.

§ 1970. NEW YORK. Law unchanged; strike out all the citations in the 1st and 5th pars., with the note signs, and substitute 1885,342.

OHIO. Insert the citation 1887, p. 50 in the 1st par.

WISCONSIN. Insert the citation *Wis.* 1887,535 after *Ill.* in the 1st par.

MICHIGAN. Insert the citation *Mich.* 1887,270,2 before *Io.* in the 1st par., and insert *Mich.* after *Ill.* in the 5th par.

NEBRASKA. Insert the citation 1887,30,28 after the citation in the 1st par.

NEVADA. Law unchanged; change the citation in the 1st par. to 3817.

CALIFORNIA. Insert the citation 1887,137,2 after the California citations in the 5th par.

FLORIDA. Before final payment the owner may require of the head contractor or sub-contractor satisfactory evidence that all previous payments have been used in paying for the work performed so far as necessary, and that all just claims against the building will be paid: Fla. 1887,3747,14. Strike out the citation *Fla. ib.* 2 at the end of the section.

TENNESSEE. In Tennessee the owner may require a refunding bond of the head contractor: Tenn. 1886,85.

ARIZONA. Strike out *Ariz. ib.* 10 in the last par.; repealed.

Reference should be made to § 1972 besides §§ 1965,1967 in note <sup>b</sup>.

§ 1971. **Amount of the Lien.** NEW YORK. Strike out the note signs and all the citations throughout the section, and substitute 1885,342,1.

PENNSYLVANIA. Insert *Pa.* 1887,275 after *N.Y.* in the 1st par.

MICHIGAN. Strike out the citation *Mich.* 8377 in the 1st par., and *Mich.* 8379 in the 2d par.

NEBRASKA. Insert the citation *Neb.* 1887,30,29 after *Kan.* in the 1st par.

NORTH CAROLINA. Insert the citation 1887,67 after *W. Va.*

NEVADA. Law unchanged; change the citation in the 1st par. to 3817 for the new Gen. Stats.

FLORIDA. Law unchanged; change the citation in par. (5) to 1887,3747,1.

ARIZONA. Strike out the reference and citation; repealed.

§ 1972. **Rights and Duties of the Head Contractor.** NEBRASKA. Insert the citation *Neb.* 1887,30,28 before *Mo.* 3191 in the 2d par.

MICHIGAN. Insert the citation *Mich.* 1887,270,2 before *Kan.* in the 3d par.

PENNSYLVANIA, ILLINOIS, WISCONSIN, NORTH CAROLINA. In all these states the head contractor is required to give the owner notice of all amounts owed to laborers and sub-contractors before receiving any part of the price: *Pa.* 1887,275; *Ill.* 1887, p. 221; *Wis.* 1887,535; *N.C.* 1887,67. See also § 1970 *ad fin.*

ALABAMA. Insert *Ala.* 3039 after *Uta.* in the 3d par.

FLORIDA. If the head contractor sub-let the entire contract, he is liable to the owner for any damage sustained thereby: Fla. 1887,3747,13.

ARIZONA. Add *Ariz.* 2272 to the 1st par., and *Ariz.* 2273 to the 1st sentence of the 2d par.; and strike out *Ariz. ib.* 10 at the end.

§ 1973. **Subject Property.** NEW YORK. Strike out the note sign and all the citations in par. (A), and substitute *N.Y.* 1885,342,1. Strike out the reference and citation to New York in par. (A) (2).

MICHIGAN. Law unchanged; change the citation in par. (A) to 1887,270,1.

WYOMING. Insert *Wy.* after *Ida.* in clause (B) (1); and strike out *Wy.* throughout clause (3).

FLORIDA. Law unchanged; change the citation in par. (A) to 1887,3747,1.

ARIZONA. Strike out *Ariz.* 1479 in par. (A) (1); and insert *Ariz.* 2258 at the end of (A) (2). Strike out *Ariz.* 1885,93,3 in (A) (3), and add (η) 10 acres: *Ariz.* 2263 to clause (B) (3). Insert *Ariz.* 2264 after *Ala.* in the last par. but one.

§ 1974. **Estate of Owner.** NEW YORK. Law unchanged; change the citation in par. (A) to 1885,342,1; and add to the section (G) *The lien attaches to the extent of the interest which the owner may have assigned by a general assignment for the benefit of creditors made within thirty days prior to the time of filing the notice* (§ 1968): *N.Y.*



MICHIGAN. Law unchanged; change the citations to 1887,270,1 throughout this section. Strike out *Mich.* 1885,216,1 in 2d par.

PENNSYLVANIA. Add the citation 1887,273 to the citation in the 1st par.

OHIO. Add the citation 1887, p. 47 after *Vt.* in par. (B); and insert the citation *O.* 3192; 1887, p. 48 before *Mich.* in the 1st line of p. 291.

ALABAMA. Insert *Ala.* 3046 after *Wyo.* in line 4, p. 291.

ARIZONA. Add *Ariz.* 2268-9 after *Tex.* 3174-5 in par. (B).

WYOMING. Strike out all references and citations throughout the section.

§ 1975. **Preventing Lien.** NEW YORK. Insert the citation *N.Y.* 1885,342,24 after *Mass.* in clause (3) of the 1st par.; and insert the citation *N.Y.* before *N.C.* in clause (4). Change the citation at the end of the section to *N.Y.* 1885,342,19, leaving out the note signs.

A reference should be made from this section to § 1981 for similar provisions.

§ 1976. **Limitation for Suit.** NEW YORK. Strike out the reference to New York, with the citation, in clauses (3) and (10), these laws having been repealed; and change the citation in clause (8) to *N.Y.* 1885,342,6.

MICHIGAN. Law unchanged; change the citation in clause (4) from 8381 to 1887,270,3 & 5.

ILLINOIS. Insert the citation *Ill.* 82,28; 1887, p. 219 after *O.* in clause (9). The owner or his agent may require suit to be brought within thirty days after written demand to that effect: *Ill.* 1887, p. 219. Strike out the whole of clause (12).

ALABAMA. Strike out *Ala.* 3454 in clause (3), and add *Ala.* 3041 to clause (14).

ARIZONA. Strike out *Ariz.* 1885,93,9 in clause (3), *Ariz.* 1481 in clause (5), and insert (12) *within four months from the time of record: Ariz.* 2282. Strike out *Ariz.* in clauses (3) and (5), p. 292.

OHIO. To the 2d par. of p. 292 add clause (6) *If a promissory note be given, the lien dates from the first of the items included in it: O.* 3188; 1887, p. 47.

TENNESSEE. Insert *Tenn.*<sup>b</sup> 1886,85 after *Pa.* in clause (3).

FLORIDA. Strike out the citation *Fla.* 143,5 in clause (2); and add *Fla.* 1887, 3747,17 after *S.C.* in clause (14), and strike out *Fla.*<sup>a</sup> in clause (2) of the succeeding par.

WYOMING. Strike out the reference to Wyoming, with the citation, in clause (4); and insert *Wyo.* 1886,25 after *Col.* in clause (5).

IDAHO. Strike out *Ida. ib.* 6; 1876-7, p. 56 in the last line on the page.

§ 1978. **Assignment of Liens.** ALABAMA. Insert *Ala.* 3047 after *Ga.* in the 1st par.

§ 1979. **Special Liens.** OHIO. Insert the citation 1887, p. 47, after the *O.* citation.

A reference should be made from this section to §§ 1960-1,4653.

§ 1980. **Co-existing Liens.** NEW YORK. Strike out all the references, with the citations, in pars. (C) and (D), these laws having been repealed; and add to the section a clause (*F*) *In New York the order is (1) day or weekly wage-workers, (2) sub-contractors in the order of their filing liens, (3) the head contractor: N.Y.* 1887,420.

MICHIGAN. Strike out the reference to Michigan and the citation in pars. (A) and (C). Insert *Mich.* 1887,270,7 before *Io.* at the end of par. (D).

FLORIDA. Strike out the sentence relating to proportional execution at the top of p. 293.

PENNSYLVANIA. Insert *Pa.* 1887,275 after *Ct.* in par. (C).

ALABAMA. Strike out the note sign <sup>b</sup> in par. (C).

NORTH CAROLINA. Add the citation 1887,67 to *N.C.* 1801 in par. (C).

TENNESSEE. Insert the citation *Tenn.* 1886,85 after *Ky.* in par. (C).

OHIO. Add 1887, p. 49 after the citation to *O.* in clause (D).

IDAHO. Strike out *Ida. ib.* 7 in the 1st line on p. 293.

§ 1981. **Removal of Lien.** NEW YORK. Insert *N.Y.* 1885,342,24 (*thirty days*) before *O.* at the end of the 1st sentence of the section.

§ 1982. **Precedence.** NEW YORK. Strike out the note signs throughout; and change the citation in par. (A) to *N.Y.* 1885,342,5. Strike out both the citation and the reference to New York in the 1st par. on p. 294, and the citation only in the 2d par., but insert *N.Y.* before *Ind.* in par. (B) (2). Strike out the 3d par. on p. 294, giving these liens precedence of any liens taken by the principal contractor. No mechanics' lien takes priority of the amount actually owing on a mortgage given for the purchase-money.

MICHIGAN. Insert *Mich.* 1887,270,10 after *Pa.* in par. (B), and strike out the proviso in the end of the 5th par. on p. 294, and also the word *Mich.* before *Io.* in the last line of the section.

WYOMING. Strike out both references and citations; repealed.

IDAHO. Strike out *Ida. ib.* 4 in par. (A) (1).

ARIZONA. Strike out both references and citation; repealed.

§ 1984. **Materials not Liable to Execution.** ARIZONA. Strike out both references and citation; repealed.

§ 1985. **Other Suits.** NEW YORK. Strike out note signs and all the citations throughout the section, and substitute the new statute *N.Y.* 1885,342,15 & 23.

MICHIGAN. Strike out *Mich.* 8394 in the last line of p. 294.

IDAHO. Insert *Ida.* 5136 after *N.Y.* in the 2d par.

ARIZONA. Strike out both references and citation; repealed.

§ 1987. **Rights of Sub-contractors.** MICHIGAN. Strike out *Mich.* 8385 in the 2d par.

NEW YORK. Any person doing work or furnishing materials for any person other than the owner may at any time demand of him the terms of the contract or agreement, the amount due and unpaid to the principal contractor; and if he fail to do so, or make a false statement, they may file and claim a direct lien: *N.Y.* 1885,342,3

§ 1988. [New Section.] **Other Laws.** MINNESOTA. In Minnesota, all labor performed by contract or by the day on any building, article, or utility, or that has entered into the construction of anything, shall be a first lien thereon to the full amount of the consideration agreed upon between the owner or employer and employee, whether the person performing the labor be a contractor, sub-contractor, or wage-worker. Material furnished for such purpose is a second lien thereon. Any contractor or sub-contractor who receives the full amount of

the contract price and fails to pay any such person, thereby allowing a lien to be filed, is made guilty of obtaining money under false pretences : Minn. 1887, 170,1-3.

Liens under this act must be recorded with the county register within ninety days from the last day of service ; and a copy must be served on the owner : Minn. *ib.* 4.

The fact that the person performing such labor, etc., was not enjoined by law from so doing is made conclusive evidence that it was done with the owner's consent : Minn. *ib.* 5.

Suit must be brought within four months after lien filed. No incumbrance on the land, whether created before or after, takes precedence of that lien : Minn. *ib.* 6 & 10.

§ 2002. **Tenancy without Contract.** WYOMING. It is deemed a tenancy on sufferance ; add *Wy.* 1386 after par. (B).

§ 2005. **Tenancy from Term to Term.** MARYLAND. Insert clause (6) at the end of (B) : *If the lessee in a lease with covenant for perpetual renewal, or any person claiming under him, shall have retained uninterrupted possession of the premises for twelve months after the lease expires, it is conclusively presumed in favor of such lessee that a new lease was executed by the lessor for such additional term, under such rent, covenants, and conditions as were provided in said lease or sub-lease :* Md. 1886,154.

NEVADA. By the new Gen. Stats. tenancies from term to term are recognized. Insert *and Nevada* (3751) after *Md.* in the 1st line of par. (C) ; and strike out the citation 59 at the end of the section.

§ 2008. **Attornment.** IDAHO. The provisions of this section are not retained in the Rev. Stats.

§ 2023. **Rent by Tenant for Life.** IDAHO. Insert *Ida.* 2878 after *Dak.* in the 1st par.

§ 2025. **Rent due Tenant pur Autre Vie.** Insert *Ida.* 2879 after *Dak.* in the 1st par.

§ 2034. **Special Lien for Rent.** WASHINGTON. The landlord is given a lien for rent on the crops. Insert *Wash.* 1886, p. 115 after *Texas* in the 4th line on p. 303.

TENNESSEE. Insert 1887,171<sup>a</sup> after the citation to Tenn. in the 5th par. of division (2).

ALABAMA. The lien is enforced by attachment. Add *Ala.* 3061 after *Ark.* in line 4, p. 304.

ARIZONA. All the provisions of this section are repealed by the new Rev. Stats.

§ 2042. **Taxes.** See § 6013 for taxes paid by tenants in the case of alien landlords.

§ 2050. **Tenant by Sufferance.** WYOMING. The principal provision is adopted. Insert *Wy.* 1387 after *Wash.* in the 1st par.

§ 2051. **Same Subject : Tenant at Will.** MARYLAND, IDAHO. Tenancies at will may be terminated by the landlord on giving one month's notice. Insert *Md.* 1886,470 after *Ill.* in the 2d line on p. 308 ; and *Ida.* 2857 after *Dak.* in the same line. One week's notice is sufficient if the tenancy is by weekly payment : Md.



§ 2052. **Same Subject: Year to Year.** NEVADA. Ten days' notice by either party is sufficient to determine monthly tenancies. Insert *Nev.* 3751 before *Col.* in the 3d par. of the section.

IDAHO. Insert *Ida.* 2881 after *Dak.* at the end of the section. The California code is followed.

§ 2053. **Written Lease.** WYOMING. The tenancy determines absolutely at the end of the term. Insert *Wy.* 1387 after *Wash.* on p. 309.

§ 2058. **Re-entry.** Insert *Ida.* 2858 after *Dak.* in the 1st par.; and *Ida.* 2859 after *Dak.* in the 2d par. The California code is followed.

§ 2102. **Removal of Fixtures.** IDAHO. Insert *Ida.* 2882 after *Dak.* at the end of the section.

§ 2104. **Preservation of Timber.** Provisions encouraging the growth of timber have, in the last two years, been adopted in several states, and, in many states, "arbor days" have been established.

CONNECTICUT, PENNSYLVANIA, UTAH. An exemption from taxation for a certain number of years has been made on plantations of timber. Insert in par. (A) *Ct.* 3825; *Pa.* 1887,173; *Uta.* 1886,1.

MAINE, NEW JERSEY, ILLINOIS, RHODE ISLAND, IDAHO. A holiday in these states has been established for planting trees, called arbor day. Insert *Me.* 1887, 79; *N.J.* 1886, p. 428; *Ill.* 1887, p. 304; *R.I.* 1887,641; *Ida.* 1299.

CONNECTICUT, NEVADA, PENNSYLVANIA, KENTUCKY, TENNESSEE, RHODE ISLAND. So in these states an arbor day has been established, but it is not a legal or court holiday: *Ct.* 1756; *Nev.* 1887,44; *Pa.* 1887, p. 431; *Ky.* 1886, p. 266; *Tenn.* 1887,172. And in Rhode Island it is not a holiday for the purpose of presenting, etc., notes and bills.

Strike out the word *Western* in the first line of the section.

**Art. 218.** A reference should be made from this article to § 2254.

§ 2180. **Enclosures.** NEVADA. By the new Gen. Stats. partition fences are those erected on the line of lands owned or occupied by different persons: *Nev.* 375.

Improved lands, as here meant, are those cultivated in grain, vegetables, or from which hay is cut, or town lots: *Nev.*

ARIZONA. The New Mexico statute is adopted. Add *Ariz.* 3209 after the 3d par. All the other provisions concerning fences are repealed.

§ 2181. **Fences in Towns.** A reference should be made from this section to § 2180.

§ 2182. **Erection.** CONNECTICUT. When owners disagree, the proportion each is to maintain or pay for is determined by the fence-viewers. Insert *Ct.* 2279-80 after *Me.* in the 3d par. In the 2d par. of division (B) change the citation to 2275 for the new revision.

MICHIGAN. Add to the citation in the 2d par. 801; 1887,146.

MINNESOTA. Add to the citation in the 2d par. 1887,50.

NEVADA. The provision that owners of adjoining lands, when both owners' land is improved, are each bound to erect half the division fence, is adopted. Insert *Nev.* 371 after *W.Va.* in the 2d par. Change the citation in the 3d par. to 372 for the new Gen. Stats., and in the 2d par. of division (B) to 371.

ALABAMA. Insert *Ala.* 1371 after *Nev.* in the last par. on p. 327.

ARIZONA. See § 2180 [repealed].

IDAHO. Insert *Ida.*<sup>b</sup> 1302,2886 after *Wash.* in the 1st par. of (A); *Ida.* 1305 after *Nev.* in the last par. on p. 327; *Ida.* 1303,2886 after *Dak.* in the 1st par. of (B); and *Ida.* after *Mon.* in the last par. Add *Note*<sup>b</sup> *Only when such owners own land in common, which is enclosed by one fence.*

§ 2184. **Removal.** TEXAS. The provision of par. (A), that neither party can remove his part of the partition fence, is adopted. Insert *Tex.* 1887,43.

ARIZONA. Strike out the last par.; see § 2180.

§ 2185. **Repairs.** IDAHO. Strike out *Ida. ib.* 3 in the 2d par.

MICHIGAN. If part owner of division fence fail, after notice, to repair, the other may proceed to repair, and recover value of repairs from the recusant, as in the 2d par. Insert *Mich.* 779; 1887,146 after *Ill.* in the 3d line; and strike out *Mich.* 798-9 in the same par.

Strike out the word *plus* before *double value of repairs* in the same par.

ARIZONA. Provisions repealed; see § 2180.

§ 2188. **Lawful Fence.** MAINE, CONNECTICUT, ILLINOIS, KENTUCKY, MISSOURI. These states have adopted new statutes defining what shall be a lawful fence; generally for the purpose of providing barbed wire fences. The citations are as follows: Me. 1887,15; Ct. 2273; Ill. 1887, p. 188; Ky. 1887, p. 194; Mo. 1886,111 & 168.

ARIZONA. Provisions repealed; see § 2180.

§ 2189. **Damages by Cattle.** KENTUCKY. For second or subsequent breaches of a lawful fence, the owner of the cattle must pay double damages. Insert *Ky.* 1886,111.

IDAHO. Strike out the reference and citation in par. (B).

ARIZONA. Provisions repealed; see § 2180.

§ 2190. **Local Laws.** ARIZONA. Provisions repealed; see § 2180.

WYOMING. The enclosure laws are general; but the lawful fence varies in certain specified counties: *Wy.* 4182-3.

§ 2192. **Trees.** A reference should be made from this section to § 2104.

§ 2206. **Rights of Abutters.** IDAHO. Add *Ida.* 2283 after *Dak.*

§ 2253. NEW YORK, MICHIGAN, KANSAS, NORTH CAROLINA, MINNESOTA, DAKOTA, NEW JERSEY. These states have passed new statutes giving persons a right to cut drains through lands of others for providing for the drainage of swamp lands, etc. The citations are as follows: N.Y. 1886,636; Mich. 1885,227; 1887, 159 & 160; Kan. 1886,161; N.C. 1887,267; Dak. 1885,47; 1887,43; N.J. 1886, 56 & 70; Minn. 1887,97 & 98.

NEW YORK. Damages must be paid. Insert *N.Y.* after *Ct.* in the last par.

NEVADA, IDAHO, WYOMING. The provisions of the new revision appear to apply to ditches for irrigation only: *Nev.* 362-5. See § 1179.

§ 2254. **Light and Air.** NEW HAMPSHIRE, MASSACHUSETTS, VERMONT. By new statutes of these states, any unnecessary fence, boarding, or other structure over six feet in height, erected for the purpose of annoying the owners of adjoining property by obstructing their view or of depriving them of light or air, is declared to be a private nuisance, which may be abated or the owner punished as with other nuisances: N.H. 1887, Oct. 25 (if over five feet high); Vt. 1886,84; Mass. 1887,348.

CONNECTICUT. And so in Connecticut; and action may be maintained by the proprietor of any land against the owner or lessee of land adjacent who maliciously erects any structure thereon with intent to annoy or injure the plaintiff in his use or disposition of the land: Ct. 982.

§ 2258. **Telegraph.** NEW YORK, ILLINOIS. The provision that no easement can be acquired by prescription in maintaining telegraph wires and poles has been adopted in several states: N.Y. 1886,40; Ill. 1887, p. 298.

CONNECTICUT, RHODE ISLAND, ILLINOIS. So, of telephone wires and poles: R.I. 1886,561; Ct. 3943; Ill. Or electric light or power wires: Ct., Ill.

§ 2501. **Definition.** IDAHO. The definition of succession is adopted from the California code. Insert *Ida.* 5700 after *Dak.* in the 5th par.

§ 2602. **Who may make a Will.** IDAHO. Every person, male or female, aged eighteen may make a will. Insert *Ida.* 5725 after *Dak.* in par. (C); and strike out *and Idaho* in par. (I).

ARIZONA. Every married person may make a will, whatever may be his or her age, as in Idaho or Texas: Ariz. 3232.

§ 2607. For *Art.* 648 read 646.

§ 2618. **Mortmain.** IDAHO. The California provision is adopted that a devise made for charitable, etc., purposes is void unless the will be executed thirty days before the testator's death. Such devises must not exceed one third of the estate if there be heirs; and in such case a *pro rata* deduction is made; and all divisions of property contrary hereto are void, and go to the residuary legatee or heirs-at-law: *Ida.* 5750.

§ 2630. **General Provisions.** ARIZONA. The provision of par. (B) is extended to property held in possession, reversion, or remainder. Add *Ariz.* after the 2d par. of (B). He may bequeath all real estate remaining at his decease. Add *Ariz.* after the 4th par. of (B).

WASHINGTON. Estates in severalty, joint-tenancy, or in common may be devised. Add *Wash.* 1886, p. 165 after the last par. but one.

§ 2640. **Wills must be in Writing.** IDAHO. Wills must be signed at the end by the testator, or by some other person by his express direction and in his presence; except holographic wills: *Ida.* 5727. Insert *Ida.* after *Dak.* in the 2d, 3d, and 4th pars.

§ 2641. **Seal.** NEW HAMPSHIRE. Wills need no longer be sealed: N.H. 1887, Sept. 30.

§ 2642. **Acknowledgment.** IDAHO. The testator may either sign or acknowledge his signature; but must declare it to be his will. Insert *Ida.* after *Dak.* in the 1st and last pars.

UTAH. Add to the citation 1886,17; law unchanged.

§ 2644. **Witnesses.** IDAHO. The will must be attested by two witnesses, who must sign in the presence of the testator and at his request, and a person signing the testator's name by his request must add his own as witness. The witnesses are required to write opposite their names their places of residence. Insert *Ida.* 5727 after *Dak. Civ. C.* 691 in the 1st par.; *Ida.* after *Dak.* in the 3d, 6th, and 7th pars.; and *Ida.* 5729 after *Dak.* in the 1st and 2d pars. on p. 355.

§ 2645. **Holographic Wills.** IDAHO, ARIZONA. The principal provision, that a holographic will need not be attested by any witnesses, is adopted: *Ida.* 5728;



Ariz. 3234-5. In Idaho it must be entirely written, dated, and signed by the testator; it may be made either in or out of the State, and may be proved in the same manner as other private writings; and so, as to the last provision, in Arizona. Insert *Ida.* 5728 after *Dak.*, and *Ida.* before *La.* at the end of the 1st par., after *Cal.* in the 5th par., and before *Mon.* in the last par. but one; and add *Ariz.* 979 at the end of the same par., and *Ariz.* 3234-5 after *Miss.* in the 1st par.

§ 2646. **Competency.** IDAHO. Under the Revised Statutes the witnesses must be competent at the time of attestation, and their subsequent incompetency does not invalidate the will. Insert *Ida.* after *Wash.* in par. (A), and *Ida.* 5730 after *Dak.* in the 3d par. on p. 356.

ARIZONA. In Arizona, as in Texas, the witnesses must be competent and over fourteen years of age: *Ariz.* 3234.

§ 2648. **Devisees and Legatees.** ARIZONA. The provisions of this section appear to be omitted in the new Rev. Stats.

§ 2650. **Devise to Witness Void.** ARIZONA. The Texas provision is followed, that the will may be proved by the evidence of the witnesses notwithstanding a devise to them, and the devise or bequest will not be void, provided there be corroboration. Add *Ariz.* 3248 after *Tex.* in the 2d par.

§ 2653. **Law.** IDAHO. The California code is followed, that the law existing at the time of the execution governs, and that the validity and interpretation of wills wherever made are governed, when relating to property within the State, by the laws of the State; but when relating to personal property, by the law of the testator's domicil. Insert *Ida.* 5759 after *Cal.* in the 1st par., and *Ida.* 5760 after *Dak.* throughout the 3d par.

§ 2672. **Revocation by Destroying.** IDAHO. The provisions that no will can be revoked except by the burning, destroying, etc., by the testator, or by some other person in his presence or by his direction, is adopted in the Rev. Stats. Insert *Ida.* 5731 after *Dak.* in par. (A) and par. (B) (1). When the destruction is by another person than the testator, his consent or direction must be proved by two witnesses. Insert *Ida.* 5732 after *Dak.* throughout par. (C).

§ 2673. **Subsequent Will.** IDAHO. So, a will may be revoked by a subsequent will or by some other writing executed like a will, or its revocation may be implied in law. Insert *Ida.* after *Dak.* in pars. (A) and (B), and after *Wash.* in par. (C).

ALABAMA. Revocation may be implied in law. Insert *Ala.* after *Ga.* in par. (C).

§ 2674. **What Wills may be Revoked.** IDAHO. A will executed in duplicate may be revoked by revoking one of the duplicates. Insert *Ida.* 5733 after *Dak.* in the 2d par.

§ 2676. **Implied Revocation.** CONNECTICUT. A will by an unmarried person is also deemed revoked "by the birth of a child": Ct.<sup>b</sup> 542.

ALABAMA. Add the words *and Alabama* after *New York* in the 1st line of par. (C).

IDAHO. The will of an unmarried woman is deemed revoked by her subsequent marriage and is not revived on her husband's death. Insert *Ida.* 5737 after *Dak.* in the 1st and 2d pars. of (A). A will is deemed revoked if the testator afterwards marries and leaves children at his death, etc. Insert *Ida.* 5735

after *Dak.* in par. (C). So, if he leave a widow; and no other evidence to rebut this presumption can be received. Insert *Ida.* 5736 after *Dak.* throughout par. (D).

ARIZONA. The provision of par. (E) is adopted, that a will made when there are no children living is void if the testator leave a child at death, following the statute of Texas. Insert *Ariz.*<sup>b</sup> 3244 after *Miss.* in the 1st and 3d pars. of (E), and insert *Arizona* after *Virginia* in the 3d par. of (E). And the word *good* in the next line should read *void*.

§ 2677. **Effect.** IDAHO. The revocation of a will revokes all codicils: *Ida.* 5742.

§ 2679. **Implied Revival.** IDAHO. The principal provision is adopted that the revocation of a second will does not revive the first unless republished. Insert *Ida.* 5734 after *Dak.* in the 1st par.

**Art. 269. Preservation of Wills.** ARIZONA. All the provisions of this article appear to be omitted in the new Rev. Stats.

§ 2702. **Nuncupative Wills. By Statute.** ARIZONA. Any person may make a nuncupative will during his last sickness. Add *Ariz.* 3237-8 after par. (B) (1).

§ 2703. **Execution.** ARIZONA. Three witnesses are required, but verbal wills not so executed may be valid to pass sums not exceeding fifty dollars: *Ariz.* 3238.

§ 2704. **Must be Written Out.** ARIZONA, IDAHO. All nuncupative wills must be reduced to writing within six days of the time spoken in Arizona, or within thirty days in Idaho. Insert *Ariz.* 1001,3240 after par. (A) (1), and *Ida.* 5329 in par. (A) (5); and add *Ariz.* after par. (B) (2).

§ 2808. **Construction of Devises.** IDAHO. The principal provision, that every devise of real estate is constituted to convey a fee, is adopted. Insert *Ida.* 5748 after *Dak.*

ARIZONA. The provisions of this section appear to be omitted in the new Rev. Stats.

§ 2809. **After-Acquired Property.** IDAHO. Real estate acquired subsequently passes under the will unless a contrary intention clearly appear. Insert *Ida.* 5749 after *Dak.* in par. (B), and insert *Ida.* after *Dak.* in par. (E) and note <sup>c</sup>.

ARIZONA. The provisions of this section appear to be omitted in the new Rev. Stats.

DISTRICT OF COLUMBIA. After-acquired real property passes by the will when it appears that such was the testator's intention. Insert *D.C., U.S.* 1887,25,2 after *Ala.* in par. (C).

§ 2810. **Subsequent Conveyance.** The provisions of the California code are followed throughout. Insert *Ida.* 5740 after *Dak.* in par. (A), *Ida.* 5741 after *Dak.* in par. (A) (1), *Ida.*<sup>a</sup> after *Dak.* in par. (A) (2), *Ida.* 5739 after *Dak.* in par. (B), and *Ida.* 5738 in par. (C).

§ 2818. **Property Undevised.** ARIZONA. The provisions of this section appear to be omitted in the new Rev. Stats.

§ 2823. **Representation by Legatee's Heirs.** IDAHO. When a devise or bequest is made to any relation of the testator who dies, the legacy does not lapse, but his issue take. Insert *Ida.* 5747 after *Dak.* in par. (A), and *Ida.* after *Dak.* in par. (B).

NEW JERSEY. So, by a new statute, this principle is extended to a case of a

brother or sister, or a descendant of a brother or sister of the testator: N.J. 1887,47.

ARIZONA. Under the Rev. Stats. this principle is limited to the case of a descendant of the testator. Strike out *Ariz.* in pars. (B) and (C).

§ 2825. ARIZONA. The last par. but one of this section is repealed.

§ 2842. Omission of Children Born before the Will. IDAHO. The California code is followed, that when a testator omits to provide in his will for any of his children or their issue, they take as if he had died intestate, unless it appear that the omission is intentional. Insert *Ida.* 5744 after *Dak.* in par. (A), and *Ida.* after *Dak.* in par. (A) (3).

ARIZONA. The provisions of this section are omitted in the Rev. Stats. Strike out *Ariz.* 1503 in par. (A), and *Ariz.* in par. (B).

§ 2843. Omission of Children Born after the Will. IDAHO. The provisions of the California code are followed throughout. Insert *Ida.*<sup>b</sup> 5743 after *Dak.* in par. (B); *Ida.* after *Dak.* in par. (B) (1); *Ida.* 5746 after *Ore.* in par. (B) (2); *Ida.* after *Dak.* in par. (B) (5), and after *Dak.* in the last line before par. (C).

ARIZONA. Certain changes are made in this section by the Rev. Stats., the Texas statute having been followed. Strike out note sign <sup>b</sup> after *Ariz.* in par. (B); and insert *Ariz.* after *Miss.* in pars. (B) (1) and (B) (5), and strike out *Ariz.* in par. (B) (4).

§ 2844. Posthumous Children. ARIZONA. A posthumous child takes as if the father died intestate, unless provision has been made for him or he has been expressly excluded in the will. Add *Ariz.* 3242 after the citations in pars. (B) (1) and (2).

§ 3010. Estate Descendible. NEW MEXICO. For in *New Mexico and Louisiana* in the 2d par. read *Louisiana*, the New Mexico law having been changed. Add 1887,32,15 to the citation in par. (A).

CONNECTICUT. Strike out *Ct.* 18,11,1,2,5 in par. (A).

§ 3012. Accretion. NEW MEXICO. Strike out the entire last par., the laws of descent having been revised.

§ 3020. Heirs. NEW MEXICO. Strike out the 1st par., as before.

§ 3022. Acceptance by the Heir. NEW MEXICO. It seems probable that the New Mexico provisions contained in the first two pars. and in the last par. but one are repealed by the new descent laws: 1887,32.

§ 3024. Of the Benefit of Inventory. NEW MEXICO. The same doubt applies to the provision contained in the 1st and last pars.

§ 3025. Constitution of Heirs. NEW MEXICO. The same doubt applies to the provisions contained in the last two pars.

§ 3027. Establishment of Heirs. MICHIGAN, WISCONSIN. Add to the citations 1887,278 and 1887,192, respectively.

§ 3100. Course of Descent. PENNSYLVANIA, NEBRASKA, TEXAS, NEW MEXICO, OHIO. In these states new laws relating to descent have been passed. Add to the citations in the 1st par., concerning real property, *Pa.* 1887,145; *Neb.* 1887,34; *Tex.* 1887,70; *N.M.* 1887,32, 1-7; and strike out the last two lines, relating to New Mexico. Add to the 2d par., relating to personal property, the citations *O.* 4176; 1887, *p.* 134; *N.M.* 1887,32,1-7.



§ 3101. **Children Living, Wife or Husband Dead.** CONNECTICUT. Strike out clause (3), and substitute the following: *If any minor child die before marriage and without issue and before any legal distribution of the estate descending, his portion is distributed, both realty and personalty, as if he had died in the lifetime of such parent: Ct. 631.*

ARIZONA. The provision of par. (A) seems to be omitted in the new Rev. Stats., and descendants of the testator take *per stirpes* in all cases.

§ 3102. **Same Case: Personalty.** NEW MEXICO. The personal property is distributed as the estate descends, except as to the widow's or husband's share, in all cases. Strike out *N.M.* in par. (A) (1), and add *N.M.* after par. (A) (2).

§ 3103. **Children Dead, Grandchildren Living, Wife or Husband Dead.** NEW MEXICO. Append the note signs <sup>b,d</sup> to the reference to New Mexico in par. (B), and add *Note<sup>d</sup> If grandchildren only are alive, they shall inherit per stirpes, says the statute of 1887; but the context shows that the legislature meant per capita, and used the phrase ignorantly.*

§ 3105. **Children and Wife or Husband Living.** CONNECTICUT. Append the note sign <sup>k</sup> to the other note signs to Connecticut in pars. (A) (1) and (C) on p. 392; and add to the section *Note<sup>k</sup> This intestate share is subject to the laws affecting dower estates (§§ 3231-2).*

NEW MEXICO. In such case the widow takes one half the real estate remaining, if there was only one child surviving or leaving issue; otherwise one third, free of all claims of creditors. Except that when such estate exceeds \$20,000 in value she is only entitled to a fifth; and the Indiana provisions are followed generally that a widow re-marrying cannot alienate such estate, and if she die the estate reverts to the children by a former marriage, etc., etc. The husband in such case takes one third the surplus real estate in fee, as in Indiana. In detail, add *N.M.* 1887,32,20 after *Fla.* at the end of (A) (2), *N.M.* 1887,32,25 after par. (A) (5), and *N.M.* after *Ind.* at the end of par. (A) (5). Between the 1st and 2d pars. of (A) (5) the following should be inserted: *In New Mexico, she takes one third of the real estate left at his decease, free of all claims of creditors: N.M. 1887, 32,17.* And insert *N.M.* 1887,32,18 after *Ind.* in the 1st line of p. 392; *N.M.* after *Ind.* in the 2d line; *N.M.* 1887,32,21 after *Ind.* in the 4th line; and *N.M.* 1887,32,19 after *Ind.* in the 6th line; and add to the notes <sup>i</sup>\$10,000, *in New Mexico; but this is evidently a misprint.*

ARIZONA. In Arizona, in such case, the widow takes one third the real estate for life, and the husband the same. Add *Ariz.*<sup>c,h</sup> after par. (A) (2); and *Ariz.* after *Miss.* in the 2d par. of (C) on p. 392. Strike out *and Arizona* in the last par.

Add to note <sup>a</sup> to this section *This share may be affected by marriage settlement; see § 6440.*

§ 3106. **Same Case: Personal Property.** OHIO. Change the note sign <sup>b</sup> to <sup>i</sup> in the reference to Ohio in par. (A) (1); and add *O.*<sup>i</sup> before *Mich.* in par. (B) (2), the husband's share being the same as the widow's, by the new statute. Strike out the citation *O.* 3109 in par. (B) (8), and change the word *one* in the preceding line to *some*.

NEW MEXICO. One half the personal property goes to the widow if only one child, otherwise one third. The husband's share appears to be always one third.

Add *N.M.* 1887,32,21 at the end of par. (A) (1), and *N.M.*<sup>g</sup> at the end of par. (A) (2), and *N.M.* 1887,32,22 at the end of par. (B) (6).

ARIZONA. Both the widow and husband take one third the surplus property, irrespective of the number of children. Add *Ariz.*<sup>c</sup> after par. (A) (1), and *Ariz.* after par. (B) (2).

§ 3107. **No Issue: Wife or Husband Dead.** IDAHO. If there are no descendants living, the estate descends to the father and mother equally. Strike out *Ida.* in par. (A), and add *Ida.* after *Wash.* in par. (C).

NEW MEXICO. In such case the real estate descends half to the father and mother, the other half to the brothers and sisters and their descendants; but see § 3141 below. Add *N.M.*† at the end of par. (G).

ARIZONA. Real estate descends, as in Idaho, to the father and mother equally. Strike out *Ariz.* in par. (A), and add *Ariz.* to par. (C).

CONNECTICUT. Substitute (C): If the intestate left no issue, such estate goes to the brothers and sisters and their issue of the blood of such ancestor; if none, to the children of such ancestor and their issue; if none, to the brothers and sisters of such ancestor and those who legally represent them, provided that if such intestate be a minor and shall not leave any lineal descendants, or brothers or sisters of the whole blood, or their descendants, or any parent, the estate goes equally to the next of kin of the blood of such ancestor or person from whom it descended; and if none, to the next of kin of the intestate generally: Ct.

§ 3109. **Same Case: Wife or Husband Living.** NEW MEXICO. When there is no issue, the widow or husband takes three fourths of the real estate, the remainder to the father and mother jointly, as in Indiana. Add *N.M.*<sup>a</sup> 1887,32, 23 to the end of par. (B).

CONNECTICUT. Add the note sign <sup>k</sup> to the reference to Connecticut in par. (C) and par. (B) on p. 396; for the note see § 3105.

ARIZONA. Half the real estate goes to the widow or her husband, the other half as before. Add *Ariz.*<sup>a</sup> after *S.C.* in par. (C).

§ 3110. **Same Case: Personalty.** OHIO. If there is no issue all the surplus personalty goes to the widow or her husband. Insert *O.*<sup>a</sup> before *Ill.* in par. (A).

ALABAMA, ARIZONA. So, as to the widow, in Alabama, and the widow or husband in Arizona. Insert *Ala.* after *Wash.* in par. (A), and *Ariz.*<sup>a</sup> at the end of par. (A). Strike out *Ala.* in par. (C).

CONNECTICUT. In marriages before April 20, 1887, the husband takes all the surplus. Insert *Ct.* after *R.I.* in par. (F); see § 3105 note <sup>j</sup>.

§ 3111. **No Issue; No Widow or Husband, Father or Mother Dead.** IDAHO. If the mother be dead all the estate goes to the father. Insert *Ida.* after *Wash.* in par. (A) (1); and if the father be dead, it all goes to the mother. Insert *Ida.* after *Wash.* in par. (B) (1), and strike out *Ida.*<sup>\*</sup> in (B) (2) in both places.

ARIZONA. The Texas provision is followed, that the brothers and sisters take the share of the mother if either be dead. Insert *Ariz.*<sup>\*</sup> after *Tex.* throughout par. (A) (2); if there be no brothers and sisters or their issue, the whole goes to the father. Strike out the note sign <sup>\*\*</sup> to Arizona in par. (B) (2), and substitute the note sign <sup>\*</sup>; and strike out *Ariz.*† in the 2d line below.

NEBRASKA. If the father be dead all the real estate descends to the mother.

Insert *Neb.* after *Kan.* in par. (B) (1); and strike out the reference to *Neb.* in par. (B) (2).

§ 3112. **NEW YORK, NEW JERSEY.** The wife or husband being dead and there being no issue, the personal property goes in equal shares to the mother, brothers and sisters, and their descendants, if deceased, *per stirpes*. Insert *N.Y., N.J.\** before *Md.* in par. (A), and strike out the whole of par. (D).

§ 3113. **No Issue, Widow or Husband, nor Father and Mother.** **NEW MEXICO.** The usual provision is adopted that real estate descends to brothers and sisters and their issue, *per stirpes*. Strike out the whole of par. (B), and insert *N.M.†* before *Ariz.* in par. (A), and strike out the whole of note <sup>9</sup>.

**IDAHO.** Strike out the note sign \* to the reference to Idaho in par. (A); the half-blood distinction being repealed.

**ARIZONA.** Change the note sign † in par. (A) to the note sign \*; the descent distinction having been done away with and the half-blood distinction having been adopted.

§ 3115. **No Issue, nor Father or Mother.** **IDAHO.** In such case half the real estate goes to the husband or wife, the other half as if no husband or wife. Insert *Ida.* before *Uta.* at the end of the 1st par.

**NEW MEXICO, ARIZONA.** The Indiana law is followed, giving all to the widow or her husband. For *Indiana* in the last line read *three states*; and insert *Ind.*; *N.M.* 1887,32,24; *Ariz.* at the end of the line as citations.

§ 3116. **Same Case: Personalty.** **NEW MEXICO.** The Indiana law is followed, giving all to the widow or her husband in such case. Add *N.M.* after *Ind.* in the 1st par.

§ 3117. **No Issue, Husband or Widow, nor Brother and Sister.** **NEW MEXICO.** The Indiana law is followed, giving all to the father and mother. Add *N.M.* after *Miss.* in par. (C).

§ 3118. **Same Case: Personalty.** A reference should be made after par. (B) to § 3102 (A).

§ 3119. **No Issue, Father or Mother, nor Brother and Sister, or their Issue.** **ALABAMA.** All goes to the next of kin. Insert *Ala.\** before *La.* in par. (C).

**IDAHO.** It seems, in Idaho, the issue of brothers and sisters are in such case cut off, and the husband or wife takes if there be no brother or sister living.

**NEW MEXICO.** Strike out the whole of par. (E); repealed.

§ 3120. **Same Case: Personalty.** **NEW MEXICO.** See § 3116. A reference should also be made from par. (A) to § 3102 (A).

§ 3121. **No Issue, Father or Mother, Brother and Sister, or their Issue, nor Husband or Wife.** **PENNSYLVANIA.** If the next of kin be one or more grandparents, the descendants of deceased grandparents take with them the share of such deceased grandparent by right of representation, if of the blood of the ancestor from whom such estate descended or was devised to the intestate: *Pa.* 1887,145.

**ALABAMA.** The estate goes to the next of kin within any reference to those claiming through the nearest ancestor. Strike out *Ala.* in par. (A), and insert *Ala.\** before *Miss.* in par. (B).

**ARIZONA.** The Texas law is followed. Strike out the reference to Arizona in par. (A), and insert *Ariz.†* after *Tex.* in par. (M).



NEW MEXICO. The Indiana law is followed. Strike out the whole of par. (P), and insert *N.M.*† <sup>a</sup> 1887,32,5 after *Ind.* at the end of par. (H).

IDAHO. Strike out the note sign \*; see § 3113.

§ 3122. **Same Case: Personalty.** PENNSYLVANIA. Personalty goes like realty in the same case. See § 3121 above.

§ 3123. **No Kindred.** ARIZONA. Strike out the note sign <sup>a</sup>.

NEW MEXICO. Strike out the reference to New Mexico in par. (D), and the notes <sup>b</sup> and <sup>c</sup>.

§ 3125. **No Kindred, nor Husband or Widow.** NEW MEXICO. The estate escheats. Insert *N.M.* 1887,32,12 after *La.* in par. (A).

§ 3126. **Personalty.** IDAHO, NEW MEXICO. The estate escheats as in § 1166.

§ 3130. **Tenure.** ARIZONA. The estate descends in parcenary. Add *Ariz.* 1459 at the end of the 2d par.

ALABAMA, NEW MEXICO. The estate descends in common, except (in New Mexico) when it descends to parents of the intestate. Add *Ala.* 1923; *N.M.* 1887,32,4 at the end of the 3d par., and *N.M.* at the end of the 4th par.

§ 3131. **Law Governing.** A reference should be made from this section to § 3140.

§ 3133. **Half Blood.** ARIZONA. The principle of par. (B) is adopted, that collaterals of the half blood inherit only half as much as those of the whole blood, etc. Insert *Ariz.* 1462 at the end of par. (B).

NEW MEXICO. The Indiana statute is followed, which abolishes the half-blood distinction as to estate first purchased by the intestate, etc. At the end of par. (E) strike out *Ariz.* 1467; and insert *and New Mexico* after *Indiana* in the 1st line of the succeeding par.

§ 3134. **Descent and Purchase.** ARIZONA. The Texas provision is followed specially abolishing the descent distinction. Add *Ariz.* 1461 after *Tex.* in par. (B); and for the word *Texas* in the 1st line of the par. read *two states*; and strike out *Ariz.* 1467 in par. (A), and the whole of the last par. in this section; and see § 3141 for reversions of gift estates.

§ 3131. **Law Governing.** WYOMING. The principal provision is adopted, that the real estate of a non-resident descends according to the law of the territory; the personal estate, according to the law of his domicile. Add *Wy.* 2195 at the end of the 1st par.

§ 3135. **Persons not in Esse.** ARIZONA. No right of inheritance accrues to any person other than descendants of the intestate, unless born at the time of intestate's death. Add *Ariz.* 1464 after *Fla.* in par. (B).

§ 3136. **Posthumous Children.** NEW MEXICO. Posthumous children, only, of the intestate inherit as if living at his death. Insert *N.M.* 1887,32,1 after *La.* in par. (A).

ARIZONA. So, in Arizona, of children or descendants of the intestate only. Strike out *Ariz.* in par. (C).

§ 3137. **Per Stirpes; Per Capita.** TEXAS. Law unchanged; add to the citation 1887,70.

ARIZONA. The general rule is followed that whenever heirs are in the same degree to the intestate, they take in equal shares; but otherwise, *per stirpes*. Add *Ariz.* 1466 after *Tex.* in par. (A), in both places.

§ 3138. **Representation.** NEW MEXICO. The general provision is followed that the descendants of any person shall inherit *per stirpes* the estate that such person would have inherited had he survived the intestate. Insert *N.M.* 1887, 32,2 after *Fla.* in the 2d line of p. 406.

§ 3139. **Next of Kin.** ARIZONA. The provision that next of kin shall be determined according to the civil law is omitted in the Rev. Stats.

§ 3141. [New Section.] **Exceptional Cases.** In Indiana and New Mexico, an estate which came to the intestate by gift or conveyance in consideration of love and affection, reverts to the donor if living at intestate's death, when the intestate dies without children or descendants, saving to the widow or widower his or her rights, *provided* that such widow or widower has a lien upon such property for the value at the intestate's death of all improvements made by him or her thereon, and for all moneys derived from the separate estate of such husband or wife expended in making such improvements: *N.M.* 1882,32,7; *Ind.* 2473.

§ 3151. **Inheritance by Bastards.** MAINE. Law unchanged; add 1887,14 to the citation in par. (B).

NEW MEXICO. Add 1887,32,8 to the citation in par. (B). Bastards both inherit from the mother and by representation from her kin. Add *N.M.* at the end of par. (C), after *Fla.*

ARIZONA. So, in Arizona. Add *Ariz.* in par. (C), and omit it from par. (D).

§ 3152. **Inheritance from the Father.** (See also § 6632.) NEW MEXICO. The Indiana statute is followed, that estates descend to illegitimate children in default of other heirs, etc. Add *and New Mexico* after *Indiana* in the 1st line on p. 409; *N.M.* 1887,32,9 after *Ind.* in the 4th line; and *N.M.* after *Ind.* in the 6th line. Strike out the last par. but one of the section.

§ 3154. **Inheritance from Bastards.** (See also § 6632.) MAINE. Add 1887, 14 to the citation in par. (A).

NEVADA. It seems the estate of a bastard goes to the mother in preference to the widow or husband; but *quære*: *Nev.* 2983.

NEW MEXICO. The mother of a bastard dying without issue, and, if she be dead, her descendants or kindred, inherits his estate: *N.M.* 1887,32,11.

§ 3162. **Proof of Advancement.** ARIZONA. The provisions of this section are omitted in the Rev. Stats.

§ 3163. **Advancement. General Law.** NEW MEXICO. The usual provision as to advancements is adopted. Insert *N.M.* 1887,32,13 after *Fla.* in par. (A).

ARIZONA. If the advancements are not equal to the share the person advanced would inherit, he must come into hotchpot if he would take any more of the estate. Strike out *Ariz.* in par. (B) (1), and *Ariz.* 1470 in par. (C), and insert *Ariz.* at the end of par. (B) (2).

ALABAMA. The child need not come into hotchpot. Add *Ala.* after *Ga.* in par. (B).

§ 3164. **Advancement to Ancestors.** ARIZONA. The provisions of this section are omitted in the Rev. Stats.

§ 3167. **Value of.** NEW MEXICO. Advancements are estimated at their value at the time of advancement. Insert *N.M.* 1887,32,14 after *Fla.* 92,6 in the 3d par.

ARIZONA. The provisions of this section are omitted in the Rev. Stats.

§ 3168. **Advancements to Other Heirs.** CONNECTICUT. Advancements may be made as well to other descendants as to the children. Insert *Ct.* 630 after *Vt.*

§ 3202. **Amount of Dower.** CONNECTICUT. Dower is absolutely abolished as to marriages made since April 20, 1877. Insert *Ct.* 623 before *Ind.* in par. (B).

And the husband and wife may, during marriage, mutually abandon all rights in each other's property at common law, or under the statutes in force at the time of their marriage and until April 20, 1877, and accept instead the provisions in force now, by written contract recorded in the probate court and in the town-clerk's office where they reside : *Ct.* 618,624. So, also, the provisions of §§ 3105-6, 3109,3110, with regard to the statutory share of the husband and wife in the property of the other, do not apply to any case where, by written contract made before or after marriage, either party has received from the other what was intended as a provision in lieu of such share : *Ct.* 623. See also § 6358.

OHIO. Both the husband and wife are endowed as at common law. Insert *O.* 1887, *p.* 135 after *Mc.* in par. (D), and change the word *two* in the 1st line of the par. to *three*.

NEW MEXICO. Dower is absolutely abolished. Insert *N.M.* 1887,32,16 after *Miss.* in par. (B).

TERRITORIES. "A widow shall be endowed of a third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she shall have lawfully released her right thereto:" *U.S.* 1887,397,18.

§ 3204. **Inchoate Dower.** NEW MEXICO. The Indiana statute is followed as in all cases of descent and dower. Add *N.M.* 1887,32,42 after *Ind.* 2508; and *N.M. ib.* 43 after *Ind.* 2509.

§ 3212. **Dower in Equitable Estates.** NEW MEXICO. The Indiana statute is followed as before. Add *N.M.<sup>b</sup>* 1887,32,25 after the 1st par.; *N.M.<sup>b</sup> ib.* 27 after *Mo.* in the 5th par., and *N.M.<sup>b</sup> ib.* 28 after *Ind.* in the 6th par.

§ 3213. **Dower in Land Mortgaged after Marriage.** NEW MEXICO. If land was purchased by the husband during marriage and mortgaged to secure purchase-money, the mortgage is good against dower whether she joined in the mortgage or not. Add *N.M.* 1887,32,29 after *Ga.* in par. (B).

TERRITORIES. A late U.S. statute adopts the principal provision. Add *U.S.* 1887,397,13 (*Territories*) at the same place.

§ 3214. **Dower in Lands Mortgaged before Marriage.** TERRITORIES. A late U.S. statute adopts the principal provision. Add *U.S.* 1887,397,13 (*Territories*) at the end of the 2d par.

§ 3215. **Dower in the Estate of a Mortgagee.** TERRITORIES. A late U.S. statute adopts the principal provision. Add *U.S.* 1887,397,13 (*Territories*) at the end of the 1st sentence.

§ 3216. **Dower in Surplus Proceeds.** TERRITORIES. A late U.S. statute adopts the principal provision. Add *U.S.* 1887,397,13 (*Territories*) at the end of the 1st sentence.

§ 3218. **Dower in Lands Exchanged.** TERRITORIES. A late U.S. statute adopts the principal provision. Add *U.S.* 1887,397,13 (*Territories*) at the end of the 1st par.



§ 3231. **Waste by Dowress.** OHIO. If a dowress commits or suffers waste she is liable like tenants for life. Insert *O.* 4194; 1887, *p.* 135 after *N.J. Waste* 3 in par. (A). Strike out the whole 2d par., and insert *O.* 4177; 1887, *p.* 134 before *N.J.* in the 3d par.

§ 3241. **By Jointure.** OHIO. Either husband or wife may be barred from dower by jointure as in this section provided. Change the citation in the 1st par. to *O.*<sup>c</sup> 4189; 1887, *p.* 135; insert *O.*<sup>c</sup> after *N.Y.* in par. (A), and add the note sign <sup>c</sup> to the reference to Ohio in par. (C); and strike out the reference to Ohio in the 2d par. of (C).

NEW MEXICO. The Indiana statute is followed throughout. Add *N.M.*<sup>b</sup> 1887, 32,34 after *Ga.* at the end of the 1st par., *N.M.* after *Ga.* at the end of par. (A), *N.M.*<sup>b,d</sup> *ib.* 37 after *Ind.* at the end of par. (A) (3), *N.M.*<sup>b</sup> *ib.* 38 after *Ore.* at the end of par. (B), *N.M.* *ib.* 36 after *Ore.* at the end of the 1st par. of (C), and *N.M.* after *Ore.* in the 3d par. of (C).

For descent and alienation of the jointure estate, see § 3405.

§ 3242. **By Settlement of Personal Property.** OHIO. It appears that dower may no longer be barred in this way. Strike out the reference and citation to Ohio throughout the section.

NEW MEXICO. The Indiana statute is followed. Add *N.M.* 1887,32,34 after *Ga.* at the end of the 1st and 3d pars.

§ 3243. **By Settlement after Marriage.** OHIO. The provisions of this section are extended to the husband as well as the widow. Add the note sign <sup>c</sup> after *O.* in the 1st par.; and change the note <sup>c</sup> to read *see* § 3241, *note* <sup>c</sup>.

NEW MEXICO. The general provision is followed. Add *N.M.*<sup>a</sup> 1887,32,38 at the end of the 1st par. A reference should be made from this section to § 3202 (E).

§ 3244. **By Husband's Will.** NEW MEXICO. The Indiana statute contained in the general provision of par. (A) is followed. Add *N.M.* 1887,32,25 & 39 after *Fla.* at the end of p. 424, and *N.M.* after *Ore.* at the end of the 4th par. on p. 425.

§ 3246. **Forfeiture of Dower.** OHIO. The husband also forfeits his dower if he abandon his wife and dwell in adultery. Add the words *Ohio and* before *Illinois* in the 2d line, and 1887, *p.* 135 to the citation.

NEW MEXICO. So, as to the wife, in New Mexico. Add *N.M.*<sup>b</sup> 1887,32,30 after *S.C.* at the end of the 1st par.

TERRITORIES. A late U.S. statute adopts the principal provision. Add *U.S.* 1887,379,13 (*Territories*) at the end of par. (C) (1).

§ 3248. **Failure of Jointure.** OHIO. The provisions of this section are extended to the case of husbands. Append the note sign <sup>a</sup> to both the references to Ohio, and add to the section *Note* <sup>a</sup> *Or widower*; *see* § 3302.

NEW MEXICO. The principal provision is adopted, that the widow may claim dower when evicted from her jointure estate. Add *N.M.* 1887,32,40 at the end of the 1st par.

§ 3249. **By Act of Husband.** NEW MEXICO. The Indiana statute is followed, providing that no act of the husband shall prejudice the wife's right of dower. Insert *N.M.* 1887,32,33 after *Ark.* in the last line on p. 427; and change the word *four* in the 4th line of the section to *five*; and add *N.M.* after *Ark.* in the 3d line of p. 428.

OHIO. So, if he or the wife give up any real estate by collusion or fraud, or lose it by default, the other still has dower : O. 1887, p. 135.

§ 3261. **Separate Property.** WYOMING. Insert *Wy.* 2233 after *Col.*

§ 3262. **Waiver of Will.** NEW MEXICO. A widow may waive the will and take her intestate share in both real and personal property. Add *N.M.* 1887,32, 39 at the end of par. (A).

§ 3265. **Method of Waiver.** NEW MEXICO. The widow must elect dower or take the will within one year of her husband's death. Insert *N.M.* 1887,32, 38 after *Ore.* at the end of par. (1).

MAINE. Or within thirty days after the decision of a bill, brought by her to determine her rights, to the Supreme Court : Me. 1887,88.

ALABAMA. The waiver must be filed eighteen months after probate. Insert *Ala.*<sup>b</sup> 1964 after clause (1), and strike out *Ala.*<sup>b</sup> 2293 in clause (3).

§ 3271. **By the Heir.** MISSOURI. The widow must sue for dower within one year or be forever barred. Insert *Mo.*<sup>a</sup> 1887, p. 177 after *N.Y.* in the 3d par.

§ 3276. **Division by Bounds or Otherwise.** CONNECTICUT. Dower is assigned by metes and bounds. Insert *Ct.* 619 after *R.I.* in the 1st par.

§ 3301. **Amount.** MASSACHUSETTS. Add to the citation in par. (A) 1885, 255 ; 1887,290. The husband has the right to the use of one half of the wife's real estate for life if they have had no issue born alive ; or to all her real estate, not exceeding \$5,000, where no issue survive her.

CONNECTICUT. The principal provision applies only to marriages made before April 21, 1877. As to others, see §§ 3105,3109.

ALABAMA. Strike out the words *and Alabama* in par. (A).

OHIO. Both husband and wife take the same estate in the lands of each other. Insert O. 1887, p. 135 before *Ill.* in par. (F). Curtesy is abolished. Add O. 1887, p. 136 after *Me.* in par. (G).

NEW MEXICO. So, in New Mexico. Insert *N.M.* 1887,32,16 after *Miss.* in par. (G).

ARIZONA. The statutes relating to curtesy proper are repealed. Strike out *Ariz.* 1474 in par. (A).

§ 3302. **Extent.** OHIO. Strike out the reference to Ohio throughout par. (B), there being no curtesy.

NEBRASKA. Substitute *Neb.* for *O.* at the end of the section.

§ 3303. **Election.** A reference should be made from this section to § 3202 (E).

§ 3304. **Bar.** CONNECTICUT. Every devise to the husband is held to be in lieu of curtesy unless the contrary appear. Insert *Ct.* 623 after *N.H.* at the end of the 3d par.

NEW MEXICO. The Indiana statute is followed, that a husband may be bound by curtesy by ante-nuptial settlement, etc. Add *N.M.*<sup>a</sup> 1887,32,35 at the end of the 2d par.

§ 3306. **Waiver of Curtesy.** A reference should be made from this section to § 3202 (E).

§ 3307. **Forfeiture, etc.** NEW MEXICO. The Indiana statute is followed throughout. Add *N.M.*<sup>a</sup> 1887,32,31 at the end of the 3d par., and *N.M.* 1887, 32,32 at the end of the 5th par.

§ 3308. **Waste.** CONNECTICUT. A tenant by curtesy is liable for waste like a dowress: Ct. 624.

OHIO. Strike out the citation *O.* 4177, and the whole of the 2d par.; tenancy by curtesy being abolished.

§ 3309. **Eviction.** NEW MEXICO. The Indiana statute is followed, that a man evicted from his jointure is entitled to curtesy, etc. Add *N.M.* 1887,32,40 at the end of the section, and for *Ind.* read *two states*.

§ 3401. **On the Death of the Wife.** IDAHO. The California code concerning community property is followed. Add *Ida.* at the end of par. (A) (1), and strike out the citation and reference to Idaho at the end of p. 437.

NEW MEXICO. Strike out the whole of par. (C); repealed by the new descent law.

§ 3402. **Upon the Death of the Husband.** NEW MEXICO. Strike out the whole of par. (C).

§ 3403. **In all Cases.** TEXAS. Insert after the 1st par.: *But such descendants shall inherit only such portion as the parent through whom they inherit would be entitled to if alive: Tex.* 1887,96.

IDAHO. The California law is followed, that if the decedent is a widow or widower and leaves no kindred, it goes to the father, mother, brothers, or sisters of the deceased spouse of the intestate: *Ida.* 5702.

§ 3404. **NEW MEXICO.** This entire section is undoubtedly repealed by the new Descent Law: *N.M.* 1887,32.

§ 3405. **The Jointure Estate.** NEW MEXICO. All the provisions of this section concerning the descent, etc., of the jointure estate are adopted, following the statute of Indiana: *N.M.* 1887,32,44.

§ 4011. **Law of Personal Property.** IDAHO. The California code is followed, that personal property is governed by the owner's domicile. Add *Ida.* 2890 to the citations.

§ 4030. **Choses in Action.** IDAHO. Upon the death of the owner a chose in action passes to the personal representatives, as in California. Add *Ida.* 2891 to the 2d par.

§ 4031. **Assignment of Choses in Action.** IDAHO. Under the Rev. Stats. all choses in action arising upon contract may be assigned so as to vest the title in the assignee, and the California code is also followed, that a non-negotiable written contract may be transferred by indorsement, in like manner with negotiable instruments. Insert *Ida.* 2891 after *Dak.* in the 1st par.; strike out the Idaho reference and citation throughout the 2d and 3d pars.; and add *Ida.* 3600 after *Dak.* at the end of the 4th par.

ARIZONA. Under the Rev. Stats. all instruments and writings not negotiable may be assigned so as to vest the title in the assignee. Change the citation in the 1st line of p. 441 to *Ariz.* 122, and strike out the Arizona citation and references in the 1st and 2d pars., and in the last line on p. 440.

§ 4032. **Suits by Assignee.** WYOMING. The provisions of this section seem to be omitted in the Rev. Stats. Strike out *Wy. Civ. C.* 23 in the 1st line of p. 442.

§ 4036. **Suits against Assignors.** ARIZONA. The provision that the assignee of a non-negotiable instrument may sue the assignor without pursuing the



obligor when the latter is insolvent, etc., is omitted in the Rev. Stats. The provisions of the Texas statutes, that parol testimony is inadmissible to prove a release, and that the assignee of a non-negotiable instrument must sue a remote assignor only after the subsequent assignors, etc., is adopted. Strike out *Ariz.* in clause (2) of the 1st par.; and add *Ariz.* 124 at the end of the 2d par., and *Ariz.* 125 at the end of the 3d par.

§ 4037. "Due Diligence." ARIZONA. Strike out the reference, the provision defining "due diligence" being omitted in the Rev. Stats.

For *compare* § 4734, read § 4741.

§ 4038. Fraud. IDAHO. The provision of this section seems to be omitted in the Rev. Stats.

§ 4040. *Feræ Naturæ*. WISCONSIN. By a new statute, birds ordinarily kept in confinement, and beasts or dogs of any value, may be the subjects of larceny: Wis. 1887,523.

§ 4100. Contract. IDAHO. The Rev. Stats. follow the California code, that all contracts may be oral except such as are specially required by statute to be in writing: *Ida.* 3224.

§ 4104. Conditions. IDAHO. Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void: *Ida.* 3229.

§ 4110. Who may Contract. IDAHO. The provision of the California code is followed, that all persons may contract except infants, insane persons, and persons deprived of civil rights: *Ida.* 3220.

§ 4113. Joint Contracts. TEXAS. The usual provision is adopted, that in case of one or more joint obligors the contract survives against his representatives as well as against the survivors. Insert *Tex.* 1887,26 after *Mo.* in the 3d par.

§ 4117. Volunteers. IDAHO. The California code is followed, that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it: *Ida.* 3221.

§ 4121. Consideration Presumed. IDAHO, ARIZONA. Seals being abolished, the provision is adopted that all written contracts import a consideration *prima facie*. Add *Ida.* 3222 after *Dak.*, and *Ariz.* 2784 after *Fla.* in the 2d par. In Idaho the burden of showing a want of consideration is on the party seeking to avoid the contract: *Ida.* 3223.

§ 4123. Want of Consideration. IDAHO. The provision of the 1st par. seems to be omitted in the Rev. Stats. For § 4739 in the 4th line read § 4744.

§ 4132. Gaming Contracts. CONNECTICUT. Money paid under gaming contracts may be recovered by any person at any time after the event, and treble the value of the money lost is recovered in such suit. Insert *Ct.* 2554 after *Me.* in the 1st and 2d pars. of (B); and strike out the reference to Connecticut in note <sup>a</sup>.

§ 4134. Holidays. NEW YORK, IDAHO, ARIZONA, MASSACHUSETTS, KANSAS, WYOMING, COLORADO, NEW JERSEY, OREGON, have made changes in the law of legal holidays. In detail: January 1 has been made a legal holiday for all purposes in Arizona; February 22, in Massachusetts (it having previously been a holiday, it seems, only for the purposes of negotiable paper), and in Idaho and

Arizona; Arbor Day, being the last Monday in April, in Idaho (and for other states see also § 2104); April 21, in Arizona; May 30, in Massachusetts, Kansas, and Wyoming and Arizona; July 4, in Massachusetts and Arizona; "Labor Day," being the first Monday in September, in Massachusetts, Colorado, New Jersey, and New York, and so in Oregon, Labor Day is the first Saturday in June; any day is appointed by the governor for Thanksgiving, in Massachusetts and Arizona; or for Fast, in Massachusetts and Arizona; or any day set apart by the Governor or President for any public observance in New Jersey, Idaho, or Massachusetts; December 25, in Massachusetts and Arizona; and all general election days in Arizona; and Saturdays are half-holidays for all purposes, after twelve o'clock, in New York: N.Y. 1887,289; Ida. 1299; Wy. 1430; Ariz. 2068; Mass. 1887,263; Ida. 1299; Kan. 1886,125; Col. 1887, p. 327; N.J. 1887,114; 1886,260; Ore. 1887, p. 86.

And in Arizona when any legal holiday falls on Sunday the following day is a holiday.

§ 4135. **Contracts Executed on Sunday.** NEW JERSEY. No person shall be compelled to labor on legal holidays: N.J. 1886,260.

NEW YORK. The saving provision as to Jews appears to be repealed: 1886, 593.

§ 4140. **Clause 4 of the Statute Adopted.** LOUISIANA. A new statute of frauds has been enacted: La. 2278,1887,121. In detail, strike out *Louisiana* in the 1st par. of the section. Insert *Louisiana* after *Utah* in the 2d par., the words *and Louisiana* after (*in all except Pennsylvania*) in par. (2), the words *and Louisiana* after *North Carolina* in par. (3), the words *and Louisiana* after *Montana* in par. (4), and the words *and Louisiana* after *North Carolina* in par. (5).

NEVADA. In the new Gen. Stats. the clause as to special promises by executors or administrators is omitted.

ARIZONA. But in Arizona, by the Rev. Stats., this clause is adopted; and the exception in clause (3), of mutual promises to marry, omitted; and clause (4), as to contracts concerning lands, adopted, for interest for a longer term than one year. Strike out *Ariz.* in clauses (1), (3), (4), and (5); and insert *Ariz.* after *Fla.* in note c.

IDAHO. Clause (4), concerning contracts for real estate, is omitted in the new Rev. Stats. Insert *Ida.* after *Wash.* in the last line of the clause.

MISSOURI. The agent must have written authority when the contract relates to real estate, as in clause (4). Insert *Mo.* 1887, p. 195 after *Minn.* in the last line of the section.

§ 4142. **The Memorandum.** ARIZONA. The provision concerning auctioneers' memoranda appears to be omitted in the Rev. Stats. Strike out *Ariz.* 2127 in the last line.

§ 4143. **Clause 1 Adopted.** IDAHO. Contracts for leasing for a longer period than one year, or for the sale of any interest in land, must be in writing and subscribed by the party or his agent having written authority. Insert *Ida.* 6009 after *Col.* in par. (B).

MINNESOTA. The agent's authority must be both written and recorded: *Minn.* 1887,26.

§ 4144. **Clause 16**, in ARIZONA, appears to be omitted from the Rev. Stats.

§ 4145. **Performance.** ARIZONA. The usual provision concerning specific performance appears to be omitted from the Rev. Stats. Strike out *Ariz.* 2123.

§ 4148. **Other Contracts Required to be in Writing.** A reference should be made from this section to § 4533.

§ 4149. **Fraud.** IDAHO. The California provision concerning fraud is adopted, that a person who is prevented by the fraud of the other party from putting the contract in writing may nevertheless enforce it: *Ida.* 3225.

§ 4175. **Tender.** The law of tender before and after suit will be more fully treated of in the second volume in Part IV.

IDAHO. The other person must make any objection to the article tendered at the time, or he will be deemed to have waived it. Add *Ida.* 3231 after *Dak.* at the end of the section.

IDAHO, ARIZONA. Strike out the references and citations in the last line of p. 471; repealed.

§ 4177. **Effect of Tender.** IDAHO, ARIZONA. All the provisions of this section seem to be omitted in the Rev. Stats.

§ 4192. **Fraud.** ARIZONA. The provisions in the 2d and 3d lines of this section are omitted in the Rev. Stats.

§ 4204. **The Construction.** IDAHO. The California provision is followed, that when a contract is partly written and partly printed, the former holds, etc. Add *Ida.* 3223 after *Dak.* in the 6th par., and *Ida.* after *Dak.* in the last line of the page.

§ 4338. **Loans Pass Title as against Creditors.** ALABAMA. The loan passes title when possession shall have remained three years, etc. Insert *Alabama* before *Mississippi* in the 4th line.

ARIZONA. The principal provision is adopted, that when a loan of personalty is pretended to have been made to any person with whom possession shall have remained two years without demand made and pursued at law by the lender, or when any reservation or limitation is pretended to have been made of a use or property by way of a condition, reversion, remainder, or otherwise, in goods or chattels, and the possession shall have remained with another as aforesaid, the absolute property shall be taken to be with the possession; and such loan, reservation, or limitation is void as to creditors of or purchasers from the person remaining in such possession, unless declared by deed, will, or other writing duly recorded: *Ariz.* 2036.

§ 4343. **Bill of Lading.** WASHINGTON. All the provisions of the California code concerning bills of lading in this section are adopted, both as to bills of lading and warehouse receipts: *Wash.* 1886, p. 121.

§ 4352. **The Time of Liability.** ALABAMA. If a carrier at the point of destination give notice to the consignee and the goods are not taken by him, he is thereafter liable only as a warehouseman: *Ala.* 1180.

§ 4354. **Sale of Goods.** IDAHO, WYOMING. Provision has been made for the sale of unclaimed goods, etc., by railroads, carriers, etc., as in other states. The subject does not appear to be of sufficient importance to justify its being stated at length.

In detail, insert *Ida.* 1160; *Wy.* 1472-4 after *Dak.* in par. (1), *Ida.* 1163; *Wy.*



after *Washington* in par. (2), *Ida.* after *Dak.* in par. (3), *Wy.* after *Ala.* in par. (4); and add (10) *Artisans*; see § 4641: *Wy.* at the end of p. 514.

MISSOURI, MASSACHUSETTS. The provisions of the section are extended in Missouri to innkeepers, and in Massachusetts to warehousemen. Insert *Mo.* 1887, p. 212 after *Neb.* in clause (3), and *Mass.* 1887,277,1 before *Vt.* in clause (4).

§ 4355. **Time of Sale.** MASSACHUSETTS, IDAHO, MISSOURI, ALABAMA, ARIZONA. Changes should be noted in this section as follows: insert *Ida.* 1161 after *N.J.* in clause (A) (4); *Mo.*<sup>c</sup> 1887, p. 212 after *Tenn.* below in the same clause; *Ala.* 1182 after *Cal.* below in the same clause; and *Wy.* 1472 after *Wash.* There must be notice of a sale by publication; insert *Ida.*; *Wy.* 1474; *Ala.* in clause (1) of the 3d par. below; and special notice to the owner or consignor, if known; insert *Mass.*<sup>e</sup> before *Vt.*, and *Ida.*, *Wy.* before *Ala.* in the last par. but one of (A), and *Ala.* before *Ariz.* in the last par. So, when the owner is unknown or cannot be found. Insert *Ida.* after *Nev.* in clause (B) (2); append the note sign <sup>c</sup> before *Mo.* in clause (B) (3); insert *Ariz.* 324 after *S.C.* in clause (B) (5), and *Ala.* 1182 after *Cal.* in clause (B) (6); insert *Ida.* after *Dak.* in clause (1) of the last par. of (B). Perishable goods may be sold immediately in Alabama. Insert *Ala.* 1181 after *Ga.* in clause (C) (2), and *Ala.* after *Ga.* in the last par. but one on the page, and in the 1st and 2d lines on p. 516.

Strike out *Ariz.* 3661 and *Ariz.*<sup>d</sup> 3664.

§ 4356. **Effect.** MISSOURI. Add the citation 1887, p. 212 to the Missouri citation in the 1st par.; and append the note sign <sup>c</sup> to *Mo.* in the last par.

IDAHO. The proceeds of the sale are to be applied first to the necessary expenses and the remainder paid to the county treasurer, from whom the owner may claim it at any time. Insert *Ida.* 1161 after *Dak.* in the 1st par., *Ida.* 1162 after *Wash.* in the 2d par., and *Ida.* after *Dak.* in the 4th par.

ARIZONA. The owner may claim at any time within sixty days after the sale. Strike out *Ariz.* (*six months*) in the 2d par., and insert *Ariz.* after *Cal.* in the 2d line of the 4th par.

MASSACHUSETTS. The owner may claim any time within six months after the sale. Insert *Mass.*<sup>e</sup> 1887,277,3 before *R.I.* in the last par.

§ 4359. **Bills of Lading.** NEW YORK. The provision of this section, that no master or agent of a vessel or common carrier shall give any bill of lading or receipt for merchandise unless actually shipped, and that no property can be delivered except on surrender and cancellation of such bill of lading, appears to be repealed: *N.Y.* 1886,593. Strike out *N.Y.* 1858,326,5 in the 2d line on p. 517; *N.Y.* 1859, 353 in the 5th line, and also in the 7th line.

ARKANSAS. But in Arkansas all the provisions of this section have been adopted. Insert *Ark.* 1887,60,5 after *Mo.* in the 2d line on p. 517, *Ark. ib.* 9 after *Mo.* in the 7th line, *Ark. ib.* 6 after *Mo.* in the 9th line, *Ark.* after *Mo.* in the 10th line, *Ark. ib.* 7 after *Mo.* in the last par. but one, and *Ark.* in the last line of the par.

MISSISSIPPI. Every bill of lading or instrument in the nature thereof, acknowledging the receipt of cotton or other things, is conclusive evidence, in the hands of a *bona fide* holder, as against the person issuing the same, that the goods have actually been received for transportation: *Miss.* 1886,37.

§ 4370. **Warehousemen, Definitions, Titles.** DAKOTA. A public warehouseman is one who advertises or offers to receive the merchandise of any parties on storage for hire; he may store grain in bulk or mix it. Add *Dak.* 1887,130,4 at the end of the 2d par., and *Dak. ib.* 9 at the end of the 5th par.

§ 4371. **Receipts to be Genuine.** NEW YORK. All the provisions of this section are repealed: N.Y. 1886,593. Strike out *New York* in the 2d, 3d, and 4th lines of the section, N.Y. 1858,326,1 in the 2d line on p. 518, and the New York references and citations in all the following pars.

ARKANSAS. The provisions of this section have generally been adopted in Arkansas. Insert *Arkansas* after *Missouri* in the 2d and 5th lines of the section, *Ark.* 1887,60,1 after *Mo.* in the 5th line on p. 518, *Ark. ib.* 2 after *Mo.* in the following par., *Ark. ib.* 3 after *Mo.* 556 in the next following par., *Ark.* after *Kan.* in the next par., and *Ark. ib.* 4 after *Mo.* 556 in the following par.

VIRGINIA. So, in Virginia, the principal provisions have been adopted, that no warehouseman shall issue any receipt except for goods actually received, nor any second receipt while the first is outstanding uncanceled, and he cannot sell or remove such goods without the written consent of the person having the receipt. Insert *Va.* 1886,421,2 after *Md.* in the 1st par. on p. 518, *Va. ib.* 3 after *Ore.* in the 3d par., *Va.* after *Kan.* in the next par., and *Va. ib.* 4 after *Kan.* 23,148 in the next par.

IOWA. No warehouseman can issue a receipt as security for any loan unless the goods are in his custody. Insert *Io.* 1886,165,4 after *Ind.* 6545 in the 2d par. on p. 518, and add the citation 1886,165,5 after *Io.* 2175 below.

ALABAMA. Append the note sign <sup>a</sup> to the citation to Alabama in the 3d and 5th pars. on p. 518; and add to the section *Note <sup>a</sup> Applied also to carriers' bills of lading.* A warehouseman or carrier is liable in damages for non-compliance with the provisions of this section: Ala. 1179.

DAKOTA. A warehouseman may not issue any second receipt while the first is outstanding, except as a duplicate; and every warehouseman must give a receipt setting forth the quantity, kind, and grade of grain stored, which is conclusive against the warehouseman. Insert *Dak.* 1887,130,16 after *Ore.* in the 3d par. on p. 518, and *Dak. ib.* 8 after *Ore.* in the last par. of division (A).

MISSISSIPPI. A warehouseman's receipt or instrument in the nature thereof is conclusive evidence in the hands of any *bona fide* holder, as against the person issuing it, that the cotton or other goods mentioned therein have actually been received for storage: Miss. 1886,37.

§ 4372. **Warehouse Receipts.** NEW YORK. All the provisions of this section are repealed as in § 4371 above.

IOWA, VIRGINIA, ARKANSAS, DAKOTA, WASHINGTON. In these states the main provision, that warehousemen's receipts may be transferred by indorsement, is adopted. Insert *Io.<sup>a</sup>* 1886,165,2 after *Wis.*, *Va.<sup>c</sup>* 1886,421,1 after *Neb.*, *Ark.* 1887,60,6-7; *Dak.* 1887,130,9; *Wash.* 1886, p. 121 after *Cal.* in the 1st par., and insert *Ark.*; <sup>b</sup> *Wash.* among the citations in the 1st par. on p. 519. In Washington, warehouse receipts may be drawn to "bearer," and pass by a simple transfer; see § 4343. Insert *Va.<sup>c</sup>* after *Wis.*, and *Ark.* after *Mo.* in the 2d line of the 4th par. on p. 519; and *Va.* after *Md.*, and *Ark.* after *Mo.* in the 5th par.

Append to the section *Note* ° *But only when the word negotiable is written or stamped on the face of the receipt by the person or corporation issuing it.*

MASSACHUSETTS. Warehouse receipts are exempt from the provisions if the words "non-negotiable," etc., be written below. Add *Mass.* 1886,258 at the beginning of the citations in the 5th par.

ALABAMA. The provisions of this section do not impair landlords' or recorded liens.

§ 4373. **Delivery.** VIRGINIA, ARKANSAS, DAKOTA, ALABAMA. The provisions are adopted that no person having issued a receipt may part with the goods except to the holder of the receipt, and he is required thereupon to destroy it, etc. Add *Va. ib.* 4; *Ark. ib.* 7; *Dak. ib.* 9, and *Ala.* 1178 to the citations in the 1st par. Insert *Va.* among the citations in the 2d par.; and add *Va.*; *Ark. ib.* 7 & 10, and *Dak. ib.* 16 to the citations to the 3d par., and *Ark.* to the citations to the last par.

NEW YORK. The provisions of this section are repealed. See § 4371 above.

§ 4375. **Warehouseman's Lien.** NEW JERSEY, VIRGINIA. In these states warehousemen's liens have been provided by statute. Add *N.J.* 1886,130; *Va. ib.* 4 to the citations in the 1st par. For *Art.* 447 in the 2d line read *Art.* 464.

§ 4376. **Storage a Bailment.** VIRGINIA. The Minnesota statute has been followed, that storage of grain is deemed a bailment, not a sale. Add *Va. ib.* 5 after *Minn.* in both places in the 1st par.

§ 4393. **Lien.** ARIZONA. Hotel and boarding-house keepers are given a lien on the baggage of their guests, etc. Add *Ariz.* 2289 at the end of the 2d par.; and *Ariz.* after *N.M.* at the end of the 4th par.

§ 4501. **Delivery.** ARIZONA. No gift except by deed or will is valid unless actual possession have come to the donee. Add *Ariz.* 2033 to the citations in the 1st par.

§ 4503. **Gifts by Insolvents.** ARIZONA. The provisions of the Texas statute as to gifts by insolvents being void as to creditors, etc., have been followed throughout. Add *Ariz.* 2032 at the end of p. 525; and *Ariz.* after *Miss.* in the 2d par. on p. 526, and after *Tex.* in the last par. but one of the section.

§ 4504. **Gifts by Minors.** ALABAMA. All conveyances of personalty in favor of minor children except by will, where the custody and control remain with the parents, vest an absolute estate in such parents in favor of purchasers and creditors, unless recorded within three years in the county where such parents reside: *Ala.* 1819.

§ 4508. **Record.** ALABAMA. Strike out *Ala.* 2170 in the 1st par.

§ 4520. **Pledges: Definitions.** IDAHO. The provisions of the California code are followed. Add *Ida.* 3410 to the citations in the 2d par., and *Ida.* 3411 to those in the 3d par.

§ 4521. **General Principles.** IDAHO. So, the California code has been followed throughout nearly all the provisions of this section. Insert *Ida.* 3412 at the end of the 1st par., *Ida.* 3413 at the end of the 2d, *Ida.* 3414 at the end of the 3d, and *Ida.* 3415 for the 4th and 5th. So, *Ida.* 3416 contains the provisions of the 6th, 7th, and 8th pars. The 9th par., that pledgees assume the duties and liabilities of depositaries for reward, and the 1st par. on p. 521, that a gratuitous pledge-holder is like a gratuitous depositary, do not appear to have been followed



in Idaho. But otherwise all the provisions of this section contained in the California code have been adopted. Insert *Ida.* 3417-3429 after *Dak. Civ. C.* 1760-1782 in the last par. but one of the section.

ALABAMA. Two days' notice of the sale of the pledge is required, in writing, personal or by mail : *Ala.* 1785.

§ 4522. **Rights of Pledgee.** ALABAMA. Collateral securities taken or property pledged to secure the payment of a debt, must not, without a transfer of the debt, be transferred or assigned except as herein provided : *Ala.* 1784.

A transfer of the debt passes to the transferee the right of the transferor in the property pledged. A transfer of the property without a transfer of the debt is a discharge of the pledge, and restores title to the person from whom it was received : *Ala.*

§ 4523. **Duties of Pledgee.** ALABAMA. All banking, insurance, and other corporations, private bankers, brokers, and other persons engaged in the business of loaning money, etc., must, if demanded, give the borrower a receipt describing the collateral, debt, amount, maturity, etc., numbers of negotiable bonds, if given, etc., or no title will pass : *Ala.* 1783.

§ 4530. **Record of Chattel Mortgages.** IDAHO. Change the citation in the 1st par. to *Ida.* 3386-7. It is not valid "as against creditors or purchasers," if not recorded.

WYOMING, ARIZONA. The provisions of this article extend to all bills of sale, deeds of trust, and other conveyances of personal property which have the effect of a mortgage or lien thereon. Add *Wy.* 71 ; *Ariz.* 2365 to the citations in note <sup>b</sup>.

ARIZONA. Strike out the references and citations in the 3d par., the Arizona statutes having ceased to consider the case of ships.

§ 4531. **Time of Record.** ARIZONA. Chattel mortgages must be recorded forthwith. Add *Ariz.* to clause (4), and strike out *Ariz.* (*thirty miles*) 3650 in clause (5).

WYOMING. The mortgage takes effect only from the time of record except as between the parties. Add *Wy.* 74 to the citations to clause (6).

§ 4532. **The Place of Record.** OHIO. Law unchanged ; add to the citation 1886, p. 72.

NEVADA, ALABAMA. Chattel mortgages are recorded in the Registry of Deeds of the county where the property is, and in the county where the mortgagor resides also. Insert *Nevada* after *California*, and *Alabama* after *Idaho* in the 5th line. In Alabama, if the goods mortgaged be subsequently removed to another county, the mortgage must be also recorded in that county within six months. Add (7) *within six months* : *Ala.* after the 5th par. <sup>1</sup>

WYOMING. Cattle mortgages may be recorded in the county where the range is situated : *Wy.* 72.

ARIZONA. If the goods mortgaged be removed to another county, the mortgage must be recorded therein within thirty days after removal. Add *Ariz.* 2372 after *Wash.* in the 3d line of the 5th par.

§ 4533. **Form, Acknowledgment, and Signature.** IDAHO. Chattel mortgages must be acknowledged or proved like deeds of real estate. Insert *Ida.* after *Cal.* in the 5th line.

ALABAMA. Chattel mortgages must be in writing and subscribed by the mortgagor: Ala. 1731.

NEVADA. No chattel mortgage is valid if for a less sum than \$100: Nev. 1887,57.

§ 4534. **Affidavit.** ARIZONA. Change the citation to 2364, and strike out note <sup>a</sup>, with the note sign.

§ 4535. **Duration.** ILLINOIS. Add to the citation 1887, p. 241.

COLORADO. A chattel mortgage remains valid five years, if the principal amount due exceed \$2,500; ten years if it exceed \$20,000: Col. 1887, p. 75. If it exceed \$2,500, there must annually be recorded an affidavit of the mortgagees, or one of them, that it was given in good faith to secure the payment of the sum mentioned; that it is still unpaid, or that a specified portion is unpaid.

§ 4537. **Method of Foreclosure.** IDAHO. It seems that chattel mortgages may no longer be foreclosed like mortgages of real property. Strike out the citation and reference in par. (C).

§ 4538. **Sale.** WYOMING. Notice of the sale may be given by posting when there is no newspaper. Add *Wy.*<sup>d</sup> after *Dak.* in clause (4).

IDAHO. The time of notice is as in execution sales. Insert *Ida.* after *Wash.* in clause (6).

§ 4539. **Manner of Sale.** IDAHO. The sale is made as in sales under execution. Insert *Ida.* 3393 after *Wash.* in clause (2).

MICHIGAN. Law unchanged; add the citation 1887,178.

§ 4540. **Redemption.** IDAHO, ARIZONA. The provision authorizing redemption by the mortgagor is omitted in the Rev. Stats.

§ 4541. **Discharge.** ARIZONA. The provisions of the section are followed throughout, that a chattel mortgage may be discharged by certificate or entry on the record like mortgages of realty. Insert *Ariz.* 2368 after *Tex.* in clause (1), *Ariz.* at the end of clause (2), and *Ariz.* 2360 after *Md.* in clause (3).

NEVADA. They are released in the same way as mortgages of realty. Insert *Nev.* 1887,57 after *Md.* in clause (3).

§ 4542. **What may be Mortgaged.** A reference should be made from this section to § 1853.

COLORADO. Cattle or herds may be mortgaged with their increase. Add *Col.* 1887, p. 76 to the citations to clause (8).

CALIFORNIA. Strike out the whole of clause (10); repealed. Add to clause (12), in the 2d par., *also the wines, etc., themselves*; and add clause (13) *pianos and organs*: Cal. 1887,8.

PENNSYLVANIA. Insert clause (15) *Iron ore mined and prepared for use, pig-iron, rolled or hammered iron, blooms, bars, or sheets, nails, plates, castings, etc.; but not for less than \$500*: Pa. 1887,32. *There are further special provisions applying to the record, duration, etc., of such mortgages.*

ARIZONA. All the provisions of this section are omitted in the Rev. Stats.

§ 4543. **Sale by Mortgagor.** NEW JERSEY. The mortgagor is forbidden to conceal or carry away the mortgaged property. Add *N.J.* after *Ct.* in the 2d line, and 1887,83 to the New Jersey citation.

MICHIGAN. All the provisions of this section appear to be repealed by the statute of 1887,154.

COLORADO. Strike out the note sign <sup>a</sup> to the reference in the 3d, 5th, and 6th lines; and substitute the note sign <sup>d</sup> for <sup>c</sup> to the reference in the 12th line; such sale, etc., being made larceny: Col. 1887, p. 76.

ARIZONA. Under the Rev. Stats. the mortgagor is forbidden to remove or otherwise dispose of the mortgaged property: Ariz. 2370. Strike out *Ariz.* in the 3d line; and insert *Ariz.* after *N.M.* in the 5th line, and after *Ga.* in the 7th line, changing the citation as above.

CALIFORNIA. The mortgagor is forbidden to remove the mortgaged property under penalty of a misdemeanor. Add *Cal.* after *Ark.* in the 4th line, and insert *Cal.*<sup>a</sup> 1887,77 after *Tex.* in the citation below.

VIRGINIA. It is made larceny for the mortgagor to dispose of the mortgaged property. Insert *Va.* after *Md.* in the 6th line, and *Va.*<sup>d</sup> 1887,396 after *Del.* in the citations below.

VIRGINIA, CALIFORNIA. But the provisions of this section may be waived by the written consent of the mortgagee. Add *Va., Cal.* to the citations in the 2d par.

§ 4546. **Special Cases of Chattel Mortgages by Tenants.** NEVADA. The lien of a mortgage on a growing crop continues after the crop is harvested and prepared for market, and delivered to the mortgagee or his order: Nev. 1887,57.

§ 4553. **Record.** ALABAMA. Conditional sales must be recorded like chattel mortgages. Add *Ala.* 1815 at the end of the citations in clause (A) (1).

NEW YORK. The exception of household goods, pianos, etc., is extended to engines and machines: N.Y. 1886,495.

§ 4566. **Rights and Duties of the Seller.** IDAHO. Many of the provisions of this section are copied, following the California code. Thus, after personal property has been sold, the seller has the rights and obligations of a depositary for hire until delivery is completed. One who sells personal property must bring it to his own door; but further transportation is at the buyer's risk. Personal property sold is delivered at the place where it is at the time of the sale, or at the place where it is produced; and when either party at the sale has an option as to the manner of delivery, he must give notice of his choice or be deemed to have waived it. Add *Ida.* 3252 after the 1st par., *Ida.* 3251 at the end of the 1st sentence on p. 544, *Ida.* 3250 at the end of the next par., and *Ida.* 3249 at the end of the next succeeding par.

§ 4569. **Warranty.** IDAHO, PENNSYLVANIA. One who sells or agrees to sell goods by sample thereby warrants the bulk to be equal to the sample. Add *Pa.* 1887,17; *Ida.* 3246 after the 8th par.

IDAHO. One who sells or agrees to sell personal property as his own thereby warrants that he has a good and unincumbered title thereto. Add *Ida.* 3245 after the 7th par. One who sells or agrees to sell any article to which there is affixed a mark to express the quantity thereof, or the place where it was manufactured, thereby warrants the truth thereof. Add *Ida.* 3247 after the 2d par. on p. 547. One who makes a business of selling provisions for domestic use is held to warrant by a sale thereof that they are sound and wholesome. Add *Ida.* 3248 after the 4th par. on p. 547.

§ 4573. **Vendor's Lien.** IDAHO. One who sells personal property has a special lien thereon, dependent on possession, for its price, etc., as in the 1st par. Add *Ida.* 3443 after *Dak.*



§ 4580. **Record.** MARYLAND. Such bills of sale must be released on record by the vendee upon payment or discharge: Md. 1886,368.

§ 4591. **Frauds upon Creditors.** IDAHO. The provisions of the 2d par., as to transfers or charges of property in fraud of creditors, are copied, following the California code: add *Ida.* 3020 after *Dak.*; and the principal provision, that of the Stat. 13 Eliz., is omitted. Strike out the reference and citation in par. (A).

ARIZONA. The provisions of the 2d par. on p. 557, that nothing herein contained applies to conveyances, etc., made upon good consideration to persons acting in good faith without knowledge of the fraud, are followed. Add *Ariz.* after *Fla.* in the 2d par. A reference should be made from this par. also to § 4503.

§ 4592. **Of Land, to Defraud Purchasers.** ARIZONA. The provisions of this section are omitted in the Rev. Stats. Strike out *Ariz.* 2114,2115.

§ 4593. **Revocable Conveyances.** ARIZONA. All the provisions of this section are omitted in the Rev. Stats. Strike out *Ariz.* 2116,2117,2118.

§ 4594. **Conveyances in Trust for the Grantor.** ARIZONA. So, of this section. Strike out *Ariz.* 2124.

§ 4598. **General Provisions.** IDAHO, ARIZONA. The provision of the 1st par., that fraudulent conveyances are also void as against the heirs or representatives of the persons defrauded, appears to be omitted in the Rev. Stats. Strike out the references and citations in the 1st par.

ARIZONA. The saving provision as to purchasers without notice is omitted. Strike out *Ariz.* 2137.

§ 4599. **Sales in Fraud of Creditors.** ARIZONA. The principal provision, that every conveyance or sale made by a vendor is presumed fraudulent unless accompanied by delivery and followed by actual and continued change of possession, is adopted. Add *Ariz.* 2034 at the end of the 2d par., and strike out *Ariz.* 2128 in the 3d par.

§ 4602. **Definitions.** IDAHO, ARIZONA. The provisions of this section are omitted from the Rev. Stats., except that in Arizona real estate includes mining claims: *Ariz.* 2038.

§ 4620. **Definition of Liens.** IDAHO. The provisions of the California code are followed throughout, except as to the 1st par. Add *Ida.* 3325 at the end of the 2d par., and *Ida.* 3325-3330 after *Dak.* in the last par. but one.

§ 4621. **Creation of Liens.** IDAHO. An agreement may be made to create a lien upon property not yet acquired, etc. Add *Ida.* 3331 at the end of the last par. but one. A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence. Add *Ida.* 3332 after *Dak.* in the last par.

§ 4622. **Effect of Liens.** IDAHO. The provisions of the first three pars. are copied in the Rev. Stats., following the California code. Add *Ida.* 3333-5 at the end of the 3d par.

§ 4625. **Redemption from Lien.** IDAHO. So, all the provisions of this section except those contained in the last par. have been adopted in the Rev. Stats. Add *Ida.* 3337-8 at the end of the last par. but one.

§ 4626. **Extinction of Liens.** IDAHO. The California provision of the last

par., as to effect of the voluntary restoration of property to its owner by the owner of a lien thereon, is adopted. Add *Ida.* 3339 after *Dak.* at the end of the section.

§ 4640. **Laborers.** MAINE. A lien upon logs or lumber cut has been enacted in a new statute. Add 1887,21 to the citation in clause (C) (2).

WYOMING. So, in Wyoming. Insert *Wy.* 1483 after *Ida.* on the first line of p. 564.

IDAHO. But it seems to be omitted from the Rev. Stats. Strike out the reference and citation in the 1st line on p. 564.

FLORIDA. Law unchanged ; add 1887,3747,7 to the citation in the first line of p. 564.

§ 4641. **Artisans.** FLORIDA. Law unchanged ; add 1887,3747,5 to the citation in the 1st par.

ARIZONA. The lien holder making sale must give notice to the owner. Add *Ariz.* after *Tex.* in the last par. but one.

WYOMING. Sale is made as in carriers' liens (see § 4354). Strike out *Wy.* 77,2 in the last line of the section.

§ 4642. **Graziers' Liens.** MAINE, OHIO. Law unchanged ; add 1887,1 ; 1886, p. 80 to the citations in the 1st par., respectively.

IDAHO. Under the Rev. Stats. a lien is given to ranchmen, stable-keepers, etc. Insert *Ida.* 3445 after *Dak.* in the 1st par., *Ida.* after *Va.* in the 2d par., and *Ida.* after *Dak.* in the last par. but one.

MICHIGAN, WISCONSIN, MAINE, ILLINOIS, KANSAS. In these states liens have been given to the owners of breeding stock, as in the 3d par. Add *Mich.* 1887,280 ; *Wis.* 1887,441 ; *Me.* 1887,52 ; *Ill.* 1887, p. 17 ; and *Kan.* 1887,227 to the citations in that par., and insert *Kan.* before *Neb.* in the succeeding par.

NEBRASKA. Add to the citation in the 3d par. 1887,3.

TENNESSEE. Add to the citation in the 3d par. 1887, p. 213.

ARIZONA. Stable-keepers are given a lien. Add *Ariz.* 2290 at the end of the last par. but one.

§ 4643. **Liens on Ships.** MAINE. In Maine, by amendment, the lien does not apply to labor or materials furnished after the vessel is launched, or for its repair : *Me.* 1887,70.

ALABAMA. The provision of par. (E) seems to be omitted in the new code.

ARIZONA. Strike out the reference in par. (L) (1).

§ 4645. **Duration.** MAINE. Add to the reference in the 2d par. the citation 1887,70.

NEW YORK. The lien lasts for thirty days after the debt is contracted : *N.Y.* 1886,88. Strike out clause (3) in the 2d par.

§ 4646. **Enforcement.** ARIZONA. Strike out *Ariz.* 2759 in par. (B).

§ 4647. **Release of Lien.** ALABAMA, ARIZONA. Strike out *Ala.* 3331 ; *Ariz.* 2764 ; omitted in the new revision.

§ 4648. **Sale.** ALABAMA, ARIZONA. Strike out the citations and references ; omitted in the new revisions.

§ 4652. [New Section.] **Seed Liens.** In Dakota any person furnishing grain, flaxseed, or potatoes for planting has a lien upon the crop produced from the kind of seed so furnished, which, if duly recorded, has preference over all other liens or incumbrances upon such crops : *Dak.* 1887,150.

§ 4653. [New Section.] **Clerks and Employees.** Book-keepers, agents, clerks, porters, and other employees of merchants, transportation companies, and other corporations have a lien of superior dignity to all others upon the stock, fixtures, and other property of such merchant, etc., for labor performed in the conduct of the business, to be enforced like mechanics' liens (Art. 196) : Fla. 1887,3747,10.

§ 4654. [New Section.] **IDAHO.** Bankers have a general lien dependent on possession upon all property in their hands belonging to a customer for the balance due from such customer in the course of business : Ida. 3448.

§ 4700. **Definitions: a Bill of Exchange.** **IDAHO.** The provisions of the California code contained in this section have, in the Rev. Stats., been followed throughout, except only as to the definition of indorsement, and of negotiable instruments contained at the bottom of p. 572 : thus, insert *Ida.* 3520 after *Dak.* in the 4th par. of the section, *Ida.* 3521 after the 6th par., *Ida.* 3522-3 after *Dak.* in the 1st par. on p. 572, *Ida.* 3551 after *Dak.* in the 3d par. on that page, *Ida.* 3590-1 after *Dak. Civ. C.* 193-4 in the par. relating to checks ; but in Dakota only an indorsee of a *check* after maturity, without actual notice of dishonor, acquires title equal to that of an indorsee before maturity ; and insert *Ida.* 3575-7 after *Dak.* in the par. in the middle of p. 572, providing that the general law of negotiable paper applies to promissory notes.

§ 4701. **Negotiability of Notes.** **IDAHO.** An instrument, otherwise negotiable in form, payable to a person named, but with the words added "or to his order" or "to bearer," or words equivalent thereto, is in the former case payable to the written order of such person, and in the latter case payable to bearer : *Ida.* 3465. The principal provision, that of the Stat. 3 and 4 Anne, c. 9, is omitted in the Rev. Stats. Strike out the reference and citation in the 1st par.

**ARIZONA.** So, in Arizona, "an indorsee for value before maturity and without notice is compelled to allow only the just discounts against himself:" *Ariz.* 121. Strike out the reference and citations in the 1st par.

**ALABAMA.** In Alabama a note payable to an existing person or *bearer* is nevertheless construed as if payable to such person or *order* : *Ala.* 1761. Strike out the reference *Ala.* in the 5th line of the 2d par.

§ 4702. **Action by Indorsee.** **IDAHO.** The principal provision is omitted ; see § 4701 above. Strike out *Ida. ib.* 4.

**ARIZONA.** In Arizona "any person to whom a negotiable instrument has been assigned may maintain an action in his own name, which the original obligee or payee might have brought ; but he shall allow all just discounts against himself" : *Ariz.* 121.

§ 4705. **Notes Payable to the Order of the Maker.** **IDAHO.** Notes payable to the order of fictitious persons are deemed payable to the bearer. Insert *Ida.* 3467 after *Dak.* in the 3d par.

**ARIZONA.** The provisions of this section are omitted from the Rev. Stats. Strike out references and citation.

§ 4706. **Want of Consideration,** **ARIZONA,** is a defence as between the original parties or indorsees with notice or after maturity. Insert *Ariz.*<sup>a</sup> 128 after *Texas* throughout the 1st par.

§ 4709. **Usury and Fraud.** **IDAHO.** Usury is not a defence against any assignee before maturity for value and without notice, but the maker may never-



theless recover the usurious interest paid by him from the original holder, following the Minnesota statute. Insert *Ida.* 1266 after *Md.* in the 4th line of the 1st par., and *Ida.* after *Minn.* in the following line.

§ 4710. **Of the Indorsement; General Principles.** IDAHO. All the provisions of this section are adopted in the Rev. Stats., following the California code. Insert *Ida.* 3469-3475 after *Dak.* in the last line.

§ 4711. **Warranty by the Indorser.** IDAHO. The California code provisions as to warranty by the indorser are adopted in the Rev. Stats. Insert *Ida.* 3476 after *Dak.* in the last line.

§ 4712. **Indorsement in Blank.** IDAHO. The California code definition of indorsee in due course is adopted in the Rev. Stats. Insert *Ida.* 3481 after *Dak.* in the last line.

§ 4713. **Anomalous Indorsement.** A reference should be made from this section to § 4743, p. 589.

§ 4714. **Indorsement after Maturity.** ARIZONA. The Texas statute is followed, that the indorsee after maturity is liable to any defence which the maker might have set up as against the payee before notice of the assignment. Insert *Ariz.* 121 after *Tex.* in the 3d and 4th lines.

§ 4720. **Form of Acceptance.** IDAHO. All the provisions of the California code contained in this section are followed in the Rev. Stats.: that an acceptance must be written on the bill, but an acceptance written on a paper other than the bill will bind the acceptor as against a person who, on the faith thereof, gave value; and that the holder may require acceptance on the bill, and may at his option accept a qualified acceptance or one written elsewhere than on the bill, or a refusal by the drawee to return the bill after presentment. Insert *Ida.* 3532 after *Dak.* in par. (A); change the citation in par. (B) to 3535, and in par. (C) to 3533; and insert *Ida.* 3534 after *Dak.* in the last line of the section.

ARIZONA. All the provisions of this section are omitted in the Rev. Stats. Strike out *Ariz.* 3469-3474.

§ 4721. **Promise to Accept.** IDAHO. The provisions of the California code as to cancellation of acceptances, and the effect of the acceptance in admitting the signature of the drawer but not of the indorsers, are followed. Insert *Ida.* 3537-8 after *Dak.* in the 3d par.; and strike out *Ida. ib.* 10 in the last line.

ARIZONA. All the provisions of this section are omitted in the Rev. Stats. Strike out *Ariz.* 3469-3474.

§ 4722. **Time of Acceptance.** IDAHO. The provisions of this section are omitted in the Rev. Stats.

ARIZONA. All the provisions of this section are omitted in the Rev. Stats. Strike out *Ariz.* 3469-3474.

§ 4723. **Presentment and Demand.** IDAHO. All the California code provisions contained in this section, except that in the last par., have been followed in the Rev. Stats. Insert *Ida.* 3483 after *Dak.* in the 2d par., *Ida.* after *Dak.* in the 4th par., *Ida.* 3527-3531 after *Dak.* in the 5th par. on p. 579, *Ida.* 3544-7 after *Dak. Civ. C.* 1907-10 in the par. in the middle of p. 579, and *Ida.* 3484 after *Dak. Civ. C.* 1856 below. The instrument may be presented either by the holder or by his agent. And insert *Ida.* 3548-50 after *Dak.* at the bottom of p. 579, and *Ida.* 3524 after *Dak. Civ. C.* 1887 on p. 580.

§ 4724. **Foreign Bills.** IDAHO. All the provisions of the California code in this section have been adopted in the Rev. Stats. Insert *Ida.* 3552-3560 after *Dak.* in the last line of the section.

§ 4725. **Apparent Maturity.** IDAHO. All the provisions of this section have been followed in the Rev. Stats. Insert *Ida.* 3485-6 after *Dak.* in the 2d line on p. 581, and *Ida.* 3487-9 after *Dak.* at the end of the section.

§ 4726. **Days of Grace.** IDAHO. Days of grace are abolished in all cases, following the California code. Insert *Ida.* 3526 after *Uta.* in par. (C), and change the word *three* to *four*; and strike out the Idaho references and citations in pars. (A) and (B).

ARIZONA. Bills at sight are entitled to the days of grace. Add *Ariz.* at the end of the 2d par., and strike out *Ariz.* in par. (B).

§ 4727. **Holidays.** MASSACHUSETTS, NEW YORK, COLORADO. The first Monday of September, "Labor Day," is made a legal holiday: Mass. 1887,263; Col. 1887, p. 327; N.Y. 1887,289.

OREGON. So, in Oregon, the first Saturday in June. See below.

NEW HAMPSHIRE. Election day is made a holiday. Insert *N.H.* 1887, Aug. 17, before *N.Y.* in the last par. but two on p. 582.

RHODE ISLAND. If the 30th of May fall on Sunday, the day preceding is not deemed a holiday. Strike out note <sup>a</sup>, with the note sign on the 5th line of p. 583: R.I. 1886,573.

NEW YORK, NEW JERSEY, ALABAMA. The principle of par. (B) is adopted, that bills or notes falling due on Sundays or legal holidays are payable on the secular day following. Insert in the 1st par. of (B) *N.Y.* 1887,289 & 461; *N.J.* 1886,260; *Ala.*<sup>a</sup> 1759. Strike out the references to these states in par. (A), and *N.J. ib.* 15 in the last par. of (A). So, in New York, when holidays fall on a Sunday. Strike out *N.Y. ib.* 2 on p. 583, and insert *N.Y. ib.* 2 after *Me.* in the following par.

VIRGINIA. If a holiday fall on a Sunday, the Monday following is deemed a holiday, and the bill must be presented on the Saturday preceding. Insert *Va.* 1886,433 after *Del.* in the first par. on p. 583, and strike out *Va.* 1880,103,1 in par. (B), and *Va. ib.* 2 in the second par. on p. 583.

NEW YORK. Notes, etc., falling due on Saturday, a half-holiday, are payable or presentable on the next succeeding business day: N.Y. 1887,461. Every Saturday, from noon to midnight, is designated a half-holiday.

KANSAS. May 30 is declared a legal holiday: Kan. 1886,125.

OREGON. The principle of par. (A) is adopted, that bills falling due on holidays are payable or presentable on the day before. Insert *Ore.* 1887, p. 86 after *Col.* at the top of p. 582. January 1, any day appointed by the Governor for a Fast, May 30, Labor Day, being the first Saturday in June, July Fourth, any general election day or day appointed by the Governor for Thanksgiving, and Christmas Day are made holidays.

NEW JERSEY. If a note falls due on Sunday or a holiday, twenty-four hours is allowed beyond the day when the note is made due under this act, for giving notice: N.J. 1886,260. And the principles of this section are extended to checks payable on a specified day, or on a certain number of days after date; and the same time is allowed for giving notice of dishonor.

ARIZONA. The principle is extended to all contracts which are to be performed on Sunday or holidays, and they are to be performed on the day succeeding. Add *Ariz.* 2070 after *Dak.* in the last par. but one.

IDAHO, ARIZONA. The Rev. Stats. contain no special provision for holidays, etc., as to negotiable instruments. For general holidays, see § 4134.

§ 4728. **Protest for Non-Acceptance.** ARIZONA. Notice of non-acceptance or non-payment is required according to the rules of commercial law, together with protest by a notary. Add *Ariz.* 129 after *Io.* at the end of the 3d par.; and *Ariz.* after *Tex.* at the end of the following par.; for § 4725 read § 4731.

IDAHO. All the provisions of the California code contained in this section are followed in the Rev. Stats. Insert *Ida.* 3491-3501 after *Dak.* in the middle of p. 584; *Ida.* 3502-7 at the end of p. 584, and *Ida.* 3490 at the end of the section.

§ 4729. **Form of Protest.** CONNECTICUT. Protest by a notary is *prima facie* evidence of the facts stated when made without the State: Ct. 1084.

ARIZONA. The protest is evidence of notice to the drawer and indorsers. Add *Ariz.* after *La.* at the end of the par.

§ 4730. **Manner of Notice.** IDAHO. The provision of the 1st par. is omitted in the Rev. Stats.

ARIZONA. The notary protesting is required to give notice by mail and make record of the protest. Insert *Ariz.* 130 after *La.* in the 6th par. on p. 586, and *Ariz.* after *La. D.* 325 in the last par.

§ 4731. **Protest and Notice Abolished.** ARIZONA. The provisions of the Texas statute are followed throughout, except that the holder must sue within sixty days after the right of action shall accrue, or at the second term of court. Add *Ariz.* 119 after *Tex.* 262, *Ariz.* 120 after *Tex.* 264, and *Ariz.* 124 after *Tex.* 268. For § 4141 at the end of the section read § 4036.

§ 4732. **Acceptance for Honor and Reference.** IDAHO. All the California code provisions contained in this section are followed. Insert *Ida.* 3539-43 after *Dak.* in the last par.

§ 4733. **Demand Notes.** IDAHO. Six months is deemed a reasonable time for presenting demand notes if they bear no interest. Insert *Ida.* 3578 after *Dak.* in the 6th par.

§ 4741. **Who may be Sued.** COLORADO. Suit may be brought against the drawer, acceptor, or indorsers, any or all of them in the same action. Insert *Col. Civ. C.* 13 after *Nev.* in the first par.

IDAHO. Under the Rev. Stats. this general provision applies equally to persons severally liable on all written instruments. Insert the note sign <sup>a</sup>, and change the citation in the first par. to 4106.

WYOMING. So, in Wyoming. Insert *Wyo.* <sup>a</sup> 2398 after *Mon.* in the first par.

ARIZONA. Suit may also be brought against any or either of them separately. Add *Ariz.* at the end of the 1st par. And the Texas statutes are followed, that no judgment can be rendered against any person not primarily liable unless judgment has been previously or is at the same time rendered against the principal obligor, unless he is beyond the State, insolvent, etc.; and this applies to all written instruments. Add *Ariz.* <sup>a</sup> 687 after *Miss.* in the 3d par., and *Ariz.* 688 after *Tex.* at the end of the section.



§ 4742. **Liability of the Drawer.** IDAHO. The Rev. Stats. follow the California code, that the rights and obligations of a drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument. Insert *Ida.* 3525 after *Dak.*

§ 4743. **Liability of the Indorser.** IDAHO. The California code is followed, that one who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, is liable upon it to an indorsee in due course in whatever manner and at whatever time it may be filled, so long as it remain negotiable in form. Insert *Ida.* 3482 after *Dak. Civ. C.* 1854, on p. 589; see also § 4713. The California code is also followed as to indorsements "without recourse." Insert *Ida.* 3477 after *Dak. Civ. C.* 1846, *Ida.* after *Dak.* in the following par., and *Ida.* 3478 after *Dak.* in the last par.

§ 4744. **Rights of Holder.** For § 4031 in the 4th line on p. 590 read § 4032.

IDAHO. The California code is followed, that an indorsee of a negotiable instrument has the same rights against every prior party that he would have had if the contract had been between them in the first instance, and that a want of consideration for the undertaking of a maker, acceptor, or indorser does not exonerate him from liability to an indorser in good faith. Insert *Ida.* 3479 and *Ida.* 3480 after *Dak.* in the last two pars., respectively.

§ 4745. **Holder for Value.** IDAHO. The California code is followed, that every signature is presumed to have been made for value before maturity, and in the ordinary course of business. Insert *Ida.* 3468 after *Dak.* in the 2d par.

§ 4746. **The Title of the Holder.** ARIZONA. The Minnesota statute is followed, that a signature is presumed genuine unless specially denied. Insert *Ariz.* 127 after *Minn.* in the 1st line of the 3d par.

§ 4750. **Damages, when Allowed.** ARIZONA. Under the Rev. Stats. it appears that the bill must be drawn within the territory, and indorsement therein is not sufficient to entitle the holder to damages. Add *Ariz.* after *Tex.* in the 2d par. on p. 591.

§ 4751. **To whom Liable.** CONNECTICUT. It appears that the holder is only entitled to damages from the drawer or indorsers in case of non-payment. Strike out the reference to Connecticut in the 4th par.

ARIZONA. The Texas statute is followed throughout, that damages may be recovered by any holder from any person liable. Strike out the Arizona reference and citation in the 2d par., and add *Ariz.* at the end of the 1st and 3d pars.

§ 4752. **Interest and Costs.** ARIZONA. Strike out *Ariz.* 3476 in the 1st par. The costs of protest and suit are allowed in addition to damages, as in Texas. Add *Ariz.* after *Miss.* in the first two pars. on p. 592.

§ 4753. **Damages.** ALABAMA. The holder is allowed five per cent damages in all cases. Insert *Ala.* after *Uta.* in par. (A) (1), and strike out *Ala.* in par. (A) (2).

IDAHO. The holder is allowed fifteen per cent when payable beyond the United States; and ten per cent if drawn upon any of the United States east of the Rocky Mountains; or five per cent if in any state west of the Rocky Mountains, including Utah and Montana; or two per cent if payable within the territory. Insert *Ida.* 3562 in clause (A) (3); strike out the last sentence in division

(A); change the word *twenty-five* in the 5th line before division (C) to *ten*, and the word *twenty* in the succeeding line to *five*; and insert *Ida.* after *Dak.* in the 1st line of p. 593.

ARIZONA. By the Rev. Stats. ten per cent damages are given on bills payable beyond the United States or in another state without distinction. Insert *Ariz.* in clause (A) (2), strike out *Ariz.* in clause (A) (6), and insert *Ariz.* in clause (B) (3), and strike out the words *and Arizona* towards the end of division (B).

§ 4754. **Exchange.** ARIZONA. All the provisions of this section are omitted in the Rev. Stats.

§ 4762. **Futures.** TEXAS. By a new statute the buying, selling, or dealing in futures is made a misdemeanor. Insert *Tex.* 1887,13 after *Ark.* in the 1st par.

MICHIGAN. So, in Michigan, contracts to sell or buy futures are void. Insert *Mich.* 1887,199 after *Io.* in the 3d par. And bonds, notes, checks, etc., given for bonds or contracts given to the vendee of cereals binding the vendor to sell to such vendee any grain or cereals at a fictitious price, or a price double, or more, the market price are void; and their issue or negotiation is made a penal offence: *Mich.* 1887,20.

§ 4801. **Money of Account.** ARIZONA. The provisions of this section are omitted in the Rev. Stats.

§ 4811. **Legal Rate.** MICHIGAN. The legal rate of interest is six per cent. Add 1887,138 to the citation in the 1st par. Insert *Mich.* after *Ill.* in the 2d par., and strike out *Mich.* in the 3d par.

NEVADA. So, in Nevada, it is seven per cent. Add 1887,77 to the citation in the 1st par., insert *Nev.* after *Cal.* in the 3d par., and strike out *Nev.* in the next line.

ARIZONA. So, in Arizona, it is made seven per cent instead of ten per cent. Insert *Ariz.* in the 1st line, and strike it out in the 3d line of the 3d par.

§ 4812. **Contract Rate.** DAKOTA. The restriction of the provisions of this section to certain special counties is repealed: *Dak.* 1887,207. Strike out note c, with the note sign.

ARIZONA. Under the Rev. Stats. any rate may be contracted for in writing. Add *Ariz.* 2162 at the end of (A), and strike out the Arizona citation and reference in par. (B).

§ 4815. **Insurance and Taxes.** A reference should be made from this section to § 1863.

PENNSYLVANIA. The provision authorizing the borrower to contract to pay taxes on the loan in addition to legal interest is repealed: *Pa.* 1887,177.

§ 4816. **Compound Interest.** IDAHO. Interest upon interest cannot be recovered, and no stipulation to that effect in the contract is valid. Insert *Ida.* before *La.* in the 4th par.

ARIZONA. But this provision is left out of the Rev. Stats. Strike out *Ariz.* 3452.

§ 4820. **Foreign Rates.** ARIZONA. The Texas statute is followed, that the rate of interest in other states and counties is presumed to be the same as the home rate, and may be recovered without special allegation. Insert *Ariz.* 1876 after *Tex.*

§ 4831. **Usury Laws.** A reference should be made from this section to § 4819.

MISSISSIPPI. By a new statute all persons are forbidden to receive usurious rates of interest. Insert *Miss.* 1886,13 after *Ala.* in par. (B).

§ 4832. **Penalty.** A reference should be made to § 4819.

IDAHO. Under the Rev. Stats. usury forfeits the whole interest, as in par. (B). Insert *Ida.* 1266 after *Dak.*, and insert (E) *In Idaho, such contract also works a forfeiture of ten cents on the hundred by the year, and at that rate upon the amount, to the county school fund: Ida.* 1266.

ARKANSAS. All titles to property made as part of an usurious contract are void. Insert *Ark.* 1887,39,1 before *Ga.* in par. (C).

ALABAMA. Insert (F) *A banker who discounts a note, bill, etc., at a higher rate than eight per cent is guilty of a misdemeanor: Ala.* 4140.

§ 4833. **Recovery Back.** ARKANSAS. In bills in equity to recover money or goods received usuriously, the plaintiff may not be required to pay any interest whatever, as a condition of granting relief, following the New York statute. Add *Ark.* 1887,39,4 at the end of the 2d par. of (B).

IDAHO. Strike out both references and the citation in this section; the law is changed by the Rev. Stats.

§ 4834. **State Suits.** CONNECTICUT. Strike out the citation and reference: repealed; and for *Connecticut* in the 4th line read *Maryland*.

§ 4840. **Judgments.** IDAHO. Strike out the note sign <sup>b</sup> to the citation in the 1st par. All judgments now bear interest; the legal rate is always allowed upon a judgment, whatever may be the contract. Insert *Ida.* 1264 after *Mo.* in the last par. but one.

§ 4843. **Other Contracts.** IDAHO. Under the Rev. Stats. interest is payable on all contracts for the payment of money or loans, on money had or received for the use of another, on money lent, or on unsettled accounts, but not, as before, upon all instruments in writing. Insert *Ida.* after *Dak.* in the last par. on p. 600, and strike it out on the last line on the page; and insert *Ida.* before *Mon.* in the 4th and 5th pars., and after *Neb.* in the 6th par., on p. 601.

§ 4845. **After Maturity.** MINNESOTA. The principal provision is extended to all contracts; and any provision increasing the rate of interest after maturity, or after the making or delivery of the note, etc., works a forfeiture of the entire interest thereon; except in the case of notes or contracts, which bear *no* interest before maturity: *Minn.* 1887,66.

§ 4850. **Computation of Time.** MAINE, CONNECTICUT, PENNSYLVANIA. Three states have, during the last two years, adopted standard time: *Me.* 1887,29; *Pa.* 1887,17; *Ct.* 3955.

**Art. 486. Weights and Measures.** Several states have adopted new standard weights and measures: *N.H.* 1887, Aug. 24; *Ct.* 3978-3981; *Me.* 1887, pp. 45 & 121; *O.* 1886, p. 31; 1887, p. 16; *Ill.* 1887, p. 309; *Tenn.* 1887,240; *Ark.* 1887,97; *Ida.* 1250-1; *N.Y.* 1887,337; in detail, the changes are as follows:

NEW YORK. The barrel of apples, pears, potatoes, and quinces contains one hundred quarts dry measure: *N.Y.* 1887,337. If by weight, a barrel of potatoes is one hundred seventy-two lbs.

TENNESSEE. A liquid barrel contains forty-two gallons. A bushel of wheat



sixty lbs.; of Indian corn, fifty-six lbs.; of barley, forty-eight lbs.; of buckwheat, fifty lbs.; of corn meal, fifty lbs.; of pease, sixty lbs.; of beans, sixty lbs.; of potatoes, sixty lbs.; of apples, fifty lbs.; of carrots, fifty lbs.; of onions, fifty-six lbs.; of turnips, fifty lbs.; of beets and roots, fifty lbs.; of clover seed, sixty lbs.; of herdgrass or timothy seed, forty-five lbs.; of parsnips, fifty lbs.; of bran and shorts, twenty lbs.; of flaxseed, fifty-six lbs.; of fine salt, fifty lbs.; of sweet potatoes, fifty lbs.; of cotton-seed, twenty-eight lbs.; of millet seed, fifty lbs.; of dried apples, twenty-four lbs.; of apple seed, forty lbs.; of blue grass seed, fourteen lbs.; of corn in the ear, shucked, seventy lbs.; unshucked, seventy-four lbs.; coke, forty lbs.; charcoal, twenty-two lbs.; stone, eighty lbs.; Hungarian grass seed, forty-eight lbs.; lime, eighty lbs.; slaked lime, forty lbs.; peaches, fifty lbs.; dried peaches, twenty-six lbs.; plums, sixty-four lbs. The barrel of flour weighs one hundred and ninety-six lbs.; of beef and pork, two hundred lbs. A barrel of apples contains two and one half bushels.

OHIO. A bushel of wheat contains sixty lbs.; of apples, forty-eight lbs.; of English turnips, sixty lbs.; of hemp seed, forty-four lbs.; of millet seed, fifty lbs.; of hominy, sixty lbs.; of wild peaches, thirty-three lbs.; of dried apples, twenty-two lbs.; of malt, thirty-four lbs.; of Hungarian grass seed, fifty lbs.; lime, seventy lbs.; coke, forty lbs.; bituminous coal, eighty lbs.; cannel coal, seventy lbs.; corn in the ear, sixty-eight lbs.; tomatoes, fifty-six lbs.; peaches, forty-eight lbs.; plums, fifty lbs.

ARKANSAS. The bushel of wheat contains sixty lbs.; of rye, fifty-six lbs.; Indian corn, fifty-six lbs.; barley, forty-eight lbs.; buckwheat, fifty-two lbs.; oats, thirty-two lbs.; corn meal, forty-eight lbs.; pease, sixty lbs.; beans, sixty lbs.; potatoes, sixty lbs.; carrots, fifty lbs.; onions, fifty-seven lbs.; English turnips, fifty-seven lbs.; clover seed, sixty lbs.; herdgrass or timothy seed, sixty lbs.; bran and shorts, twenty lbs.; flaxseed, fifty-six lbs.; fine salt, fifty lbs.; sweet potatoes, fifty lbs.; cotton-seed, thirty-three and one-third lbs.; millet seed, fifty lbs.; dried peaches, thirty-three lbs.; dried apples, twenty-four lbs.; blue grass seed, fourteen lbs.; corn in the ear, shucked, seventy lbs.; unshucked, seventy-four lbs.; red top, fourteen lbs.; orchard grass, fourteen lbs.; sorghum, fifty lbs.

MINNESOTA. A bushel of wheat, clover seed, or potatoes contains sixty lbs.; of rye or corn, fifty-six lbs.; of oats, thirty-two lbs.; of barley, forty-eight lbs.; of buckwheat, forty-two lbs.; of dried apples or peaches, twenty-eight lbs.: Minn. 1887,22.

IDAHO. A bushel of wheat contains sixty lbs.; of rye, fifty-four lbs.; of Indian corn, fifty-two lbs.; of barley, fifty lbs.; of buckwheat, forty lbs.; of oats, thirty-two lbs.; of flaxseed, fifty-six lbs.

MAINE. The bushel of oats contains thirty-two lbs.; of beans, sixty-two lbs.

NEW HAMPSHIRE. So, of beans, sixty-two lbs.; of corn, fifty-six lbs.

ILLINOIS. The bushel of fine salt contains fifty lbs.; and strike out the reference on p. 604, fixing the size of a bushel of sweet potatoes.

NEW YORK. The barrel of potatoes weighs one hundred and seventy-two lbs.

MISSOURI. The barrel of flour weighs one hundred and ninety-six lbs.

ARIZONA. The statutes of weights and measures seem to be omitted from the Rev. Stats.

§ 5013. **Release.** CONNECTICUT, ARIZONA. The provision of par. (B) is adopted, that a creditor may compromise with any one or more joint co-partners, and release him without discharging the others. Insert *Ct.* 1022 before *Va.* in par. (B), and *Ariz.* 133 after *Dak. Civ. C.* 869. This does not, in Arizona, impair the rate of contribution between joint contractors. Add *Ariz.* at the end of the last par. but one.

§ 5100. **Definitions.** ARIZONA. This chapter includes indorsers, guarantors, drawers of bills, and other sureties, as in Texas. Add *Ariz.* 2416 at the end of the 2d par.

§ 5101. **Obligation of the Surety.** ARIZONA. The Texas statute is followed, that no surety can be sued unless the principal be joined, when he can be reached. Add *Ariz.* 2415 after *Tex.* in the 2d par.

§ 5105. **Suit by the Creditor.** ARIZONA. The provision of par. (B) is adopted, and a surety may at any time after an action is accrued require a creditor to bring suit, and if he do not so commence suit within sixty days the creditor is discharged. Insert *Ariz.* 2408-9 after *Ark.* in clause (B) (1).

WYOMING. So, in Wyoming; such suit to be brought within a reasonable time. Add *Wy.* 3038-9 after *Wash.* in clause (B) (3); and *Wy.* 3040 after *Ark.* in clause (C) (1).

§ 5106. **Execution.** ARIZONA. The general provision is followed, that execution issues first against the property of the principal, and in default thereof against that of the sureties. Insert *Ariz.* 2411 after *Miss.*

WYOMING. But this provision seems to be omitted from the Rev. Stats. of Wyoming. Strike out the reference and citation.

§ 5120. **Payment by the Surety.** WYOMING, ARIZONA. The provision of par. (C) is adopted, that any surety by making payment is entitled to prosecute a judgment against the principal. Insert *Wy.* 3041; *Ariz.* 2412 after *Fla.*

§ 5140. **Contribution.** ARIZONA. The provision of clause (1) is adopted, that any surety satisfying the contract is entitled to an assignment of it, and may have execution against the other sureties to recover their due proportion. Insert *Ariz.* 2413 at the end of clause (1), and *Ariz.* at the end of clause (2).

§ 5286. **Contracts with Aliens.** ALABAMA. The provision of this section seems to be omitted in the new code.

§ 5305. **Firm Name.** NEW YORK. A violation of this section cannot be used as a defence against an assignee or receiver or administrator of such partner: N.Y. 1886,262.

MINNESOTA. Foreclosures of mortgages heretofore made in the firm name are validated: Minn, 1887,154.

OHIO. The statute of 1884, requiring partners to record their names and residences with the county recorder, is repealed: O. 1886, p. 38. Strike out the whole of the last par. but two.

ARIZONA. So, in Arizona, the corresponding statute is repealed or superseded by the Rev. Stats.: strike out the whole of the last par. but three; and all the provisions of the California code above are followed: insert *Ariz.* 2403-6 after *Dak. Civ. C.* 1443-6 in the 8th par., and *Ariz.* after *Cal.* in the 7th par.

§ 5342. **Certificate of Limited Partnership.** IDAHO. The certificate must

distinguish which are general and which are special partners. Strike out the word *Idaho* in par. (3).

§ 5344. **Record.** VIRGINIA. Law unchanged; add to the citation 1886,187.

§ 5350. **Renewals.** CONNECTICUT. The affidavit must state whether the special capital has been reduced or impaired, and to what extent, in case of renewing a partnership.

MASSACHUSETTS. No renewal can be made unless the capital of special partners equals or exceeds the aggregate amount the special partners originally contributed; and the certificate of renewal must contain a statement to that effect, and also state the amount contributed by each special partner at the time of renewal: Mass. 1887,248,3.

§ 5352. **Limitations.** IDAHO. New special partners may be taken in, as in New York. Add *Ida.* 3292 to the 1st par.

§ 5356. **Capital.** MASSACHUSETTS, VERMONT. The provision of the 2d par. is adopted, that any partner may annually receive lawful interest on the sum so contributed by him if the payment thereof does not reduce the original capital: Mass. 1887,248,2; Vt. 1886,82. And in Vermont, if there are profits actually earned, he may receive his proportion. Insert *Vt.* before *N.Y.* in the 4th par.

VERMONT, ALABAMA. In these states the partner infringing this section is liable for such an amount as will make good his share of the capital, but nothing is said about interest. Insert *Vermont, Alabama* in the exception of the 4th line of the last par.

§ 5358. **Firm Name.** IDAHO. The provision requiring the names of general partners only to be inserted in the firm name appears to be omitted in the Rev. Stats. Strike out the reference and citation in the 1st par.

ALABAMA. The addition of the word "Company" or any other general term seems not to be forbidden in the new code; strike out the reference to Alabama in the 2d par. And in all special partnerships the word "limited" must be attached to the style and signature of the firm in all business transactions. Insert *Ala.* after *Ida.* in the last par. but one.

MASSACHUSETTS. A limited partnership which lawfully succeeds to the business of a former firm may, with the consent of the members of such firm or their legal representatives, adopt and use such firm name: Mass. 1887,248,1.

§ 5370. **General Principles.** MASSACHUSETTS. Law unchanged; add 1887, 248,4 to the citation.

IDAHO. The provisions of this section appear to be omitted in the Rev. Stats. Strike out *Ida. ib.* 18.

§ 5373. **Fraud.** NEW YORK. The statute making partners guilty of fraud in partnership affairs liable civilly to the person injured to the extent of his damage, is repealed: N.Y. 1886,593.

§ 5380. **Assignments.** IDAHO. All the provisions of this section appear to be omitted in the Rev. Stats., concerning assignments by limited partnerships. Strike out the references and citations in the 1st, 3d, and 4th pars.

§ 6001. **Who are Citizens.** CONNECTICUT. The provision of par. (B) seems to be omitted in the new Gen. Stats.

§ 6002 **Expatriation.** CONNECTICUT. The provision of the 1st par. seems to be omitted in the Gen. Stats.



§ 6005. **Persons Unborn.** IDAHO. The California code is followed, that persons unborn, but conceived, are deemed existing persons as to their interests. Add *Ida.* 2406 after the 1st par.

§ 6012. **General Rights of Aliens.** CONNECTICUT. The provision of par. (B) appears to be omitted in the new Gen. Stats.

§ 6013. **Rights of Aliens as to Property.** In several states radical laws against the holding of land by aliens have been passed: thus, in Illinois, the provision of par. (A) is repealed; and, by the act of June 16, 1887, no contract, agreement, or lease, written or parol, by which lands are leased by an alien or his agent for agricultural purposes, shall contain any provision requiring the tenant or any person for him to pay the taxes thereon, and all such provisions and agreements as to taxes are void; and if the alien landlord or his agent receive in advance or at any time any money or thing of value from the tenant in lieu of such taxes, directly or indirectly, it may be recovered back by such tenant; and all provisions or agreements in writing or otherwise to pay such taxes are void: Ill. 1887, p. 4.

(E) In Illinois a non-resident alien, firm of aliens, or corporation incorporated under the laws of any foreign country, is not capable of acquiring title to or taking or holding any lands or real estate by descent, devise, purchase, or otherwise, except that the heirs of aliens who have heretofore (June 16, 1887) acquired land in the State, and those who may acquire lands under the provisions of this act may take such lands by devise or descent and hold the same for the space of three years and no longer, if such alien is twenty-one years old at the time; if not, for the term of five years from the time of acquiring such lands; and if at the end of such time herein limited such lands so acquired by such alien heirs have not been sold to *bona fide* purchasers for value, or such alien heirs have not become actual residents of the State, the lands shall revert and escheat to the State of Illinois as below provided; *provided* that minor aliens actually residing in the United States may acquire title to lands in the State by purchase, and hold them for a term of six years after they might, under United States laws, have declared their intention to become citizens of the United States, and if at such time they have not become citizens of the United States, the lands so acquired by purchase shall revert and escheat in the same manner: Ill. 1887, p. 5, § 1.

And any alien resident of the United States who shall declare his intention of becoming a citizen thereof in accordance with the naturalization laws, and every alien female who shall in good faith become an actual resident of the United States, shall therefrom be authorized and enabled to take and hold real estate to him or her and his or her heirs and assigns forever, and may, during six years thereafter, sell, assign, mortgage, devise, and dispose of the same as if a natural-born citizen; *provided*, that such alien male shall at the time record with the register of deeds in the county where the lands lie a certified copy of his such declaration of intention, and such alien female shall so record her affidavit that she is in good faith such actual resident of the United States; but no alien unless an actual resident of the State shall have power to lease or devise any real estate which he or she may take or hold by virtue of this provision: Ill. *ib.* § 3.

If any alien who has declared his intention of becoming a citizen shall not

become a naturalized citizen of the United States within six years after such declaration, and be living, and shall not have sold said real estate to purchasers thereof for value and in good faith, such real estate acquired by him under this act shall revert and escheat to the State of Illinois, by information of the county State's attorney, service as in chancery cases, and sale of such real estate; but any person not a party or privy may lay claim to such property or the proceeds thereof within ten years after judgment or five years after disability removed: Ill. *ib.* §§ 4,7.

Any alien non-resident of the United States who owned land in the State at the time this act takes effect may dispose of the same during his lifetime to *bona fide* purchasers for value and take security for the purchase-money as a citizen of the United States might do, except that if he or his non-resident heirs again obtain title to said lands on any sale under judgment or decree for such purchase-money, he or his such heirs shall only hold title to said lands for three years after obtaining the same; and if such lands so acquired are not sold in good faith to *bona fide* purchasers for value within said time, they shall escheat to the State as above provided: Ill. *ib.* § 8. So, nothing herein shall prevent the holder of any lien or interest in real estate heretofore acquired from holding or taking a valid title to such real estate, or prevent any alien from enforcing any lien or judgment for any debt or liability which may hereafter be created or be acquired by him or adjudged in his favor, or from becoming a purchaser at any sale by virtue of such lien or judgment; *provided*, that all lands so acquired shall be sold within three years after title perfected in him, or, in default thereof, shall escheat as above: Ill. *ib.* § 9.

COLORADO. In Colorado non-resident aliens are after this act forever prohibited from acquiring by any form of purchase to them or to their use agricultural, arid, or range lands in the State, or any interest, use, or benefit therein: Col. 1887, p. 24, § 1.

Such lands are forfeit, if so acquired, to the State: Col. *ib.* 2.

If any such interest shall come to any non-resident alien by devise, descent, or purchase at foreclosure or judicial sale, he may hold the same for three years with right of alienation, after which period they are forfeited: Col. *ib.* 4.

This act does not apply to foreign corporations, syndicates, or individuals acquiring, owning, or working mines, or to corporations for engaging in any industry other than the holding of agricultural, arid, or range land outside of incorporated towns and cities: Col. *ib.* 5. Nor when the value of the land or interest is assessed at less than \$5,000 by any one holder: Col. *ib.* 6.

NEBRASKA. And in Nebraska no non-resident alien can acquire or hold any real estate by purchase, devise, or descent; *provided* that aliens now owning real estate may convey, mortgage, and devise it, and if they die intestate it shall descend to their heirs as if citizens: Neb. 1887,62. And by another statute, no non-resident alien who has not declared his intention to become a citizen of the United States, nor any corporation or association not incorporated under the laws of the State, shall acquire, own, hold, or possess by right, title, or descent accruing hereafter any real estate in the State; *provided* that this shall not apply to real estate necessary for railroads. If any non-resident alien who is the owner of real estate at the time of the passage of this act shall die, his lands

shall escheat to the State and his heirs be paid by the State the full value thereof, to be ascertained by appraisement upon oath made by the judge, treasurer, and clerk of the county where such lands lie, the expenses of appraisement to be deducted from such value paid : Neb. 1887,65.

WISCONSIN, MINNESOTA. And in Wisconsin no alien not a resident of the United States, and in Wisconsin and Minnesota no corporation not created under the laws of some state or territory therein, can hereafter acquire, hold, or own more than three hundred and twenty acres of land in Wisconsin, or one hundred and sixty acres, in the case of actual settlers, in Minnesota, who settled before 1889; or any interest therein, except such as may be acquired by devise, inheritance, or in good faith in the course of justice in the collection of debts heretofore created. The same law applies to corporations of which more than twenty per cent of the stock is owned by such aliens. All property acquired, held, or owned in violation of this act is forfeited to the State : Wis. 1887,479 ; Minn. 1887,204.

In Minnesota, the District of Columbia, and all the territories no person who is not a citizen of the United States, or has not made lawful declaration of intention to become such citizen [or corporation, etc., see Part IV.], may hereafter acquire, hold, or own real estate, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created ; *provided* that this shall not apply to cases in which such rights are secured by existing treaties. Any such property is declared forfeited : Minn. 1887,204 ; U.S. 1887,340,1 & 4.

WASHINGTON. Law unchanged ; add 1886, p. 102, to the citation in par. (A).

IDAHO. The provision of par. (A) is adopted, that aliens resident or not may take, hold, dispose of, and transmit by descent real and personal property in all respects as a native citizen. Insert *Ida.* 2827 after *Dak.* in par. (A).

CONNECTICUT. Non-resident aliens holding real estate for mining or quarrying purposes may convey the same : Ct. 17.

ARIZONA. Under the Rev. Stats. the Texas statute is followed, that aliens may take and hold property in the same manner in which United States citizens may within the country of the alien, reciprocally. Add *Ariz.* 1472 at the end of the section, and in the 1st line of the last par. change the word *two* to *three*. The law of 1885 is repealed ; strike out *Ariz.* 1885,31, and *Ariz.* in the *Exceptions* on p. 658.

§ 6014. **As to Personalty.** ILLINOIS. In Illinois aliens may acquire and hold personal property in the same manner and to the same extent as natural-born citizens of the United States : Ill. 1887, p. 5, § 2.

§ 6015. IDAHO. The general provision is adopted that the alienage of descendants does not invalidate their title to real estate descending to them. Insert *Ida.* 5715 after *Col.* in the 3d par. But no non-resident alien can take by succession unless he appears and makes claim within five years of the intestate's death. Insert *Ida.* before *Mon.* in the 5th par. Aliens inherit personally as if citizens. Insert *Ida.* 5715 in the citations in par. (B).

ARIZONA. The Texas statute is followed, but any alien to whom land may descend or be devised has five years in which he may either become a citizen and take possession, or else sell the same before the land shall escheat : *Ariz.* 1472.



**ALABAMA.** All the provisions of this section seem to be omitted in the new code; the general provisions (§ 6013) controlling. Strike out *Ala.* 2862 and the whole 7th par.

**ILLINOIS.** By the new statute aliens inherit their distributive share of personal estate as if they were citizens. Insert *Ill.* 1887, p. 5, § 2, before *Va.* in par. (B), and strike out *Ill.* 6,2 in the 2d par. of (A). So, the personal estate of an alien dying intestate shall be distributed in the same manner as estates of natural-born citizens.

§ 6016. **Alienism of Ancestors, etc.** **IDAHO, ARIZONA.** The provision of the 2d par. is adopted, that when a title to real estate is claimed by descent by a person capable at the time of inheriting, it shall be no bar that the ancestor from whom the descent was derived was an alien. Insert *Ida.* 5715; *Ariz.* 1472 in the citations to the 2d par.

§ 6017. **Wives of Aliens.** **NEW MEXICO.** A woman being an alien is not on that account barred of dower or her intestate interest. Add *N.M.* 1887,32,41 at the end of the 1st par.

**TERRITORIES.** The widow of an alien who was entitled to hold land at the time of his death, has dower as if he had been a citizen if she be a resident in the territory at the time of his death: *U.S.* 1887,397,18.

§ 6051. **Marriage.** **TENNESSEE.** Law unchanged; add 1887,151 to the citations in clause (2).

§ 6054. **Civil Rights.** **PENNSYLVANIA.** A civil rights act has been enacted in Pennsylvania as to inns, common carriers, theatres, etc. Insert *Pa.* 1887,72 after *N.J.* in clauses (1) and (2).

§ 6062. **Office-Holding.** **MASSACHUSETTS.** The office of overseer of the poor may be held by a woman: *Mass.* 1886,150.

**ALABAMA.** So, in Alabama, the office of notary public: *Ala.* 1887,36.

§ 6101. **Civil Contract.** **ARIZONA.** The provision declaring marriage a civil contract is dropped in the *Rev. Stats.*

§ 6104. **Contracts to Marry.** **IDAHO.** The California code is followed: *Ida.* 2427. Neither party is bound by a promise made in ignorance of the other's unchastity, etc.

§ 6105. **Of the Dissolution of Marriage.** **IDAHO.** The bond of matrimony is dissolved by the death of husband or wife, or by a divorce legally obtained. Add *Cal.*; *Dak.*; *Ida.* 2455 after clause (2), and *Cal.*, *Dak.* after clause (3).

§ 6110. **Age of Consent.** **NEW YORK, ARIZONA.** The age of consent to marriage is made eighteen in the male, sixteen in the female: *N.Y.* 1887,24; *Ariz.* 2087. Strike out clause (7).

§ 6111. **Prohibited Degrees.** **ILLINOIS, ARIZONA.** Marriages between first cousins are now forbidden: *Ill.* 1887, p. 225, *Ariz.* 2092.

§ 6112. **Marriages Void.** A reference should be made from this section to § 6130.

**NEVADA.** Under the new *Gen. Stats.* marriages contracted contrary to the provisions of § 6111 are void if solemnized in the State. Change the citation in par. (A) to *Nev.* 487, and add the note sign <sup>a</sup> after *Nev.* in par. (B).

**IDAHO.** The California code is followed exactly; and if either party to a marriage is reported and believed by the other person to be dead, and such other

person marry again, the marriage is only void from decree pronounced. Insert *Ida.* after *Dak.* in the 2d line of the 3d par. And under the Rev. Stats. all marriages between a white and a negro or mulatto are void. Insert *Ida.* 2425 after *Col.* in par. (F) (1).

ARIZONA. So, in Arizona, all marriages between a white and an African, or descendant of Africans, are void. Add *Ariz.* 2091 to the citations in clause (F) (3). It is not expressly provided in the Rev. Stats. that bigamous marriages, or marriages when either party is under the age of consent, or insane, or an Indian, or is convicted of crime, or when procured by force or fraud, are void. Strike out *Ariz.* in pars. (C), (D), *Ariz.* 1893 in par. (F), *Ariz.* in par. (F) (7), *Ariz.* 1906 in par. (G), and *Ariz.* in par. (H).

NORTH CAROLINA. So, in North Carolina, all marriages between an Indian and a negro are void: N.C. 1887,254.

WYOMING. Marriages by parties under the age of consent are no longer void but voidable, as in § 6113. Strike out the citation and references in par. (C).

ALABAMA. Change the citation in par. (A) to *Ala.*<sup>k</sup> 2307, and insert *Ala.* 2309 before *N.M.* in par. (C).

§ 6113. NEW YORK. Marriages when either party has not at the time attained the age of consent are voidable only when contracted without consent of the parent or guardian, and at suit of the woman only. Add the note signs <sup>k,o</sup> to the reference to New York in par. (B), and 1887,22 to the citation; and add to the notes *Note<sup>o</sup> But suit to annul for this cause may be brought by the female only.*

IDAHO. Marriages are not voidable for nonage or lunacy, if the parties have voluntarily cohabited since the party has attained such age or recovered his reason. Insert *Ida.* after *Dak.* in the 5th line on p. 669, and in the 2d par. of (C). A marriage may be annulled when either party had a husband or wife living at the time. Insert *Ida.* after *Dak.* in par. (G). Add the note sign <sup>m</sup> after *Ida.* in par. (D).

ARIZONA. It is no longer expressly provided that marriages are voidable when either party was under the age of consent, or insane, or induced by fraud or force. Strike out the Arizona citations and references throughout pars. (B), (C), and (E).

WYOMING. A marriage may be annulled if the consent of either party was obtained by force or fraud, but not if the parties have voluntarily cohabited since. Insert *Wy.* after *Ida.* in the 1st par., and after *Dak.* in the 3d par. of (E).

§ 6115. **The Issue.** IDAHO. The issue of a marriage declared void for insanity or bigamy, when begotten before the decree, are legitimate. Add *Ida.* 2452 after *Ky.* in clause (B), (3), and *Ida.* after *Dak.* in clause (B) (5).

ARIZONA. The issue of a void marriage are nevertheless legitimate. Add *Ariz.* 1470 after the 1st par. of (B). Strike out all the old Arizona provisions in this section.

WYOMING. Where both parents are under lawful age, the issue are deemed the legitimate children of the oldest parent: *Wy.* 1589.

§ 6116. **Enoch Arden Case.** MAINE. The provision of par. (D) has been adopted, that if either husband or wife has been absent seven years together, the other, not knowing such party to be living, may marry without being subject to indictment for bigamy. Insert *Me.* 124,4 before *Md.* in par. (D).

LOUISIANA. So, after five years' such absence, as in par. (E) defined, the party marrying is not liable to indictment for bigamy: La. D. 800.

ARIZONA. Strike out *Ariz.* 1930; see § 6115 above.

§ 6120. **Preliminaries.** MAINE, VERMONT, MICHIGAN, KANSAS, MARYLAND, WASHINGTON. Add to the citations in the 1st par. 1887,35; 1886,81; 1887,128; 1886,124; 1886,497; and 1886, p. 66, respectively.

MICHIGAN. The notice must be filed with the clerk of the county where either of the parties resides. Insert *Mich.* 1887,128 before *Ky.* in the 2d line on p. 672.

ARIZONA. So, with the recorder of deeds for the county. Add *Ariz.* 2088 after *Mo.* in clause (4), below; and *Ariz.* 2090 after *Wy.* 81,6, below.

MARYLAND. Add 1886,261 to the citation in clause (7). But by a new law, the application must be made to the clerk of the Circuit Court where the marriage is to be solemnized: Md. 1886,497. Bans must be read, in addition to the license, on three Sundays by some minister in the county where the woman resides.

FLORIDA. It must be filed with the judge of the County Court where the marriage is solemnized: Fla. 1887,3720.

PENNSYLVANIA. Add 1887,105 to the citation in clause (10).

§ 6121. **License.** MICHIGAN, MARYLAND, WYOMING, ARIZONA. The clerk, etc., thereupon issues a license, as in the principal provision. Insert *Mich.* 1887,128; *Md.* 1886,497; *Wy.*; *Ariz.* among the citations in the 1st par., and *Md.* and *Ariz.* among the citations to clause (2) of the 2d par.

§ 6122. **Age of Parties.** MARYLAND. The clerk, etc., is forbidden to issue a certificate to a male under twenty-one or a female under sixteen, save with the written consent, duly attested, of the parent or guardian; he may examine the party or any witness under oath as to any subject relating to the legality of the marriage; no license can be issued to parties under the age of consent or incompetent to marry: Md. 1886,497.

ARIZONA. No license can be issued to a male under eighteen or a female under sixteen, except upon the written consent of the parent or guardian: *Ariz.* 2089.

KANSAS. The clerk may require an affidavit, etc., of the age of the parties. Insert *Kan.* 1886,124 after *Pa.* in the 3d par., and *Kan.* after *Io.* 2189 in the 5th.

MICHIGAN, WYOMING. He may examine him concerning the legality of the marriage. Add *Mich.* 1887,128; *Wy.* 1545 to the citations to the 6th par.

§ 6130. **Who may Solemnize.** IOWA, NEW YORK. Add to the citations 1886,4; 1887,77, respectively. Strike out the references *Io.* in (D).

ARIZONA. Under the Rev. Stats. the judge of any court of record may solemnize a marriage. Insert *Ariz.* after *Mon.* in the 4th line of par. (D); and strike out *Ariz.* in the last line of (C), and the last line but one of (D).

CONNECTICUT. A marriage is void which is not contracted in the presence of an authorized person or society. Insert the words *Connecticut* and before *Kentucky* in the last line but one of the section; and *Ct.* 2789 before *Ky.* in the citation in the succeeding line.

IDAHO. A mayor may solemnize marriages. Insert *Ida.* after *Dak.* in par. (C).



§ 6132. **Manner.** The words *no particular form is required* should be inserted after the word *states* in the 3d line, the sentence being ambiguous as it stands.

§ 6133. **Witnesses,** in Idaho, are no longer necessary to the marriage ceremony. Strike out the citation in the 1st par.

§ 6134. **Age.** A reference from this section should also be made to §§ 6110,6122.

ARIZONA. Strike out *Ariz.* 1897 in par. (C). See § 6122.

§ 6135. **Quakers and Sects.** NEW YORK. Strike out the reference to New York in the 2d par., concerning marriages among Jews.

§ 6137. **Informal Marriages.** ARIZONA. In Arizona "all persons who at any time heretofore have lived together as husband and wife, and who shall continue to live together for one year after this act takes effect (July 1, 1887), or until one of the parties shall die, if within such year, shall be considered as having been legally married, and all their children legitimate": *Ariz.* 2095.

§ 6140. **Record by the Person Solemnizing.** MAINE. Law unchanged; add to the citation 1887,35. See *Me.* 1887,115.

MICHIGAN. The person solemnizing a marriage is required to enter the facts and day of the marriage upon the license. Insert *Mich.* 1887,128 after *Pa.* in clause (2).

§ 6141. **Return.** MAINE. Add to the citation in clause (2) 1887,35; and insert *Me.* before *Vt.* in clause (3), the new statute requiring returns of marriages to be made also to the town clerk who issues the license.

MICHIGAN. So also in Michigan. Insert *Mich.* 1887,128 after *O.* in clause (3).

MARYLAND, FLORIDA. Law unchanged; add to the citations in clause (3) 1886,497 and 1887,3720, respectively.

WASHINGTON. Law unchanged; add to the citation in the last par. 1886, p. 66.

§ 6142. **Certificate.** IDAHO. The marriage certificate must state that the consent of a parent or guardian was duly given, if necessary. Insert *Ida.* after *Wis.* in the 3d line of the 2d par.; and *Ida.* after *Ky.* in par. (D), the certificate being returned as in § 6141.

MARYLAND. The person solemnizing gives a duplicate certificate to the one returned to the parties. Insert *Md.* 1886,497 as a citation to par. (F).

TERRITORIES. Insert at the end of the section (G) *In all the territories a certificate is required, stating the fact and nature of the ceremony, full names of the parties and the officer solemnizing, signed by the parties, and filed and recorded in the probate court, which is prima facie evidence of the marriage; violation of this section is a misdemeanor. But nothing herein presents the proof of marriage, whether lawful or unlawful, by any evidence now legally admissible: U.S.* 1887,397,9-10.

§ 6144. **Evidence.** MAINE, MICHIGAN, MARYLAND. Law unchanged; insert 1887,47; 1887,128; 1886,497 after the citations in the first par., respectively.

WYOMING. Under the Rev. Stats. the marriage certificate is made *prima facie* evidence of the marriage. Add *Wy.* to the references in the 2d par.

ARIZONA. The Rev. Stats. omit this provision; but see U.S. statute, above. Strike out *Ariz.* 1900.

§ 6150. **When Brought.** MARYLAND. A libel to annul a marriage may be brought whenever the marriage is voidable. Insert *Md.* 1886,497 after *Neb.* in par. (A).

NEVADA. There is no provision in the new Gen. Stats. for the annulling of void marriages. Strike out the reference to Nevada in pars. (B) and (C).

IDAHO. Under the Rev. Stats. a libel to annul a marriage for nonage may be brought by the party so under age; or by either party, when the former wife or husband of one of the parties is living at the time of the marriage, and such marriage is still in force; or for force or fraud or impotence, by the party injured. Insert *Ida.* 2450 after *Dak.* in the 2d par. of (B), *Cal.*; *Dak.*; *Ida.* after *N.Y.* at the end of the 3d par. of (B), *Ida.* 2451 after *N.Y.* in par. (B) (4), and *Ida.* 2450 after *Neb.* in par. (B) (5).

§ 6151. **By Whom.** NEVADA. Such libel to annul may be brought by either party, etc. Insert *Nev.* 490 after *Ky.* in the 1st par.

IDAHO. A libel to annul for nonage may not be brought by the party of age at the time, under the Rev. Stats. Suits to annul for nonage must be brought by the party under age within four years after arriving at the age of consent, or by the parent or guardian before such time: *Ida.* 2451. Insert *Ida.* after *Dak.* in the 2d line on p. 681. For bigamy, it may be brought by either party during the life of the other, or by the former husband or wife; for idiocy, etc., by the party injured or his relations or guardian at any time before the death of either party; for force or fraud, by the party injured, within four years, as in clause (7); and for impotence, within four years after the marriage, by the other party. Insert *Ida.* after *Dak.* in clause (5), *Ida.* 2451 after *Dak.* in clause (6), and *Ida.* after *Dak.* in clause (7).

§ 6152. **Where Brought.** MASSACHUSETTS. Suits to annul a marriage may also be brought if the libellant has resided in the State for five years next preceding, unless it appears that the libellant moved into the State for the purpose of obtaining such decree: *Mass.* 1886,36.

NEVADA. Suits to annul are brought in the Probate Court: *Nev.* 490.

WYOMING. Strike out the reference *Wy.* at the end of the section.

§ 6153. **Effect.** IDAHO. The judgment of nullity is conclusive only upon the parties. Add *Ida.* 2454 to the citations in the 4th par.

§ 6154. **Children, Alimony, etc.** NEVADA. In these suits the court may decree for the care, custody, and maintenance of minor children as in divorce cases. Add *Nev.* 490 to the citations in the 1st par.

IDAHO. The court awards the custody of children of a marriage annulled for fraud or force to the innocent parent, etc. Insert *Ida.* 2453 after *Dak.* in the 3d par.

ARIZONA. All the provisions of this section seem to be omitted from the Rev. Stats.

§ 6157. **Suits to Affirm.** ARIZONA. All the provisions of this section seem to be omitted from the Rev. Stats.

§ 6200. **Note.** NEW MEXICO. Divorce laws have been enacted in New Mexico, leaving South Carolina the only exceptional state in this particular. Strike out the words *and New Mexico* in the 3d par.

§ 6201. **Causes.** WISCONSIN. A divorce may be granted when either party

shall have been insane for five years before action brought, and the court is satisfied that it is incurable: Wis. 1881,297.

OREGON. The law in this section is unchanged; but add to the citation 1887, p. 52.

WASHINGTON. A divorce may be granted at the discretion of the court for incurable chronic mania or dementia lasting for ten years; and add 1886, p. 120 to the citation in par. (1).

NEW MEXICO. A divorce may be granted for cruelty, intoxication, or failure by the husband to support the wife. Insert *N.M.* 998; 1887,33 after *La.* in par. (1); and *N.M.* before *Ariz.* in pars. (4), (5), and (6).

NORTH CAROLINA. A divorce may be granted upon conviction for crime, etc. Add 1887,100 to the citation, and insert *N.C.* after *W.Va.* in clause (7).

ALABAMA. Insert *Ala.* after *Kan.* in clause (9). See § 6210.

ARIZONA, IDAHO. Strike out the Arizona reference in clause (2), and the references to Idaho and Arizona in clause (13), with the whole of clause (8), and to *Ariz.* in clause (16). Add the note sign <sup>h</sup> to the Arizona reference in clause (5); and add to the notes <sup>h</sup> *Of the husband only.*

§ 6202. **Adultery.** OREGON. Add to the citation 1887, p. 53.

ARIZONA. A divorce is granted when the husband or wife is "taken in adultery," but not when committed by both parties, nor when the husband, who is libellant, "exposed his wife to lewd company whereby she became ensnared." Add *Ariz.* 2115 to the citations to the 1st par., *Ariz.*<sup>a</sup> after *Tex.* in the 2d par. of (B); add the note sign <sup>a</sup> to *Ariz.* in the 1st par. of (B); and strike out *Ariz.* 1940 above, and *Ariz.* in the last par. but one.

IDAHO. Adultery is defined to be the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife: *Ida.* 2458. Suit must be commenced within two years after the discovery. Add *Ida.* 2468 after *Cal.* in the last par. but one.

§ 6203. **Impotence.** IDAHO. No divorce is now allowed for this cause. Strike out citation and references.

§ 6204. **Desertion.** OREGON. By the new statute the desertion need only be continued one year. Strike out *Oregon* in the 3d line of the section, and insert after *Colorado* in the 6th line.

ARIZONA. So, in Arizona, it need only be continued six months; strike out *Arizona* in the 7th line. It must be with intention of abandonment, wilfully, and without reasonable cause. Add *Ariz.* at the end of the 2d and 3d pars.

CONNECTICUT. So, in Connecticut. Add *Ct.* after *R.I.* in the 1st line of the 3d par.

IDAHO. Wilful desertion is defined to be the voluntary separation of one of the married parties from the other with intent to desert. Add *Ida.* 2460 after *Dak. Civ. C.* 60 on p. 685.

NEW JERSEY. The time of imprisonment of the deserting party upon conviction in another state or country is not counted as part of such three years: *N.J.* 1887,98.

§ 6205. **Cruelty.** ARIZONA. The definitions of extreme cruelty appear to be omitted in the Rev. Stats. Strike out the references in this section.

IDAHO. The California code is followed, that extreme cruelty is the infliction



of grievous bodily injury or mental suffering. Insert *Ida.* 2459 after *Dak.* in the 3d par.

NEW MEXICO. It is defined to be cruel and inhuman treatment, whether practised by using personal means or by other means. Insert *N.M.* before *Ariz.* in the last line of the 4th par.

§ 6206. **Intoxication.** OREGON, IDAHO. Intoxication habit need continue only one year to be cause for divorce. Strike out *Oregon, Idaho* in the 2d and 3d lines, and insert them in the 4th line of the section (Ore. 1887, p. 52).

IDAHO. Habitual intemperance is defined as in the California code. Add *Ida.* 2462 at the end of the section.

ARIZONA. Habitual drunkenness is cause for divorce only when existing on the part of the husband.

§ 6207. **Failure to Support.** IDAHO. The neglect to support need to continue only one year to be cause for divorce. Strike out *Ida.* in the 1st and 5th pars., and insert *Ida.* after *Dak.* in the following line. The California code definition of wilful neglect is copied. Insert *Ida.* 2461 after *Dak.* in the last par.

ARIZONA. So, in Arizona, under the Rev. Stats., the neglect need continue only six months to be cause for divorce. And strike out *Ariz.* in the citations to par. (1).

VERMONT. "Sufficient pecuniary ability" is, in Vermont, defined to be such ability to provide suitable maintenance for the wife, whether from the income of property, personal labor, or any other source: Vt. 1886, 59.

§ 6208. **Crime.** ARIZONA. The provision in the Rev. Stats. is simply that a divorce may be granted when either party is convicted after marriage of felony or infamous crime. Strike out *Arizona* in the 3d and 6th lines; and the note sign <sup>a</sup> to the reference in the last line on p. 687, and insert *Ariz.* after *Del.* in the 4th line of p. 688. And the Texas statute is followed, that no suit for divorce can be sustained under this section until six months after conviction; nor if the person was convicted upon the testimony of the husband or wife.

IDAHO. So, by the Rev. Stats., the provision is simply for divorce upon conviction of felony, as in Arizona. Strike out *Idaho* in the 4th and 6th lines, and insert *Ida.* after *Col.* in the last line on p. 687. A divorce for this cause is denied unless prosecuted within one year after the conviction: *Ida.* 2468.

NORTH CAROLINA. A divorce is granted when either party charged with an infamous offence has been indicted, and is a fugitive from justice, and has been absent one year.

OREGON. A divorce for this cause is denied unless prosecuted within one year after the conviction: Ore. 1887, p. 53.

§ 6213. **Omnibus Clause.** CONNECTICUT. The omnibus clause has been repealed. Strike out the 1st par. of the section.

ARIZONA. So it appears in Arizona. Strike out the last par. but one.

§ 6214. **Collusion.** ALABAMA. No divorce is granted when the adultery was occasioned by collusion. Insert *Ala.* after *Ga.* in the 1st line on p. 689, and *Ala.* 2327 after *Ga.* 1715 in the citations below.

IDAHO. So, in Idaho, for any cause, if occasioned by collusion of the parties; and the California code definition of collusion is adopted. Insert *Ida.* after *Dak.* in the 3d line on p. 689, and *Ida.* 2465 after *Dak.* at the end of the section.

ARIZONA. Strike out *Ariz.* in the 3d line on p. 689, and *Ariz.* 1940 below.

MICHIGAN. Add 1887,137 to the citation in the 2d par.

§ 6216. **Condonation.** IDAHO. It is generally provided that there shall be no divorce when there has been condonation. Add *Ida.* 2464 after clause (3), and strike out *Ida.* 1874-5, etc., in clause (1). Condonation is only a bar when the condonee has fully performed the marital duties and is without reproach since the condonation, or if two years or more have elapsed after it: *Ida.* 2467. A divorce is also refused when there is an unreasonable lapse of time before the commencement of the action. Add *Ida.* 2468 after *Dak.* in the 3d par. on p. 690.

§ 6217. **Recrimination.** MICHIGAN. Law unchanged; add to the citation in the 1st par. 1887,137.

IDAHO. The California code is followed, that there can be no divorce for any cause when there is recrimination, and recrimination is defined to be the showing by the defendant of any cause of divorce by the plaintiff in bar of the plaintiff's cause of divorce. Add *Ida.* 2464 after *Dak.* in the 1st par., and *Ida.* 2466 after *Dak.* in the last par. but one.

§ 6221. **Cause occurring Abroad.** MICHIGAN. No divorce is granted for any cause unless the libellant has resided for a certain time in the State. Insert *Mich.* 1887,137 before *Md.* at the top of p. 691.

§ 6222. **Residence Limitations.** MICHIGAN, MARYLAND. A divorce may be procured for any cause allowed by law where it occurred in or out of the State if the libellant or libellee have in good faith resided in the State for two years. Insert *Michigan, Maryland* after *Connecticut* in the 3d line; and insert *Mich.* 1887,131; 6231 after *Ind.* in clause (A) (3); and insert 1886,10 after the following Maryland citation; and append the note sign *i* to the reference to Michigan in clause (A) (4); one year being sufficient only when the cause occurred within the State. Strike out *Mich.* in par. (C). Add to the section Note *i* The cause having occurred within the State.

NEW JERSEY. A divorce may be granted for adultery committed out of the State, if either party has been a resident three years next previous to the time of filing the bill: N.J. 1886,239.

NEVADA. Strike out the note sign *g* in clause (A) (5), and change the citation to 491.

ARIZONA. It is sufficient if the libellant have resided six months in the State, wherever the cause of divorce occurred. Add *Ariz.*<sup>i</sup> 2112 after *N.M.* in clause (A) (5); insert *Ariz.*<sup>a</sup> after *W.Va.* in clause (A) (7); and strike out *Ariz.* 1903 in clause (A) (4).

CONNECTICUT. Strike out in the 2d par. of (C) the words *or such other misconduct as permanently destroys the happiness of the libellant and defeats the purposes of the marriage relation*: Ct. 2735.

IDAHO, WYOMING. The California code, abrogating the presumption that the domicile of the husband is the domicile of the wife after separation, is followed. Add *Ida.* 2470; *Wy.* 1599 (*as to residence within the territory*) after *Dak.* in par. (F).

WYOMING. It is sufficient if the marriage took place in the territory and the libellant have resided there since. Insert *Wy.* after *Neb.* in the 5th line in (C).

§ 6223. **Limitation of Time.** OREGON. No divorce can be had unless for a cause which existed within five years of the commencement of the suit. Add *Ore.* 1887, p. 53 after *Ark.* in clause (1) of the 2d par., and strike out the whole of clause (2).

§ 6224. **Service and Proceedings.** MICHIGAN. When there are children under fourteen, a copy of the subpœna must be served on the district attorney of the county where suit is brought, who shall appear and may oppose the divorce, if the interest of the children or the public good so require: *Mich.* 1887, 137. No proof or testimony can be taken until four months after the bill except where the cause is desertion or where it is taken *de bene esse*: *Mich.* 1887, 137.

NEVADA. Other service may be had as the court shall order. Insert *Nev.* after *Ct.* in the 7th par.

WYOMING. Service and proceedings as in ordinary civil actions. Insert *Wy.* 1575-6 after *Nev.* in line 2, p. 693, and strike out the old reference and citation.

ARIZONA. Strike out *Ariz.* 1911 in the last line.

§ 6225. **Evidence.** RHODE ISLAND, ARIZONA. Par. (A) is followed, that either party may be a witness in divorce proceedings. Insert *R.I.* 1886, 581 after *Me.*, and *Ariz.* 2113 after *Fla.* in the 1st par. And in Rhode Island the testimony of either party can be taken only in open court: insert *R.I.* after *Mich.* in the 2d par.; except that, in Rhode Island, the deposition of either party may be taken under order of court.

ARIZONA. Strike out the note sign <sup>e</sup> in the 4th par., and change the citation to 2113; and strike out the reference in the 3d line of par. (B) (1). A bill is not to be taken *pro confesso*. Add *Ariz.* after *Miss.* in the last par. but one on p. 693. Strike out *Ariz.* 1957 in the 2d par. of (B).

MICHIGAN, NEVADA. An oath of good faith must be annexed to the bill. Insert *Mich.* 1887, 137 after *Pa.* in the 8th par. So, in Nevada, the complaint must be under oath: *Nev.* 491.

DELAWARE. The confession of neither party can be received in evidence unless it be corroborated by the testimony of three or more competent witnesses, or by strongly corroborative evidence: *Del.* 1887, 207.

IDAHO. The statute providing that the bill shall not be taken *pro confesso* does not seem to be retained in the Rev. Stats. Strike out the reference in the last par. but one on p. 693.

WYOMING. So, the provision that the answer shall not be on oath seems to be omitted. Strike out *Wy.* in the 4th par.

§ 6226. **Court.** MASSACHUSETTS. Divorce cases are now heard in the Superior Court. Strike out *Mass.* 146, 6 in clause (1), and insert *Mass.* 1887, 332 in clause (3) of the 1st par.

NEW MEXICO. Divorce cases are heard in the District Court. Insert *N.M.* 998 in clause (3) of the 1st par.

§ 6227. **Trial.** VERMONT. If the petition is undefended, an attorney is appointed by the court to represent the libellee. Insert *Vt.* 1886, 69 before *La.* in clause (2).

§ 6240. **General Effect.** IDAHO. The California code is followed, that a divorce places the parties in the same situation as if the marriage had never been contracted. Insert *Ida.* 2456 after *Dak.* in the last line on p. 695.



§ 6241. **Remarriage.** ARIZONA. The general provision is adopted, that after divorce either party may marry again at any time. Add *Ariz.* 2116 to the citations in par. (A). And the parties are no longer guilty of adultery when they cohabit before remarriage. Strike out *Ariz.* 1932 in (H).

MAINE. The provisions of pars. (A) and (E), that the parties may not marry within two years of separation, would seem to be repealed: 1887,25.

MICHIGAN. Insert at the end of the section: (L) *The court may provide in the decree that the party defendant shall not marry again within a fixed time, not exceeding two years, under penalty of bigamy: Mich.* 1887,137.

§ 6242. **Change of Name.** ARIZONA. The court may decree resumption of any former name by the wife. Add *Ariz.* 147 after par. (A).

§ 6243. **Status of Children.** IDAHO. As to children born since the act of adultery, their legitimacy is determined by the court. Change the citation in par. (A) to *Ida.* <sup>a</sup>c 2479. Otherwise, no divorce renders the children illegitimate.

ARIZONA. So, in Arizona, no divorce renders the children illegitimate. Add *Ariz.* 2116 to the citations to the 3d par., and strike out the old reference and citation.

§ 6244. **Custody of Children.** IDAHO. The usual provision is adopted, that the court may make decree for the care, custody, and maintenance of minor children. Add *Ida.* 2473 after *Dak.*

ALABAMA. Strike out note <sup>c</sup> to the reference on the last line of p. 697.

ARIZONA. Strike out *Ariz.* 1916 in the last line.

§ 6245. **Support of Children.** CONNECTICUT. The provisions of this section apply also to cases of dissolution of marriage under Art. 615. Change the citation in the first par. to *Ct.*† 2809,2812-3.

IDAHO. The support is to be decreed out of the estate of the guilty party. Add *Ida.* after *Ore.* in the 1st line of the 2d par. Note <sup>a</sup> to this section should read, *See* § 6244, note <sup>a</sup>.

ARIZONA. The provisions of this section seem to be omitted in the Rev. Stats.

§ 6246. **Pending the Suit.** ARIZONA. The provisions of this section seem to be omitted in the Rev. Stats.

§ 6248. **The Wife's Real Property.** NEBRASKA. Both in cases of divorce, absolute or limited, and in cases of dissolution of marriage, the wife's real property becomes hers absolutely upon the decree. Add *Neb.*\*† 1887,38 after *Kan.* at the end of the 1st par., and strike out the reference and citation in the 2d line below, and in the last line of par. (F).

ARIZONA. The Texas statute is followed, that the title to separate real property may in no case be divested by decree. Strike out the citations and reference in pars. (A) and (F), and add *Ariz.* 2114 after *Tex.* in par. (H).

NEW HAMPSHIRE. Add to the section (K) *Upon decree of divorce or nullity of marriage, the court may decree part of the estate of the wife to the husband in the nature of alimony, when, in its opinion, justice and equity require it: N.H. Aug.* 4,1887. *See* § 6264.

§ 6249. **The Wife's Personal Property.** ARIZONA. All the provisions of this section seem to be omitted in the Rev. Stats. Strike out the citations and references in the 1st, 2d, 7th, and 9th pars.

NEBRASKA. Law unchanged; add to the citation in the 7th par. 1887,38.

§ 6250. **Payment to Trustee.** ARIZONA. Strike out the reference and citation. The provision appears to be omitted in the Rev. Stats.

§ 6251. **The Husband's Real Property.** ARIZONA. All the provisions of this section are omitted. Divorce does not affect the husband's title.

§ 6252. **The Community Property.** IDAHO. The California code is followed as to the division of community property in cases of divorce. Strike out the citations and references in par. (A), and add *Ida.* 2480-1 to par. (B).

ARIZONA. The common property is divided as the court deem just, having regard to the rights of the children, etc.: *Ariz.* 2114. Strike out the citation and references in par. (A).

§ 6253. **The Homestead.** IDAHO. The court, in rendering the decree, may assign the homestead of the innocent party, as in Dakota and California. Add *Ida.* 2480 after *Dak.* in the 1st par., and *Ida.* after *Cal.* in the 2d par.

§ 6261. **Alimony: when Decreed.** IDAHO. Alimony may only be decreed to the wife when the divorce is for the fault of the husband. Strike out the citation and reference in par. (A), and insert *Ida.* 2474 after *Dak.* in par. (B).

ALABAMA. Alimony may only be decreed when the wife has not sufficient separate estate for her maintenance. Change the citation in par. (A) to *Ala.*<sup>d</sup> 2332.

ARIZONA. There appears to be no provision for alimony, except during suit, under the Rev. Stats. But see § 6252 above.

§ 6262. **Alimony. Amount.** IDAHO. The provisions of the California code as to the assignment of alimony are adopted throughout. Add *Ida.* 2476 after *Cal.* 5141, *Ida.* 2477 after *Dak. Civ. C.* 74, and *Ida.* 2478 after *Dak.* in the last par. but one.

WYOMING. The husband may be required to disclose his property on oath. Insert *Wy.* 1583 after *Vt.* 2381.

ARIZONA. See § 6261 above.

§ 6263. **Security.** IDAHO. Security for alimony may be required. Insert *Ida.* 2475 after *Dak.* in the 1st par.

ARIZONA. See § 6261 above. Strike out the reference.

§ 6264. **Alimony to the Husband.** NEW HAMPSHIRE. The Massachusetts statute is followed, that the court may at its discretion decree part of the wife's estate to the husband in the nature of alimony. Insert *N.H.*† *Aug.* 4, 1887 before *Mass.* in the 1st par.

§ 6265. **Alimony during Suit.** OHIO. The amount of alimony may be made sufficient to cover the support of the family pending suit. Add *O.* 1886, *p.* 62 to the citations to the last par. but two. The wife may sell or assign such order for alimony.

§ 6266. **Attachment to Secure Alimony.** NEVADA, ARIZONA. The court has jurisdiction to enjoin the libellee from disposing of any part of the estate. Insert the words *Nevada and Arizona* after *Texas* in the 3d line, and add *Ariz.* 2118 to the citations in clause (1).

OHIO. Law unchanged; add to the citation in clause (1) 1886, *p.* 62.

MAINE, CONNECTICUT, TEXAS. The court has jurisdiction to enforce the payment of alimony by attachments, sequestration, etc., as in clause (3). Add to the citations in clause (3) *Me.* 60,3; 1887,106; *Ct.* 2372; *Tex.* 1887,44.

ARIZONA. All of the other Texas provisions of this section are followed, that the husband may not bind the community property after divorce suit brought, etc. Add *Ariz.* 2119 after *Tex.* 2869, *Ariz.* 2117 after *Tex.* 2867, and *Ariz.* after *Tex.* at the end of the section.

**Art. 628. Limited Divorce.** ARIZONA. There is no provision for limited divorce in the Rev. Stats., and it would appear to be abolished. Strike out all the references to *Ariz.* in Arts. 628 and 630.

§ 6350. **Separation in Fact: Children, etc.** A reference should be made from this section to §§ 6244, 6200.

NEW HAMPSHIRE. All the Massachusetts statutes have been followed as to separate maintenance, custody of children, etc., when the wife is living separate for fault of the husband. In detail, insert *N.H.* 1887, *Nov.* 4, before *Mass.* in clause (2) of the 1st par., and in clauses (1) and (2) of the 6th par. And also "when the husband is an habitual drunkard or treats her with extreme cruelty, or being of sufficient ability, does not make suitable provision for her support, and she owns or pays the rent of the tenement in which she lives, the court may prohibit the husband from imposing any restraint upon her personal liberty, and from entering such tenement, until further order, and may also make order respecting the custody and maintenance of minor children": *N.H.* 1887, *Nov.* 4.

IDAHO, ARIZONA. The provision of clause (1) is adopted, that when the parents of minor children live separately, the proper court on petition of the wife or of either parent has power to make decrees or orders concerning their care, custody, education, and maintenance. Add *Ida.* 2534; *Ariz.* 2121 to the citations. And in Idaho the California code is followed, that when the husband and wife live separately and apart, neither has any superior right to the custody, control, or education of the children. Add *Ida.* after *Dak.* in the last par. but four on p. 709.

CONNECTICUT. Strike out the reference and citation in the 6th par.

OHIO. Strike out the references and citations in the 5th and 12th pars.

§ 6351. **Separate Maintenance.** MICHIGAN. The wife has the process to obtain an allowance only when the husband has separated from her without justifiable cause. Insert *Mich.* after *Ill.* in the 2d line, and add 1887, 90 to the citations in the 1st par.

OHIO. The statute granting the wife a separate maintenance when the husband has joined a religious society professing that marriage is unlawful, has been repealed. Strike out the reference to Ohio in the 5th clause of the 7th par.

NEW HAMPSHIRE. The separate maintenance may also be granted, as in the 7th par., when the husband is insane: *N.H.* 1887, *Aug.* 17. And the Massachusetts statute is followed as to children, personal restraint, etc.. Insert *N.H.* 1887, *Nov.* 4 before *Mass.* in the 3d par., and *N.H.* before *Mass.* in the 4th par.

§ 6353. **Powers of Wife Separated.** CONNECTICUT. When the husband has abandoned his wife for a continuous period of three years, with total neglect of duty, the Court of Probate for the district in which she resides may authorize her to mortgage or dispose of her real estate in the state as if unmarried: *Ct.* 484.

MASSACHUSETTS. There is a new statute giving the Probate Courts jurisdic-



tion of the petitions of married women for the care of their separate estate or minor children. Add *Mass.* 1887,332,1 to the citation in par. (C).

IDAHO. Strike out the words *affidavit of the husband's absence being made by two witnesses at the time of acknowledgment* in par. (D), and change the citation to 2923.

IDAHO, NEVADA, WASHINGTON, ARIZONA. There are statutes in these states authorizing married women whose husbands are absent, etc., to transact business as sole traders. Add *Nev.* 512; *Wash.* 2423; *Ida.* 2502; *Ariz.* 2101 to the citations to the 4th par. in (D).

OHIO. The provision of the 2d par. of (D) appears to be repealed. Strike out the reference and citation.

(E) ALABAMA. *If the husband be non compos mentis, or has abandoned the wife, or is a non-resident of the state, or is imprisoned under conviction for crime for a period exceeding two years, the wife may alienate her lands as if she were sole. And if the husband be living apart from the wife without fault on her part, or if he be of unsound mind, she may convey and dispose of her personal property as if sole: Ala.* 2348.

§ 6355. **Property and Liabilities of Husband.** OHIO. A husband abandoned by his wife is not liable for her support until she offers to return unless she was justified by his misconduct in abandoning him. Insert *O.* 3117; 1887, p. 133, before *Cal.* in the last par.

§ 6356. **Suits.** ALABAMA. The provision of this section, now unnecessary, is omitted in the new code. Strike out *Ala.* 2901.

NEW MEXICO. A woman living separate may sue or defend causes without joining her husband. Add *N.M.* 1887,32,45,½ to the citations in the 2d par.

IDAHO. So, in Idaho, when the husband has deserted his family. Insert *Ida.* after *Ark.* in the 3d par.

§ 6358. **Effect upon Property after Death.** CONNECTICUT. Neither party is entitled to the "statutory share" (§§ 3105-6,3109,3110) who without sufficient cause has abandoned the other, and continued such abandonment until the other's death: *Ct.* 672.

§ 6401. **Liabilities of the Husband: General Principles.** OHIO and IDAHO have generally followed the California code throughout this article. Thus, the general provision has been enacted that the husband is the head of the family, and the wife is subject to him. Add *O.* 3109; 1887, p. 132; *Ida.* 2494 to the citations in the 1st par. In Ohio the husband is bound to support his wife. Insert *O.* 3110; 1887, p. 132 after *Ct.* in the 3d par. In both states it is enacted that the husband and wife contract towards each other obligations of mutual respect, fidelity, and support. Add *O.* 3108; 1887, p. 132; *Ida.* 2493 to the citations in the 2d line of the 2d par. on p. 716. And in Ohio, that the husband may choose any reasonable place or mode of living, and the wife must conform thereto. Add *O.* 3109; 1887, p. 132 to the citation at the end of the par. In Ohio the husband must support himself, his minor children, and his wife out of his property or labor; if unable to do so, the wife must assist him so far as she is able: *O.* 3110; 1887, p. 132. In Idaho the wife must support the husband out of her separate property when he has no separate property, and there is no

community property, and he is unable to support himself. Add *Ida.* 2507 to the citations in the last par. but one.

ALABAMA. The provision is adopted that neither husband nor wife may recover for services rendered to the other. Add *Ala.* 1887,41,3 to the citations in the 1st par. on p. 716.

CONNECTICUT. All purchases made by either husband or wife, in his or her name, are presumed, in the absence of notice to the contrary, to be on his or her private account: *Ct.* 2796.

§ 6402. **Pre-existing Debts of the Wife.** CONNECTICUT. A husband or his separate property is not liable for his wife's debts or on any cause of action which originated before the marriage. Insert *Ct.* 2795 after *Vt.* in par. (A).

OHIO. But in Ohio this provision appears to be repealed. Strike out the reference and citation in par. (A).

ALABAMA. He is not liable on any cause originating before marriage. Add *Ala.* after *Mo.* in par. (B).

§ 6403. **Present Debts.** CONNECTICUT, ALABAMA. The husband is not liable for any separate debts of the wife contracted after marriage. Add *Ct.* 2795; *Ala.* 2345 to the citations in the 1st par.

OHIO. But in Ohio this provision appears to be abrogated by the statute of 1887, above; and the California code is followed, that if the husband neglects to make adequate provision for the support of his wife, any other person may supply her with necessaries and recover therefor. Insert *O.* 3116; 1887, p. 133 in the 1st line of p. 717, and strike out *Note<sup>a</sup> Except to the extent of her separate property coming to him by reason of the marriage or under marriage contract.*

ARIZONA. The Rev. Stats. are silent. Strike out *Ariz.* 1963 in the 2d par.

§ 6404. **Torts.** ALABAMA. The principal provision is adopted, that the husband is not liable for his wife's torts except when he would be liable if unmarried. Add *Ala.* 2345 to the citations in clause (2) of the 1st par.

OHIO. But in Ohio this statute is repealed; and the Dakota code is followed, that neither husband nor wife, as such, is answerable for the acts of the other. Insert *O.* 3115; 1887, p. 133, before *Dak.* in the 2d par.

§ 6411. **Debts of Husband.** PENNSYLVANIA, ALABAMA. A new statute concerning the rights of married women has been enacted. Add 1887,224,1 to the Pennsylvania citation in par. (A), and *Ala.* 1877,41,1.

ARIZONA. A wife is not liable for the debts of the husband contracted before marriage. Add *Ariz.* 2105 after *Va.* in the 2d par.

ALABAMA. By the new statute mentioned above all the provisions of this section except that in par. (A) appear to be abrogated; but a wife is not generally liable for the debts of her husband. Insert *Ala.* 1887,41,1 after *Ida.* in par. (A), and strike out the citations and references in par. (C).

NEBRASKA. A debt for necessaries furnished to the family may be enforced against the wife after execution against the husband is returned unsatisfied. Insert *Neb.* 1887,49 after *Pa.* in the last par. on p. 717.

§ 6411. **Her own Debts.** A reference should be made from this section to § 6402.

WYOMING. The husband need not be joined in such suits. Strike out the references in the last two pars.

§ 6412. **After Marriage.** ALABAMA. Debts of the wife contracted by her after marriage may be enforced against her and her separate property, provided such debt or engagement was entered into with the husband's written consent : Ala. 2345. Strike out the references and citations in the 3d par. and in par. (B).

ARIZONA. The wife may contract debts for necessities and for expenses incurred for the benefit of her separate property, following the Texas statute. Add *Ariz.* 2107 at the end of par. (B), and strike out *Ariz.* 1963, above.

§ 6414. **Torts of the Wife.** ALABAMA. A married woman is liable with her separate property for her torts. Add *Ala.* 2345 after *Wash.* in the 1st par. If committed under the husband's coercion they are jointly liable. Add *Ala.* after *Ind.* at the end of p. 718.

§ 6420. **Property Possessed at Marriage.** OHIO. Every married person has the same right and liberty to acquire, hold, enjoy, and dispose of every species of property as if unmarried. Insert *O.* 3114 ; 1887, p. 133 before *Wash.* in par. (C), and strike out the references and citations throughout pars. (A) and (B).

NEBRASKA. Law unchanged ; add to the citation 1887,49.

CALIFORNIA, DAKOTA. Strike out the 4th par. in this section. See § 6424 for these provisions.

NEW MEXICO. Law unchanged ; add to the reference in par. (B) the citation 1887,32,22.

CONNECTICUT. The provision in par. (B) applies only to women who were married prior to April 20, 1877, and since June 22, 1849. No sale or transfer by the husband of any interest in such estate is valid, unless the wife, or her representatives, if dead, join in the conveyance, and all reinvestments are in the name of the husband as trustee : Ct. 2793.

§ 6421. **Rights of Husband and Wife.** CONNECTICUT. The provision of par. (A) applies only to marriages since April 20, 1877. Append the note sign <sup>a</sup> and add to the section *Note<sup>a</sup> As to marriages since April 20, 1877. But the provisions of law as to marriages since that date apply if husband and wife have entered into a recorded contract to waive their rights under the earlier statutes : Ct. 2798.*

PENNSYLVANIA. Under the new statute the provision of par. (A) is adopted, that a husband acquires by marriage no rights whatever to any property of the wife, real or personal. Insert *Pa.* 1887,224,1 before *Io.* 2203 in par. (A).

OHIO. So, in Ohio, the California code is followed, that neither husband nor wife has in general any interest in the property of the other. Insert *O.* 3111 ; 1887, p. 132 before *Cal.* 5159 in par. (A) ; and see § 6423 *ad fin.*

IDAHO. The provision concerning sales of the wife's property and use by the husband of the proceeds seems to be omitted in the Rev. Stats. Strike out *Ida.* *ib.* 7 in the last par. but two.

ARIZONA. The wife controls her separate property, under the Rev. Stats. Strike out *Ariz.* 1972 in par. (B), and *Ariz.* 1973 in the last par. but two.

ALABAMA. All the provisions of this section appear to be abrogated by the new statute. Strike out the references and citations in pars. (B) and (C).

§ 6422. **Property Acquired since Marriage.** OHIO. All the provisions of this section are abrogated by the new statute.

ALABAMA. By the new statute all real property acquired after marriage by the wife, either by devise or descent, purchase, gift, or by her own labor, or in



any other manner remains her sole and separate property. Change the citation in par. (A) to *Ala.* 2341-2,2351. And so all personalty acquired by devise and descent, gift, purchase, or in any other way, or her personal earnings, remain her separate property. Insert the reference *Ala.* in clauses (A) (1), (2), (3), (4), and (5), and (B) (1), (2), (3), and (5); add *Ala.* after *Vt.* at the end of the section.

PENNSYLVANIA. Under the new statute all real property acquired by the wife by her own labor or otherwise, as before, remains her separate property, and so of personalty acquired in any way. Insert *Pa.* after *N.Y.* in clause (A) (4), and after *N.J.* in clause (B) (4), and add to the citation 1887,224,1.

CONNECTICUT. So, in Connecticut, of real property acquired by her own labor. Add *Ct.* before *N.Y.* in clause (A) (4); and see § 6241, note <sup>a</sup>.

NEBRASKA. Add to the citation in par. (A) 1887,49, and insert *Neb.* after *Minn.* in clause (B) (4). All personalty acquired by the wife in any manner remains her separate property.

NEW MEXICO. By the new statute all personalty acquired by gift is the wife's separate property. Add 1887,32,22 to the citation in par. (A), and insert *N.M.* before *Ariz.* in par. (B) (2).

NEVADA, IDAHO. Earnings of her minor children living with her when she is separate from her husband remain her separate property. Add *Nev., Ida.* to the references in clause (B) (6); and see also § 6353.

CALIFORNIA, NEVADA, DAKOTA. The earnings of the wife are in no case liable for the debts of the husband: *Cal.* 5168; *Nev.* 511; *Dak. Civ. C.* 83.

SOUTH CAROLINA. Under a new statute, property acquired by the wife's own labor is her separate property. Insert *S.C.* 1887,407 in clauses (A) (4) and (B) (5).

§ 6423. **Property of the Husband.** OHIO and NEVADA follow the California code provision, that neither husband nor wife (except, in Ohio, as to dower estates) has any interest in the property of the other; but neither can be excluded from the other's dwelling: *O.* 3111; 1887, p. 132; *Nev.* 516.

§ 6424. **Special Kinds of Property.** ALABAMA. The provisions of par. (C) seem to be abrogated by the new statute. All sums recovered in suits by the wife for tort, etc., remain her separate property. Add *Ala.* 2843 after *Mo.* in par. (I).

OHIO. The provisions of pars. (H) and (I) appear to be abrogated by the new statute.

SOUTH CAROLINA. The savings of income of her separate estate are the wife's separate property. Add *S.C.* 1887,407 to clause (G).

§ 6427. **Trustees for Married Women.** ARIZONA. The provisions of this section are omitted in the *Rev. Stats.*

ALABAMA. The new statute makes provisions for the appointment of trustees to hold the separate property of married women. Insert *Ala.* 1887,41,11 after *Ida.*

§ 6430. **Property Acquired in Other States.** IDAHO. The provisions of this section seem to be omitted in the *Rev. Stats.*

§ 6431. **Record of Separate Property.** IDAHO. The California provision is followed as to the record of separate property by married women. Add *Ida.* 2500 after *Dak.* in clause (A) (2), and strike out the reference and citation in par. (C).

ARIZONA. The Texas statute is followed. Strike out *Ariz.*<sup>a</sup> 1969 in the 1st par., *Ariz.* in par. (A) (2), and *Ariz.* 1970 below; and insert *Ariz.*<sup>a</sup> 2612 after *Tex.* in par. (A) (1).

§ 6432. **Effect of Record.** IDAHO. Such record is notice and *prima facie* evidence of the title of the wife. Add *Ida.* 2501 to the citation in par. (C), and strike out the reference and citation in par. (A).

ARIZONA. It is conclusive, as against creditors and purchasers. Insert *Ariz.* 2616 after *Tex.* in par. (B), and strike out *Ariz.* 1971 in (A). And this statute is declared to be for the *benefit* of married women; and failure to record as above does not affect her rights any more than if the act had never been passed: *Ariz.* 2617.

§ 6433. **The Community Property** may, in Arizona, during coverture be disposed of by the husband only. Add *Ariz.* after *Wash.* in the 2d par. It is liable for the debts of the husband contracted during marriage: *Ariz.* 2106. Strike out the reference and citation in the 2d par. on p. 728.

IDAHO. The Rev. Stats. follow the California code definition of community property. Add *Ida.* 2829 after *Cal.* in the last par. but two, and strike out the reference and citation to Idaho and the last sentence in the following par.

§ 6440. **General Principles.** CONNECTICUT. A new statute makes provision for marriage contracts as in par. (A), to be in lieu of dower, etc. Insert *Ct.*<sup>a</sup> 623 after *Me.* in the 1st par.

IDAHO. The limitations upon this section seem to be omitted in the Rev. Stats. Strike out *Ida. ib.* 22 & 23 on p. 731.

ARIZONA. The Texas statute is followed, that parties contemplating marriage may enter into what stipulations they please, providing they be not contrary to good morals or some rule of law. Add *Ariz.* 2097 to the citations to par. (E), and change the word *two* to *three* in the 1st line of the par. Strike out *Ariz.* 1964 above.

§ 6441. **Form.** ARIZONA. A marriage contract must be in writing, with two witnesses, and acknowledged or proved. Insert *Ariz.* 2098 after *La.* in par. (1), and after *Tex.* in par. (2), and strike out the citations and reference in par. (3).

§ 6442. **Record.** IDAHO. It seems that record of separate real estate in marriage contracts need no longer be recorded in the county where the married persons reside, and the effect of non-record is the same as in the case of ordinary deeds. Strike out the note sign<sup>c</sup> to *Ida.* in clause (5) of the 1st par., and the citation and reference in clause (4) in the 2d par., and add *Ida.* 2511 after *Cal.* in clause (5); and strike out *Ida. ib.* 18 below.

ALABAMA, ARIZONA. If marriage contracts are not recorded they are, not valid as against purchasers. Add *Ala.*, *Ariz.* after *Tex.* in clause (2) of the 2d par., and *Ariz.* after *Ala.* in clause (3); and strike out *Ariz.* 1985, *Ariz.*, and *Ariz.* 1984 below.

§ 6443. **Female Minors.** IDAHO. Any minor capable of contracting marriage may make a valid marriage contract. Add *Ida.* 2512 after *Nev.* in the last line, and strike out *Ida. ib.* 20 above.

§ 6445. **Post-Nuptial.** CONNECTICUT. In the same way, post-nuptial contracts may be made. Insert *Ct.* 623 before *Del.* in the 1st par.

IDAHO. The provision of the last par. is omitted in the Rev. Stats. Strike out *Ida. ib.* 21.

§ 6450. **Separate Property.** PENNSYLVANIA. Under the new statute a married woman may receive, receipt for, manage, dispose of, lease, sell, and convey her separate property, real and personal, as if sole, and has the same rights and remedies concerning it: *Pa.* 1887,224,1-3; and she may control her real or personal estate and make contracts concerning it, and appoint attorneys to act for her as if sole.

ALABAMA. She can contract in writing only and with the husband's written consent: *Ala.* 1887,41,6.

OHIO. The provision in the 2d line on p. 735, rendered unnecessary by the new statute, is abrogated.

§ 6451. **General Provisions.** MINNESOTA, DAKOTA. "After the passage of this act woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her person, reputation, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts for redress or protection that her husband has to appeal in his own name alone": *Minn.* 1887,207; *Dak.* 1887,98.

ARIZONA. So, in Arizona, "married women aged twenty-one and upwards shall have the same legal rights as men, and be subject to the same legal liabilities": *Ariz.* 2104. Except, in Arizona, the right to make contracts binding the community property. And in Minnesota, Dakota, and Arizona this section does not apply to voting and holding office. Add *Minn., Dak., Ariz.* to the citations in the 1st line on p. 736.

§ 6452. **Special Provisions.** MARYLAND. Releases and receipts given by women, married or unmarried, of the age of eighteen, are valid: *Md.* 1886,11; see § 6601.

ARIZONA. Banks may pay out deposits on the personal receipt of a married woman. Add *Ariz.* 288 to the citations in the 3d par.

ALABAMA. In the new code this provision, rendered unnecessary, is left out. Strike out *Ala.* 2036.

§ 6453. **Suits for Property.** PENNSYLVANIA. Under the new statute a married woman may prosecute and defend suits concerning her own property as if sole. Add *Pa.* 1887,224,2 after *N.J.* in the 1st par.

§ 6454. **Other Suits.** A reference should be made from this section to § 6451.

PENNSYLVANIA, ALABAMA. Under the new statutes the usual provision is adopted, that a married woman may in all cases sue and be sued without joining her husband. Add *Pa.* 1887,224,2 & 4; *Ala.* 2347 to the citations in par. (A).

COLORADO, DAKOTA, NEW MEXICO. In New Mexico the wife may prosecute or defend an action by her against her husband as if sole, but in Colorado and Dakota the new statute is silent. Add *N.M.*, and strike out *Col.* and *Dak.* in the references in par. (B).

CONNECTICUT. The provision of par. (C) is followed, that in ordinary suits the



husband must be joined by the wife. Insert *Ct.* 987 as the 1st citation to par. (C); and for § 6360, just before, read § 6356.

COLORADO, WYOMING, ALABAMA. But in these states this is no longer the case. Strike out the citations and references in par. (C).

NEW MEXICO. Add to the citation in par. (C) 1887,32,45,<sup>1</sup>.

PENNSYLVANIA. Both need no longer join in action of tort done to the wife. Strike out the 3d par. of (E) below.

COLORADO. The provision of par. (E), being unnecessary, is omitted. Strike out the reference. The provision that if the husband and wife are sued together the wife may defend is omitted. Strike out *Col. Civ. C.* 7 in the 5th succeeding par., and strike out the old note <sup>c</sup> to this section, and substitute <sup>c</sup> *Unless he be a non-resident and absent from the territory.*

§ 6455. **Joint Suits.** PENNSYLVANIA, ARIZONA. The provision that the husband and wife must be jointly sued for debts contracted by the wife for necessities is omitted in Pennsylvania, and adopted in Arizona. Strike out *Pa. Marriage* 15 in the 3d par., and insert *Ariz.* 685; 2107 after *Tex.* 2855.

Execution is levied first upon the community property; second, upon the separate property of the husband; third, upon that of the wife: *Ariz.* 2108.

§ 6456. **Powers in Corporations, etc.** ALABAMA. A reference should be made in the 4th par. to Art. 650; and strike out the first sentence, concerning stock; omitted in the new code.

§ 6460. **Power to Will.** PENNSYLVANIA. The new statute authorizes wills by married women as if sole. Add *Pa.* 1887,224,5 to the citation in par. (A).

IDAHO. So, in Idaho. Add *Ida.* 5726 after *Dak.* in the same par., and strike out *Ida.* in the 2d par.

MASSACHUSETTS. Insert *or all of her real estate not exceeding five thousand dollars in value where no issue survives her:* *Mass.* 1887,290,2 at the end of clause (1) in the 3d par.

§ 6471. **Conveyances between the Husband and Wife.** NEW YORK. The provision of par. (C) is adopted, that a conveyance or lien executed by either husband or wife in favor of the other is valid to the same extent as between other persons. Insert *N.Y.* 1887,537 as the 1st citation to par. (C).

§ 6480. **With the Husband.** OHIO. The California code is adopted, that either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried, subject to the general rules controlling confidential relations; and except that they may not by contract alter their legal relations except as to property, though they may agree to an immediate separation and make provision for support, etc. Insert *O.* 3112,3113,1887, p. 132 before *Cal.* in the 2d, 3d, and 5th pars. of (B).

ALABAMA. So, as to the first provision, in Alabama. Insert *Ala.* 2349 after *Dak.* in the 2d par. of (B), and strike out *Ala.* 2709 above.

§ 6482. **With Third Persons.** PENNSYLVANIA, ALABAMA. Under the new statutes a married woman may make contracts as if sole, except that in Alabama they must be in writing, etc. Insert *Pa.* 1887,224,1; *Ala.*<sup>d</sup> 2346 among the citations to par. (A). They may not be liable as indorser, etc., for the husband; or, in Pennsylvania, for any person. Insert *Pa. ib.* 2; *Ala.* 2349 before *Ga.* 1783 in the 2d par., and *Pa.* after *N.J.* in clause (2) below; and add to the section

*Note* <sup>d</sup> *But such contracts must be in writing, and with the husband's written consent.*

**Art. 650. Deeds by Married Women.** Strike out *The provisions of this article control*: *O.* 3112, 1884, 209.

§ 6500. **Of her Property.** A reference should be made from this section to § 6353.

OHIO. By the new statute the provision of par. (D) is adopted, that a married woman may execute and acknowledge all deeds and mortgages of her separate estate, bills of sale, or other conveyances without the husband's joining her. Insert *O.* 4107, 1887, p. 133 after *N.Y.* in par. (D), and strike out the references and citations throughout pars. (A), (B), (C), and (E).

PENNSYLVANIA. By the new statute no married woman can convey or incumber her separate real estate, unless the husband join in the deed, as in par. (A). Insert *Pa.* 1887, 224, 1 after *N.J.* in par. (A) (1). She may make leases, however, as if sole: *Pa. ib.* 3.

IDAHO. So, under the Rev. Stats., the husband must join in the deed. Insert *Ida.* 2922 after *Wash.* in par. (A), and append the note sign <sup>a</sup> to the references to *Ida.* in pars. (B) and (E) (2).

ALABAMA. So in Alabama; but see § 6353. Insert *Ala.* 2348 after *Wash.* in par. (A). It seems, however, that two witnesses are necessary in all cases: *Ala.* 1805.

ARIZONA. Strike out the references and citations in pars. (C) and (E); and insert after the word *eighteen* in note <sup>a</sup> *or in Arizona, seventeen.* Married women may convey their land without the husband's joinder, as if unmarried. Append the note sign <sup>a</sup> to the citation in par. (D).

NEVADA. The provision authorizing separate deeds by husband and wife of the wife's real estate appears to be omitted in the Gen. Stats. Strike out *Nev.* 247 in (C), and *Nev.* 184 in (D).

SOUTH CAROLINA. Change the citation in (D) to *S.C.* 1887, 407.

WASHINGTON. A separate examination is necessary in the case of mortgages by married women of a homestead only: *Wash.* 1886, p. 179. Add to the section notes <sup>b</sup> *But see* § 6353; <sup>c</sup> *In the case of mortgages of homesteads only*; <sup>d</sup> *The intention to charge the wife's separate estate must be declared in the deed.*

§ 6501. **Separate Examination.** ARIZONA. The wife must be examined privily apart from her husband, and declare that the instrument is her voluntary act, and that she does not wish to retract it. Insert *Ariz.* 2581 after *Mon.* in clause (1); but see § 6500, note <sup>c</sup>. She must be made acquainted with the contents of the instrument, and it must be explained to her. Insert *Ariz.* after *N.M.* in the 2d line, after *W. Va.* in the 3d line, and after *Ida.* in the 5th line, of p. 744.

WASHINGTON. So in Washington. Insert *Wash.* in the 3d and 5th lines of p. 744.

§ 6502. **Statutory Forms of the Certificate of Acknowledgment.** IDAHO. The California form is adopted. Add *Ida.* 2960 after *Cal.* in the citations to (1).

§ 6503. **Personalty.** ALABAMA. In Alabama the personal property of the wife may be sold, conveyed, or disposed of "by the husband and wife, by parol or otherwise": *Ala.* 1887, 41, 8; and see § 6353. Conveyances of stocks or shares must be made like deeds of real estate: *Ala.* 1805.

§ 6505. **Special Cases.** ALABAMA. The provision concerning stock is omitted in the new code. Strike out the clause ending *Ala.* 2037. See also § 1659.

§ 6506. **Powers of Attorney.** OHIO. In the 5th par. strike out the provision that the revocation is inoperative until recorded in the county where the lands are, and add to the citation 1887, *p.* 133.

IDAHO. It is provided that a wife may convey her land by power of attorney duly executed, as in par. (B). Insert *Ida.* 2924 after *Nev.* in the citations.

§ 6507. **Covenants.** ARIZONA. The provisions of this section are repealed. Strike out the reference and note <sup>a</sup>.

§ 6511. **Validating Statutes.** Add to the citations to this section *Ct.* 1886,94,4; 1887,122,5; *Minn.* 1887,178; *Del.* 1887,210,1.

§ 6520. **Married Women doing Business.** ALABAMA. The process is provided by which a married woman can become a sole trader. Insert *Ala.* after *Mon.* in the 1st line on *p.* 747.

NEVADA. So, in Nevada, to carry on business in her own name. Insert *Nev.* 534 before *Ariz.* in the 2d line on *p.* 747.

PENNSYLVANIA. The provision of par. (A) is adopted, that a woman may carry on any business on her sole account, and her earnings be her separate property. Insert *Pa.* 1887,224,2 after *N.Y.*

ARIZONA. All the statutes concerning sole traders are omitted from the Rev. Stats. as no longer necessary; see § 6450. Strike out the Arizona references throughout Art. 652.

§ 6521. **Process.** ALABAMA. A married woman records with the judge of probate in the county of their residence, and in the county where the business is carried on, a certificate setting forth her husband's written consent: *Ala.*<sup>o</sup> 2350. Strike out the reference and citation to Alabama in par. (D); the word *Alabama*, and the sentence following in the 3d and 4th lines of note <sup>a</sup>; and add to the notes *Note* <sup>o</sup> *The husband's consent need not be filed if he be of unsound mind, or a non-resident of the State, or has abandoned his wife, or is imprisoned under conviction for crime.*

ARIZONA. Strike out. See § 6520 above.

§ 6522. **Effect.** CONNECTICUT. A married woman doing business in her own name may sue and be sued. Insert *Ct.* 986 after *R.I.* in the 7th par.

ALABAMA. Her acquisitions become her separate estate. Insert *Ala.* after *Ga.* in the 8th par.

ARIZONA. Strike out. See § 6520 above.

§ 6602. **Disabilities of Minors.** IDAHO. As a general principle, minors cannot make any contract except for necessities; but, if of the age of eighteen, they are bound by their contracts unless they disaffirm them, and restore the consideration received within a reasonable time after attaining majority, unless the contract was expressly authorized by a statute. Insert *Ida.* 2407 after *Ga.* in par. (A), *Ida.*<sup>a</sup> 2408 after *Dak.* in par. (B), *Ida.* after *Cal.* in the 3d line of par. (C), *Ida.* 2407 after *Dak.* in the citations to par. (C), and *Ida.* 2409 after *Dak.* in par. (D).

§ 6607. **Rights of Parents.** IDAHO. The wages of a minor may be paid him until the parent gives notice that he claims them. Add *Ida.* 2533 to the citations to the 7th par. on *p.* 751.



§ 6608. **Duties of Parent.** IDAHO. The California code is followed as to the duties of parents to minors and their liability. Insert *Ida.* 2531 after *Dak.* in the 1st par., and *Ida.* 6782 after *Dak.* in the 2d par., and *Ida.* 2532 after *Dak.* in the 4th par.

WISCONSIN, DELAWARE, IDAHO, NEW MEXICO. New statutes make it a penal offence for a parent to abandon his minor children. Add *Wis.* 1887,318; *Del.* 1887,230; *Ida.* 6782; *N.M.* 1887,21 to the citations in the 2d par.

§ 6609. **Duties of Child.** IDAHO. The children are bound to maintain a parent who is unable to maintain himself; and a promise by an adult child to pay for necessities previously furnished such parent is binding: *Ida.* 2531. See in Part IV.

§ 6631. **Subsequent Marriage and Acknowledgment.** MAINE. Law unchanged; add to the citation in par. (A) 1887,14.

NEW MEXICO. An illegitimate child is made legitimate only when the parents have since intermarried, and the father has recognized him. Insert *N.M.* 1887,32,10 before *Ariz.* in par. (B), and strike out the reference and citation in par. (A), and the whole of note <sup>b</sup>.

§ 6632. **Acknowledgment.** ARIZONA. The father of an illegitimate child legitimates it by publicly acknowledging it and receiving it into his family, etc. Add *Ariz.* 1392 to the citations to the 1st par., and strike out the whole 2d par.; omitted in the Rev. Stats.

ALABAMA. The father may legitimate a child by deed recorded, as in Michigan. Add *Ala.* 2365 after the 4th par.

MAINE. An illegitimate child is heir if the father adopts him into his family, or in writing makes acknowledgment that he is the father before a justice or notary; and he inherits from the kindred of such father, whether lineal or collateral, and they from the child, as if legitimate: *Me.* 1887,14. Strike out the reference in par. (B).

IDAHO. If the parents intermarry, and the father acknowledges the child, he inherits, and the father from him, as if legitimate. Add *Ida.* 5704 after *Dak.* in par. (C).

§ 6640. **Who may Adopt.** NEVADA, ARIZONA. Any adult may adopt. Insert *Nev.*, *Ariz.* among the citations in the 3d line.

MICHIGAN. Strike out *Mich.* in the 6th line; and change the citation on p. 759 to 1887,144, nothing being said about the wife or husband joining in the petition.

ARIZONA. Change the citation in the 1st par. to 1385, and append the note sign <sup>a</sup>, such consent not being necessary if the wife be lawfully separated. The person adopting must be at least ten years older than the child. Add *Ariz.* after *Dak.* at the end of the section.

WISCONSIN. A person over twenty-one may be adopted: *Wis.* 1887,45. Strike out the reference in the 3d line before the end of p. 758.

CONNECTICUT. When one of the parents of an adopted child is dead, and the other remarries, the step father or mother may adopt, with the approval of the court: *Ct.* 473.

§ 6641. **The Process.** NEVADA. It is by petition in the Superior Court.

Insert *Nev.* 602 after *Ore.* in the 1st par. It must be in the district where the petitioner resides. Insert *Nev.* after *Ore.* in the 2d par.

ARIZONA. The judge examines the parties and allows the adoption at his discretion. Insert *Ariz.* 1389 after the 3d par. on p. 760, and strike out *Ariz.* in the 1st and 4th clauses of the last par.

§ 6642. **The Consent of the Child.** WISCONSIN. The consent of the child adopted is required, if he be over twenty-one, and of the parents if he be under twenty-one: *Wis.* 1887,45.

PENNSYLVANIA, MICHIGAN, NEVADA. The consent of the parents is always required, except as in the notes specified. Change the references in the 3d par. to *Pa.*<sup>e</sup> 1887,68; *Mich.*<sup>e</sup>; *Nev.*<sup>e</sup>. The consent of the parent is not required if he has wilfully deserted the child for one year, or, in Nevada, is under guardianship. Strike out *Nev.* where it appears in note <sup>c</sup>, and add *Nev.* after *Cal.* in the same line; and *Pa.* after *R.I.* in note <sup>e</sup> below.

ARIZONA. Change the reference in the 3d par. to *Ariz.* <sup>c, d, f, h,</sup> 1386, and add *Ariz.* after *Ida.* in note <sup>c</sup>.

IDAHO. The consent of the guardian, etc., is required. Insert *Ida.*<sup>a</sup> in the references in the 3d and 4th clauses of par. (3), and *Ida.* after *Wash.* in par. (5).

NEW HAMPSHIRE. Strike out the words *in New Hampshire* in note <sup>a</sup>.

WYOMING. The consent of the minor is necessary. Insert *Wy.* 2275 after *Kan.* in clause (5).

§ 6643. **Form of Consent.** IDAHO. Change the citation in par. (A) to *Ida.*<sup>a</sup> 2550. Insert *Ida.*<sup>a</sup> after *Nev.* in the 2d par., and *Ida.* after *Wis.* in the 3d line of par. (B). The child must appear in court, and give his consent, unless the parties are out of the Territory.

WYOMING. Strike out the note sign <sup>b</sup>.

ARIZONA. So in Arizona. Change the citation in par. (A) to *Ariz.*<sup>a</sup> 1388; and add *Ariz.* after *Uta.* and after *Ida.* and *Wis.* in the 3d line of par. (B), and after *Ida.* in the 5th line.

NEVADA. The parents and child adopted must appear in court, and also the person adopting. Insert *Nev.* after *Ida.* in the 3d line, and after *Cal.* in the 4th line of par. (B).

MICHIGAN. All must sign the petition. Insert *Mich.* 1887,144 after *N.Y.* in the 5th line of par. (B).

§ 6644. **Appeal.** CONNECTICUT. The provision allowing revocation of a decree of adopting appears to be abrogated.

§ 6645. **Status.** MICHIGAN. Add to the citation 1887,144.

§ 6647. **Inheritance.** NEW YORK. The person adopted becomes the heir of the person adopting as if he were their child in all respects. Insert *N.Y.* 1887,703 after *Ct.* in par. (A), and strike out the New York reference in the 1st par. of (C). Note <sup>b</sup> should read: *See* § 6645, note <sup>a</sup>.

§ 6649. **Inheritance from Persons Adopted.** NEW YORK. If the person adopted dies intestate, his property goes to his adopted parents, etc. Insert *N.Y.* 1887,703 after *Ct.* in par. (A).

PENNSYLVANIA, ARIZONA. So all his property acquired from his adopted parents and their kin, if he dies intestate and without issue or widow. Insert *Pa.*, *Ariz.* in the references in the 2d line of par. (B); and *Pa.* 1887,22; *Ariz.* 1461 in the

citations following. Strike out all the old Arizona provisions in this section; omitted in the Rev. Stats.

**Art. 666. Apprentices.** NEW YORK. There is a new statute concerning apprentices: N.Y. 1886,340.

**§ 6701. Powers.** IDAHO. The provisions of the California code are followed as to contracts and conveyances by insane persons. Insert *Ida.* 2410-2 at the end of the 1st sentence ending on p. 765. A certificate of discharge from a physician establishes the presumption of sanity.



## TABLE OF CHANGED CITATIONS.

The old citation in the original edition is on the left of each column ; that to the new code or revision, on the right.

	CONNECTICUT.		FLORIDA.		NEVADA.		IDAHO.		WYOMING.		ARIZONA.	
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128	.	.	C. D. R. 8	10	.	.	Cr. Pr. 6	7351				
130	.	.	C. D. R. 8	12	.	.						
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133	.	.			.	.			Cr. C. 115	3404	11,285	P. C. 1566
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			C. 5,14	4,20								
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			C. 12,8 . . .	9,7								
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§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
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559	19,4,1 . . . 664	664	C. 6,15 . . . 5,22	5,22	. . . . .	. . . . .	. . . . .	. . . . .	71,2 . . . 3416	3416	196 . . . 614	614
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	. . . . .	. . . . .	. . . . .	. . . . .	960 . . . 2474	2474	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
581	. . . . .	. . . . .	C. 6,17 . . . 5,20	5,20	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	ALABAMA.		. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
1001	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 70 . . . 3923	3923	. . . . .	. . . . .	. . . . .	. . . . .
1003	. . . . .	. . . . .	. . . . .	. . . . .	1883,1 . . . 3021	3021	1874-5, p. 676 . . . 18	18	26,1 . . . 498	498	3438 . . . 2935	2935
1004	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	26,1 . . . 498	498	. . . . .	. . . . .
1020	22,7 . . . . . 1	1	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 12 . . . 15	15	. . . . .	. . . . .	3 . . . . . 2932	2932
1021	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 3 . . . 4	4	Civ. C. 2 . . . 2338	2338	3 . . . . . 2932	2932
1023	22,9 . . . . . 1	1	. . . . .	. . . . .	319,2294 . . . 2666	2666	Civ. C. 13 . . . 16	16	Civ. C. 647 . . . 2337	2337	3076 . . . 914,2932	914,2932
	. . . . .	. . . . .	. . . . .	. . . . .	2293 . . . 3447	3447	Civ. C. 11 . . . 14	14	Civ. C. 649 . . . 2239	2239	3 . . . . . 914,2932	914,2932
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	1874-5, p. 796 . . . 16	16	Civ. C. 632 . . . 2341	2341	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 8 . . . 11	11	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 9 & 47 . . . 12	12	Civ. C. 631 . . . 2339	2339	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 71 . . . 3924	3924	Civ. C. 633 . . . 2341	2341	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 652 . . . 2339	2339	. . . . .	. . . . .
1040	1883,60 . . . 418	418	. . . . .	. . . . .	2 . . . . . 4877	4877	. . . . .	. . . . .	. . . . .	. . . . .	2 . . . . . 414	414
1042	1881,1 . . . 1687	1687	. . . . .	. . . . .	. . . . .	. . . . .	1874-5, p. 858-17	17	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	8,20,159	159	. . . . .	. . . . .	. . . . .	. . . . .
1043	1881,1 . . . . . 1	1	. . . . .	. . . . .	. . . . .	. . . . .	1874-5, p. 858 . . . 17,158	158	. . . . .	. . . . .	4 . . . . . 2934	2934
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 4 . . . 5,157	5,157	. . . . .	. . . . .	. . . . .	. . . . .
1052	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 13 . . . 2826	2826	. . . . .	. . . . .	. . . . .	. . . . .
1100	18,6,1 . . . 2950	2950	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
1110	. . . . .	. . . . .	975 . . . 1033	1033	3831 . . . 346	346	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	980 . . . 1039	1039	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	987-992 . . . 1041-1050	1041-1050	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
1111	. . . . .	. . . . .	2228-31 . . . 1875-8	1875-8	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
1116	. . . . .	. . . . .	. . . . .	. . . . .	78-82 . . . 3738-3742	3738-3742	1874-5, p. 752,2	2	1884,66 . . . 1414	1414	3446 . . . 2222	2222
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	4553	4553	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	p. 751 . . . 4552	4552	p. 511,2 . . . 1414	1414	. . . . .	. . . . .
1141	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 851 . . . 5210	5210	p. 511,1 . . . 1416	1416	. . . . .	. . . . .
1142	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 861 . . . 5221	5221	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 866 . . . 5226	5226	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 864 . . . 5223	5223	. . . . .	. . . . .	. . . . .	. . . . .
1143	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 853 . . . 5212	5212	. . . . .	. . . . .	. . . . .	. . . . .
1144	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	852 . . . . . 5211	5211	. . . . .	. . . . .	. . . . .	. . . . .
1145	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 856 . . . 5215	5215	. . . . .	. . . . .	. . . . .	. . . . .
1146	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 854 . . . 5213	5213	. . . . .	. . . . .	. . . . .	. . . . .
1147	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .	Civ. C. 856 . . . 5215	5215	. . . . .	. . . . .	. . . . .	. . . . .



	CONNECTICUT.		ALABAMA.		NEVADA.		IDAHO.		WYOMING.		ARIZONA.	
§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
1151	18,2,1; 1885, 110,53 . . .	647	2851 . . .	1936	805 . . .	2992	Prob. C. 315	5702	. . . . .		3551 . . .	1783
1153	1885,110 . .	647	2857 . . .	1942	812 . . .	2999	Prob. C. 315	5702	. . . . .		3555 . . .	1798
1154	. . . . .		2855 . . .	1940	809 . . .	2996	. . . . .		. . . . .			
1155	. . . . .		. . . . .		809 . . .	2999	. . . . .		. . . . .			
1156	18,2,1 . . .	647	. . . . .		805 . . .	2993	. . . . .		. . . . .			
1157	18,11,1 & 3 .	648	2851 . . .	1936	805 . . .	2992	Prob. C. 315	5702	. . . . .		3551 . . .	1783
1159	18,2,3 . . .	648	2852-4 . .	1937,1939	509 . . .	2996	. . . . .		. . . . .			
1171	. . . . .		1727 . . .	1463	. . . . .		1880-1, p. 267 .		. . . . .			
							3155					
							<i>ib.</i> 3 . . .	3157				
1175	18,2,4 . . .	1395	. . . . .		. . . . .		<i>ib.</i> 4-7 . . .	3159-64				
1177	. . . . .		1728 . . .	1459	. . . . .		. . . . .					
1179	. . . . .		. . . . .		3852-5 . .	362-5	1874-5, p. 829 .	3180-3205	65; 1882,57 . .		3241-70; 1883,41	3200-3231
									1318-1365; 1887,74			
1300	. . . . .		2 . . . . .	2	. . . . .		1880-1, p. 269 . <i>ib.</i>		. . . . .		2279 . . .	2932
1301	. . . . .		. . . . .		302 . . .	2643	Civ. C. 13 . . .	2825	. . . . .			
1303	. . . . .		. . . . .		302 . . .	2643	. . . . .		. . . . .			
1310	. . . . .		2279 . . .	1950	. . . . .		. . . . .		. . . . .			
1313	18,6,3 . . .	2952	2179 . . .	1825	. . . . .		. . . . .		. . . . .			
1332	19,17,17,9 .	1348	. . . . .		1313 . . .	3274	Civ. C. 472 . .	4530	. . . . .			
	18,11,4,3 . .	1348	. . . . .		. . . . .		. . . . .		. . . . .			
1341	. . . . .		2190 . . .	1836	306 . . .	2647	. . . . .		. . . . .			
1371	. . . . .		2191 . . .	1837	269 . . .	2610	1874-5, p. 603 .	2907,2828	. . . . .			
1375	. . . . .		2273 . . .	1923	. . . . .		. . . . .		. . . . .			
1377	. . . . .		. . . . .		. . . . .		Civ. C. 472 . .	4530	. . . . .			
1378	19,17,1,4 . .	1039	3497 . . .	3237	1327 . . .	3288	Civ. C. 487 . .	4560	564 . . . . .	2962	2702 . . .	2373
	19,17,12,1 .	1304	. . . . .		. . . . .		. . . . .		. . . . .			
1379	. . . . .		3479 . . .	3075	. . . . .		. . . . .		. . . . .			
1401	18,6,15 . . .	2966	. . . . .		262 . . .	2603	1874-5, p. 602 .	2902	1882,1,7 . . .	7		
1402	. . . . .		2196 . . .	1842	. . . . .		. . . . .		1882,1,4 . . .	4		
1403	. . . . .		2184 . . .	1830	. . . . .		. . . . .		. . . . .			
1404	. . . . .		3233 . . .	4045	. . . . .		. . . . .		. . . . .			
1406	18,6,4 . . .	2953	2183 . . .	1829	. . . . .		. . . . .		. . . . .			
1410	. . . . .		2144 . . .	1788	. . . . .		. . . . .		. . . . .			
1412	18,6,2 . . .	2952	. . . . .		. . . . .		. . . . .		. . . . .			
1413	. . . . .		2182 . . .	1818	272 . . .	2614	1874-5, p. 604 .	2833	. . . . .			
					272 . . .	2613	<i>ib.</i> 46 . . .	2837	. . . . .			
1415	. . . . .		2181 . . .	1827	271 . . .	2612	<i>ib.</i> 45 . . .	2906	. . . . .			
1420	. . . . .		2144 . . .	1788	. . . . .		. . . . .		. . . . .			
1421	. . . . .		2180 . . .	1826	. . . . .		. . . . .		. . . . .			
1426	. . . . .		2180 . . .	1826	. . . . .		. . . . .		. . . . .			
1440	. . . . .		2183 . . .	1834	. . . . .		. . . . .		. . . . .			
1441	. . . . .		2187 . . .	1833	. . . . .		. . . . .		. . . . .			
1443	. . . . .		2189 . . .	1835	. . . . .		. . . . .		. . . . .			
1450	18,6,4 . . .	2953	. . . . .		276 . . .	2617	<i>ib.</i> 50 . . . . .	2937	. . . . .			
1451	. . . . .		2192 . . .	1838	. . . . .		. . . . .		. . . . .			
1454	. . . . .		. . . . .		261 . . .	2602	1874-5 & c. . .	2928	. . . . .			
1470	. . . . .		2195 . . .	1841	. . . . .		1874-5, p. 596,1	2920	1882,1,1 . . .	1		
1471	18,6,1,14 . .	2965	. . . . .		283 . . .	2569,2624	Civ. C. 9356	6007	. . . . .		2119 . . . . .	214
1472	. . . . .		. . . . .		. . . . .		. . . . .		. . . . .		1882,1,3; 1884, 5,2 . . . . .	3 & 35
1474	. . . . .		2178 . . .	1824	270 . . .	2611	1874-5, p. 603 .	2905,2927	1884,5,1 . . .	34		
1486	. . . . .		2948 . . .	2694	. . . . .		. . . . .		. . . . .			
1489	. . . . .		. . . . .		. . . . .		. . . . .		1877, p. 94 . .	52		
1500	. . . . .		. . . . .		. . . . .		. . . . .		1877, p. 96 . .	55		
1501	. . . . .		2193 . . .	1839	277 . . .	2618	1874-5, p. 605 .	2935	1882,1,5 . . .	5		
1551	18,6,14 . . .	2965	. . . . .		230,303 . .	2571,2644	<i>ib.</i> 36 . . . . .	3002	1882,1,21 . .	24		
1552	18,6,23 . . .	2974	. . . . .		. . . . .		. . . . .		<i>ib.</i> 22 . . . . .	25		
	. . . . .		. . . . .		. . . . .		. . . . .		<i>ib.</i> 20 . . . . .	23		

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§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
1560	18,6,1,5	2954	2145; 1885,84	1789	228	2569,2624	935	2920	1882,1,1	1	2245	214
1561			2145	1789							2119	214
1564	18,6,1,5	2954	2948	2694	1883,39	2067			1882,1,1	1		
1565	19,11,17	1085	2194	1840			922	5989	ib. 24	27	3	2932
1566	18,6,1,5	2954	2146	1790			Civ. C. 10	13,3226	1882,1,8	8		
			2160	1804			1874-5	2994				
			2145	1789								
1568	18,6,1,7	2956										
1570	18,6,1,5	2954	2145-6	1790	230	2571			1882,1,1 & 26	8 & 15	129	215
1572					257	2598	1874-5 &c.	5998	ib. 17	20		
					259-60	2600-1						
1576			2158	1802	246,233	2574,2587	1874-5 &c.	2957,2994	1882,1,8	8	2249	2579
			2160	1804							2262	2582
1577					233	2574	ib. 6 & 19	2962			2249	2583
1578			2158	1802	234-5	2575-6	ib. 7,8	2955			2250-1	2580
1579			2158	1802	236-7	2577-8					2252-3	2583
1581	18,6,1,7	2956										
1582	18,6,1,5	2954	2155	1799	231	2572			1882,1,8	8	2248-9	2576-7
	1878,29	2954	2156	1800					1884,29,1	8	2193	2576
	1881,4	2954			313	2638			1882,1,9	11	1883,50	2576
1583					231	2572			1882,1,9	11	2184	3577
1585					232	2573,2659	1874-5 &c.	2974-5	1884,5,4	56-69		
					267-8	2608-9			1882,1,25	28		
					314	2659						
1591	18,6,1,9	2958										
1592	18,6,1,9	2958	2155-6	1799	231	2572	1874-5 &c.	2950			2248	2584
1593			2159	1803	238	2579	1874-5 &c.	2966				
					240	2581	ib. 13	2966				
1595					238	2579						
1597					242	2583	ib. 16	2964				
					243	2584	ib. 15	2968				
1598					244	2585-6	ib. 17	2970			2260	2591
1599			2159	1803			ib. 14	2969				
1601					239	2580	ib. 12	2965			2255	2585
					241	2582	Ida.	2969			2257	2585
1602	18,1,6,7	2956										
1604			2159	1803								
1610	18,6,1,11	2961	2152	1796	252	2593	ib. 24	3001	1882,1,13	17	2268	215
1611	18,6,1,11	2961			254	2595	ib. 26	3001	ib. 15	18	2270	2603
							ib. 24	3004			2268	2601
1613	18,6,1,11	2961	2147	1791	252	2593	1874-5 &c.	2997	ib. 13	16	122	214,2569
									28,3,9	1840		
1616			2154	1798								
1617	18,6,1,11	2961	2149	1793	253	2594	1874-5 &c.	2998	28,3,9 &c.	17		
1618	18,6,1,11	2961	2148	1792			1874-5 &c.	2930	1,3; 28,3,9	1847	134,5	2572
			2149	1793			Ida.	2931	1882,1,13	16	1881,16	548
1619	3,3,3,5	76	2148	1792			1874-5 &c.	2930	1882,1,13	16	134	2571
	3,3,3,8	81					ib. 13	2930				
1620	3,3,3,5	76					1874-5 &c.	2925	28,3,8,9	1846	131	2570,547
1621											130	546
1622			2148	1792			1874-5 &c.	2931	28,3,9	1847	135	2572
1623	18,6,1,13	2964										
1624	18,6,1,11	2961	2231	1878	252	2593	1874-5 &c.	2924	1882,1,13	16	129	546
	ib. 14	2965	2169	1813	255	2596	Ida.	3001	ib. 22	25		
	ib. 13	2964										
1625	3,3,3,4	75	2154	1798	258	2599	1874-5 &c. Civ.	5998	1882,1,17	20	139	553
					253	2594	C. 931		ib. 14	17	2274	1873
					259-60	2600-1					2269	2609
1626					311-2	2648-9	1874-5 &c.	2976			2285	2618-26
1627	18,6,1,2	2963										
1631	18,6,1,9	2958	2153	1797								
	18,6,1,3	2964										
1650			2221	1867								
1651			2207	1853								
1653			2208	1854								
1655			2217	1863								

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§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
1656	.	.	2203-7	1849-1853	.	.	.	.	.	.	.	.
1657	.	.	2220	. . . 1866	.	.	.	.	.	.	.	.
1658	.	.	2213-4	. . . 1859-60	.	.	.	.	.	.	.	.
	.	.	2216	. . . 1862	.	.	.	.	.	.	.	.
1659	.	.	2119	. . . 1865	.	.	.	.	.	.	.	.
	.	.	2210-2	. . . 1856-8	.	.	.	.	.	.	.	.
	.	.	2215	. . . 1861	.	.	.	.	.	.	.	.
	.	.	2209	. . . 1855	.	.	.	.	.	.	.	.
1670	18,6,1,5	. . . 2954	2157	. . . 1801	.	.	.	.	Wy. . . . . 25			
	18,6,1,11	. . . 2961	.	.	256	. . . 2597	1874-5 &c. . . 3003		1882,1,22	. . . 25		
1673	.	.	.	.	.	.	.	.	1882,1,23	. . . 26		
1701	.	.	2185-6	. . . 1831-2	.	.	.	.	.	.		
1702	.	.	2185	. . . 1831	.	.	.	.	.	.		
1703	18,6,2	. . . 2951	.	.	.	.	.	.	.	.		
1710	.	.	2199	. . . 1845	283-4	. . . 2624-5	Civ. C. 935 . . . 6007-8		.	.		
1711	18,6,1,13	. . . 2964	2200-1	. . . 1846-7	298	. . . 2639	.	.	.	.		
1720	.	.	2186	. . . 1832	.	.	.	.	.	.		
1722	.	.	3747	. . . 3564	.	.	.	.	.	.		
1723	.	.	2197	. . . 1843	.	.	.	.	.	.		
1746	1875,28	. . . 445	.	.	294	. . . 2635	.	.	.	.		
1853	.	.	.	.	304	. . . 2645	.	.	.	.		
1860	.	.	2168	. . . 1812	.	.	.	.	1882,1,18	. . . 21		
1865	18,7,1	. . . 3009	.	.	.	.	.	.	1882,1,6	. . . 6		
1870	.	.	.	.	.	.	.	.	1882,1,19	. . . 22		
	.	.	.	.	.	.	.	.	<i>ib.</i> 27	. . . 30		
1871	.	.	2198	. . . 1844	.	.	.	.	.	.		
1872	1881,93	. . . 983	.	.	1923	. . . 3284	.	.	1877 &c. . . 53-4		2698	. . . 3155
1882	.	.	.	.	.	.	.	.	.	.		
1894	.	.	.	.	.	.	.	.	.	.		
1900	.	.	1885,6	. . . 1870	.	.	.	.	.	.		
1901	18,21	. . . 2972	2222	. . . 1809	266	. . . 2607	1874-5 &c. . . 3364		1882,1,29	. . . 32	2284	. . . 2363
	.	.	1879,162	. . . 1868	.	.	.	.	.	.		
	.	.	2223 &c.	. . . 1869	.	.	.	.	.	.		
1905	.	.	2222	. . . 1869	1881,12	. . . 2606	1874-5 &c. . . 3361-3		1882,1,27-8	. . . 30-1	2281-3	. . . 2360-2
1924	.	.	.	.	264-5	. . . 2605-6	.	.	1882,72,16	. . . 51		
	.	.	.	.	.	.	.	.	<i>ib.</i> 1-15	. . . 36-50		
1925	19,17,5,2	. . . 3011	.	.	1309	. . . 3270	Civ. C. 468 . . . 4520		Civ. C. 381 . . . 2663		2684	. . . 797
	1882,61; 1875, 51	. . . 3012	.	.	.	.	.	.	.	.		
1926	.	.	.	.	1309-10	. . . 3271	Civ. C. 469 . . . 4521		Civ. C. 381 . . . 2410		2685	. . . 798
1929	.	.	.	.	1311	. . . 3272	<i>ib.</i> 470 . . . 4522		.	.	2686	. . . 798
1931	.	.	.	.	.	.	<i>ib.</i> 483 . . . 4544		.	.	2690	. . . 3156
1932	18,7,2; 1878, 129,1-2	. . . 3010-3011	.	.	.	.	.	.	.	.		
1933	18,7,5	. . . 3014	.	.	.	.	.	.	.	.		
1934	1882,61	. . . 3012	.	.	.	.	.	.	.	.		
	18,7,4	. . . 3013	.	.	.	.	.	.	.	.		
1936	.	.	.	.	.	.	.	.	.	.		
1941	19,17,5,2	. . . 1054	.	.	.	.	Civ. C. 468 . . . 4520		.	.		
1944	.	.	2877	. . . 1879	.	.	.	.	.	.		
1950	.	.	1879,142	. . . 1764	.	.	.	.	.	.		
1955	18,7,14-6	. . . 613-5	.	.	.	.	.	.	.	.		
1960	18,7,9	. . . 3018	3440	. . . 3018	1881,36	. . . 3808	Civ. C. 815 . . . 5125	p. 459 &c. . . 1507			1476 &c.	. . . 2258
1961	.	.	.	.	<i>ib.</i> 19	. . . 3826	.	.	.	.	1885,93	. . . 2278
	.	.	.	.	.	.	.	.	.	.	<i>ib.</i> 2	. . . 2277
1962	.	.	.	.	1875,64; 2	. . . 3809	<i>ib.</i> 813 . . . 5127	.	.	.	.	
1964	18,7,9 &c.	. . . 3018	.	.	9	. . . 3816	.	.	.	.	Ariz. . . . . 2280	
1965	.	.	.	.	.	.	<i>ib.</i> 824 . . . 5134	.	.	.	Ariz. . . . . 2280	
1966	.	.	3452	. . . 3018	.	.	<i>ib.</i> 824 . . . 5134	Wy. . . . . 1508	.	.	1885,93,1	. . . 2270
	.	.	.	.	.	.	<i>ib.</i> 816 . . . 5126	.	.	.	.	
1967	18,7,11	. . . 3020	3457	. . . 3026	.	.	<i>ib.</i> 816 . . . 5126	.	.	.	.	
1968	18,17,10	. . . 3019	3444	. . . 3022	1875,64	. . . 3812	<i>ib.</i> 820 . . . 5130	p. 460, 2 &c. . . 1508	1877 &c. . . 1511		<i>ib.</i> 5	. . . 2260,2270
1970	18,7,12	. . . 3021	3457	. . . 3026	<i>ib.</i> 10	. . . 3817	<i>ib.</i> 816 . . . 5135	<i>ib.</i> 19 . . . 1508	.	.	<i>ib.</i> 6	. . . 2270-1
	.	.	3458	. . . 3020	.	.	.	460, § 4 . . . 1510	.	.	.	
1971	18,7,12	. . . 3021	3449	. . . 3018	<i>ib.</i> 10	. . . 3817	<i>ib.</i> 815 . . . 5125	.	.	.	.	
1972	.	.	3459	. . . 3029	.	.	<i>ib.</i> 825 . . . 5135	<i>ib.</i> 3 . . . 1509	.	.	.	
	.	.	.	.	.	.	.	<i>ib.</i> 19 . . . 1508	.	.	.	
1973	18,7,9	. . . 3018	3440-1	. . . 3018	<i>ib.</i> 3	. . . 3810	<i>ib.</i> 818 . . . 5128	1877, p 77 . . . 1507	.	.	.	



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§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
1973	18,7,9	3018	3440-1	3018	ib. 3	3810	ib. 818	5125	1877, p. 77	1507		
1974			3443	3020								
			3460	3046								
1975					ib. 9	3816						
1976	1881,148,1	3030			ib. 8	3815	ib. 823	5133			ib. 18	2234
1978					ib. 17	3824						
1980	18,712	3021	3461	3040	ib. 11	3818	ib. 826	5136	p. 461, 5 &c.	1511		
1982	18,7,9	3018	3442	3019	ib. 4	3811	819	5129			ib. 4	2281
1984					ib. 13	3820						
1985					ib. 14	3821	ib. 828	5138				
2004									72,1	1386		
2005	18,6,1,16	2967							72,1-2	1386-7		
2008					275	2616						
2009			2177	1823	274	2615	1874-5 &c. 48	2933				
2021			2956	2715								
2022			2956	2715								
2034			3467	3056								
			3468	3057								
			1879,67	3056								
			3470	3059								
			3476	3066								
			3478	3068								
2035			1885,69	3069								
			1883,102	3070-4								
2037			3474-5	3064-5								
2050			2956	2715	56	3759						
2052					59	3762						
2054	1885,35	2968			56	3759						
2060			2956	2715	70	3773						
2062	18,6,1,17	2069										
2104					3838	366						
					3841	369						
2181	16,3,1,1											
	2273,2285											
2182	16,3,1,1	2273	1592	1370	1875,92	372	1884-5, p. 118	1304				
	13,6,1,2	2275			1875,921	371						
2184	16,3,1,8	2281-2					ib. 4,8	1306,1310	51,2	4184		
	1881,73	2281										
2185	16,3,1,4	2277	1592	1370			ib. 2	1303	51,2	4184		
	1881,73	2281	1596	1374								
2187	16,3,1,2-7											
	2275-80											
2188	16,3,1,1	2273	1586 &c.	1364			1874-5, p. 831		51, 1 & 9	4182-3		
							&c.					
							1300-1					
2189	16,3,1,9	2283	1589	1367	3992	741	ib. 9-12	1320-1	51,3 & 7			
	ib. 10	2284	1587	1365					4185,4189			
2253	16,12,1,8-10	2044			3852-3	362-5						
	16,12,2	2026										
	16,12,1,9	2046										
2254	18,6,1,19	2970										
2258	1881,42	3943										
2281	1881,161	1390										
2294	ib. 1 & 4	1391-3			832	3020						
2501												
2510	1885,110,155	566										
2511	ib.	566										
	ib. 94	493										
2512	ib. 155	566										
2602	18,11,1,1,1	53	2274	1945	812	3000			1882,107,1	2234	1489	3232
	1885,155,130	537										
2603			2280	1951								
2610			2275	1946								
2611					592	2779	Prob. C. 112				1627	1083
							5425					
2614			2291	1962	591	2778	ib. 111	5424	47,81	2062	1626	1082
2622	1885,110,130	537										
2630			2274	1945	812	3000			1882,107,1	2234	1492	3233
2640	1885,110,131	538	2294	1966	814	3002,6006	Civ. C. 934	5727	1882,107,4	2237	1493	3234



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§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
3265	<i>ib.</i> 192 . . .	621										
3267	<i>ib.</i> 192 . . .	621	2293 . . .	1964								
3271			2251 . . .	1913								
3272	18,11,1,4,2 &c.		2239 . . .	1901								
		619										
3274			2248 . . .	1910								
3275	1885,110,190	619	2244-5 . .	1906-7								
3276			2239 . . .	1901								
			2249 . . .	1910-1								
3277			2246 . . .	1908								
3278			2238 . . .	1900								
3301	18,7,15 . . .	625	2714 . . .	2353	157 . . .	505	1874-5 &c. .	2506	42,1 . . .	2221	1976 . . .	1460
3305	1885,110,194	623										
3401					160 . . .	508	1874-5 &c. .	5712				
3402					161 &c. .	509	Ida. . . .	5713				
3403											1977 . . .	1467-8
4031			2099 . . .	1762							3465 . . .	122
4032	19,5,6 . . .	981	2890 . . .	2594	1068 . . .	3027	C. Civ. P. 183.				3458 . . .	123
							4091					
	19,7,14 . . .	1051	2100 . . .	1765			<i>ib.</i> 3 . . .	3600			2441 . . .	123,681
4033							<i>ib.</i> 2 . . .	3600			3457 . . .	123
4036			2112-5 . .	1778-81			<i>ib.</i> 4 . . .	3601			3459 . . .	123,125
4037							<i>ib.</i> 4 . . .	3601				
4060	1880,77,1 . .	3956			4027-9 . .	4926-8						
					4020-8							
					4018,4920							
4113			2905 . . .	2604								
4121			2981 . . .	2667								
			3035 . . .	2769								
4123											3460 . . .	128
4130	1882,107 . . .	3114										
4131			3040 . . .	2775								
4132	16,5,1 . . .	2552	2131 . . .	1742					35,118 . .	1001		
	16,5,2 . . .	2553	2132 . . .	1743								
4135			2138 . . .	1749								
4140	19,11,40 . . .	1366	2121 . . .	1732	289,296,1,697 .	2637,2630	C. Civ. P. 937.	57,1 . . .	1249	2125 . . .	1206	
							6009					
							Prob. C. 215 .			2132 . . .	2030	
							6009					
4142			2122 . . .	1733	291 . . .	2632	Civ. C. 938 .	6010				
4143					285-6 . .	2626-7	Ida. . . .	6009				
4144	19,11,41 . . .	1367			290 . . .	2631	Civ. C. 937 .	6009	57,2 . . .	1250	2121-2 . .	2030
4145			Ala. . . .	1732	287 . . .	2628	<i>ib.</i> 936 . . .	6008				
4146			2123 . . .	1734			<i>ib.</i> 937 . . .	6011	57,3 . . .	1249		
4147			3240 . . .	2628	1045 . . .	3660	C. Civ. P. 178	Civ. C. 21 .	2381	2108 . . .	2327	
							4078					
4166			2091 . . .	1753								
4175	1879,26 . . .	1063					Civ. C. 983 .	6110				
							<i>ib.</i> 984 . . .	3230,6111				
4338			2174 . . .	1818								
4343			2139 . . .	1174								
4352			2142 . . .	1183	1875,42,2 . .	4965			p. 462,2 . .	1471		
4353												
4354	18,9,2-3 . . .	3779-80	2141-3 . .	1184	1875,42,1 . .	4964					3661 . . .	324
4355	Ct. 18,9,1 & 4 .		2141 . . .	1182	148 . . .	4960						
	3778,3781		2140 . . .	1181	1875,42,5 . .	4968						
					148-9 . .	4961-2						
					1875,42,4 . .	4967						
4356	18,9,1-2 . . .	3779	2142 . . .	1183	148 &c. . .	4961,4968					3665 . . .	324
	18,9,5-6 . . .	3782-3			1875,42,6 . .	4969						
4359			1881,108,5 .	1175								
4370	1878,40,1 . .	3966										
4371	<i>ib.</i> 2; 1883,97 .		1881,108,1 .	1175					35,144 . .	1048		
		3967										
	<i>ib.</i> 3 . . .	3968	<i>ib.</i> 2 . . .	1175					35,145 . .	1049		
	<i>ib.</i> 4 . . .	3969	<i>ib.</i> 3 . . .	1175					35,146 . .	1050		
	<i>ib.</i> 5 . . .	3970	<i>ib.</i> 4 . . .	1177					35,147 . .	1051		
			2139 . . .	1174								
4372	<i>ib.</i> 6 . . .	3971	1881,108,6 .	1178								





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§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
4729	19,11,16 . .	1084	1836 . . .	1110	337-340 . .	2246	1874-5, p. 818,2	290	88,6 . . .	1667	2194 . . .	130,1871,3022
4730	18,1,6 . . .	1863	2111 . . .	1776	26 . . . . .	4898	. . . . .		. . . . .		3481 . . .	130
4733	18,1,2 . . .	1857	1879,143 .	1777								
4741	. . . . .		. . . . .		1078 . . .	3037	C. Civ. P. 198	4106	. . . . .		2451 . . .	126
4744	. . . . .		. . . . .				<i>ib.</i> 183 . . .	4091				
4750	18,1,7 . . .	1864	2106,2110 .	1771,1775	20,24 . 4892,4896		1874-5 &c. .	3561	. . . . .		3475,3479 .	131
4751	. . . . .		. . . . .		25 . . . . .	4897	<i>ib.</i> 17 . . .	3561				
4752	. . . . .		2107 . . .	1772	21 . . . . .	4893	<i>ib.</i> 13 . 3561,3563					
4754	. . . . .		2108-9 . .	1773-4	22-3 . . . .	4894-5	<i>ib.</i> 14-5 . 3564-5					
4801	. . . . .		. . . . .		29-31 . . .	4900-2	1879, p. 7,1-3 .	1260-7				
4811	18,5,1 &c. .	2941	2088 . . .	1750	32 . . . . .	4903	<i>ib.</i> 4 . . .	1263	63,2 . . .	1311	3450 . . .	2161
4812	. . . . .		. . . . .		33 . . . . .	4904	<i>ib.</i> 5 . . .	1264	63,1 . . .	1310		
4815	Ct. . . . .	2942	. . . . .		33 . . . . .	4904	<i>ib.</i> 6 . . .	1265				
4816	. . . . .		. . . . .									
4821	1875,36 . .	2942	. . . . .									
4831	18,5 &c. . .	2942	2092 . . .	1754	. . . . .		1874-5 &c. .	1266				
4832	. . . . .		2092 . . .	1754								
4833	. . . . .		2092 . . .	1754								
4840	19,6,1 . . .	1154	2090 . . .	1752	32-3 . . .	4903-4	1879, p. 75 . 1263	63,3 . . .	1312	3450-1 . .	2161-2	
4842	18,5,2 . . .	2942	. . . . .		32 . . . . .	4903	. . . . .	63,4 . . .	1313			
4843	. . . . .		2089 . . .	1751	. . . . .			63,5 . . .	3414			
4850	18,5,1 . . .	2941	. . . . .		. . . . .		1883, p. 64-5 .	1250-1				
4851	. . . . .		. . . . .		. . . . .							
4860	. . . . .		1883,50 . .	1227	. . . . .							
5013	. . . . .		. . . . .		465 . . . .	4931						
5105	. . . . .		3414-5 . .	3155-4								
5120	. . . . .		3418 . . .	3157								
	. . . . .		3410-1 . .	3149-50								
5124	. . . . .		. . . . .		. . . . .		. . . . .		Civ. C. 500-1 .	3050-1		
5140	. . . . .		3412 . . .	3151								
5160	. . . . .		3413 . . .	3152								
5286	. . . . .		. . . . .		. . . . .		. . . . .		37,1-2 . . .	1075-6		
5330	19,12,1 . .	1022	. . . . .		. . . . .		. . . . .					
5340	18,8,1 . . .	3276	2063 . . .	1705	468 . . . .	4905	1885 &c. . .	3270	1878 &c. .	4069		
5341	18,8,2 . . .	3277	2064 . . .	1706	469 . . . .	4906	<i>ib.</i> 2 . . .	3271,3287	<i>ib.</i> 2 . . .	4070		
5342	18,8,4 . . .	3279	2066 . . .	1708	470 . . . .	4907	<i>ib.</i> 3 . . .	3272	<i>ib.</i> 3 . . .	4071		
5343	18,8,4 . . .	3279	2067 . . .	1709	471 . . . .	4908	<i>ib.</i> 4 . . .	3273	<i>ib.</i> 4 . . .	4072		
5344	18,8,4 . . .	3279	2068 . . .	1710	471 . . . .	4908	<i>ib.</i> 4 . . .	3273	Wy. . . .	4072		
5345	18,8,6 . . .	3282	2072 . . .	1714	472 . . . .	4909	<i>ib.</i> 7 . . .	3276	<i>ib.</i> 7 . . .	4075		
5346	18,8,4 . . .	3279	2069 . . .	1711	. . . . .		<i>ib.</i> 5 . . .	3274	<i>ib.</i> 5 . . .	4073		
5347	18,8,4 . . .	3279	2070 . . .	1712	471 . . . .	4908	<i>ib.</i> 6 . . .	3275	<i>ib.</i> 6 . . .	4074		
	18,8,5 . . .	3281	2071 . . .	1713	. . . . .		<i>ib.</i> 4,19 . .		<i>ib.</i> 4 . . .	4072		
5348	18,8,4 . . .	3279	. . . . .		. . . . .		<i>ib.</i> 21 . . .	3290	<i>ib.</i> 21 . . .	4089		
5349	. . . . .		2073 . . .	1715	. . . . .		<i>ib.</i> 8 . . .	3277	<i>ib.</i> 8 . . .	4076		
5350	1882,8 . . .	3280	2074 . . .	1716	473 . . . .	4910	<i>ib.</i> 9 . . .	3278	<i>ib.</i> 9 & 22,3 .	4077,4091		
5351	. . . . .		2075 . . .	1717	. . . . .		<i>ib.</i> 22 . . .	3291	<i>ib.</i> 22 . . .	4090		
5355	. . . . .		2087 . . .	1729	479 . . . .	4916	<i>ib.</i> 24 . . .	3293	<i>ib.</i> 24 . . .	4092		
5356	18,8,7 ; 1875,67	3283	2078-9 . .	1720-1	475 . . . .	4912	<i>ib.</i> 14-6 . .	3283-5	<i>ib.</i> 14-5 . .	4082-3		
5357	18,8,8 . . .	3284	2077 . . .	1719	478 . . . .	4915	<i>ib.</i> 13 . . .	3282	<i>ib.</i> 13 . . .	4081		
5358	18,8,3 . . .	3278	2076 . . .	1718	474 . . . .	4911	Ida. . . . .	3294	Wy. . . .	4093		
5359	. . . . .		. . . . .		474 . . . .	4911	. . . . .					
5370	. . . . .		. . . . .		480 . . . .	4917	. . . . .		<i>ib.</i> 18 . . .	4086		
5371	. . . . .		2081 . . .	1723	. . . . .							
5372	. . . . .		. . . . .		. . . . .		<i>ib.</i> 19 . . .	3288	<i>ib.</i> 19 . . .	4087		
5373	. . . . .		2082 . . .	1724	. . . . .							
5374	. . . . .		2083-5 . .	1725-7	. . . . .		<i>ib.</i> 17-9 . .	3286-8	<i>ib.</i> 17-9 . .	4085-7		
5375	. . . . .		2065 . . .	1707	474 . . . .	4911	<i>ib.</i> 10 . . .	3279	<i>ib.</i> 10 . . .	4078		
5376	. . . . .		2080 . . .	1722	474 . . . .	4911	<i>ib.</i> 19-20 .	3288-9	<i>ib.</i> 19-20 .	4087-8		
5377	. . . . .		2080 . . .	1722	. . . . .		<i>ib.</i> 11-2 . .	3280-1	<i>ib.</i> 11-2 . .	4079-80		
5378	18,8,7 . . .	3283	. . . . .		. . . . .							
5379	. . . . .		2086 . . .	1728	. . . . .		<i>ib.</i> 12 . . .	3281	<i>ib.</i> 12 . . .	4080		
5380	. . . . .		. . . . .		476-7 . . .	4913-4						

	CONNECTICUT.		ALABAMA.		NEVADA.		IDAHO.		WYOMING.		ARIZONA.	
§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
6013	2,1,4-5	15,16	2660	1914	1879,43,1	2655			42,6	2226		
6015												
6017	2,1,4	15										
6050			2									
6056				2	1879 &c.							
					4917-8,4764-7							
6058	2,2,4	26			195	471	1876-7 &c.	2420	81,1	1541		
6101							<i>ib.</i> 3	2422				
6110			2672	2309	196	472,474	<i>ib.</i> 2	2421	81,2	1542		
6111	14,1,1	2785	2670-1	2307-8	196	472	<i>ib.</i> 5	2424	35,111 &c.	1567	1892	2092
6112	14,1,1	2785	2670,2673	2307	2472	4760	<i>ib.</i> 5-6	2424-6	35,111 &c.	1567	1902	2092
											1903	2087
6113					212-3	488-9	<i>ib.</i> 4	2450	<i>ib.</i> 26	1568		
6114							<i>ib.</i> 7	2428	81,17	1557	1895	2093
6115			2673	2310	196	472	Prob. C. 316		<i>ib.</i> 23	1589		
							5703					
6116			4186	4017	795	2982			<i>ib.</i> 25	1591		
6120	14,1,2	2786	2681 &c.	2318-20	203-5	474,479-81	1876 &c.		<i>ib.</i> 24	1590		
							2429,2437		81,13	1553	1897	2096
			2677-9	2314-6	198	474			81,4-6	1544-6		
6121					198	474						
6122			2678	2315	198	474			81,5-6	1545-7		
6130	14,1,5	2789	2674	2311	197	473	<i>ib.</i> 10	2431	81,8	1548	1896	2086
6132	14,1,2	2786	2677	2314	199	475	<i>ib.</i> 10	2432	81,9	1549		
					1881,75	474	<i>ib.</i> 9	2430				
6133					199	475						
6134							<i>ib.</i> 9,11					
							2430,2433					
6135	14,1,5	2789	2675-6	2312-3	210	486			81,15	1555		
6137					206	482	<i>ib.</i> 19	2439	81,14	1554		
6140	14,1,3	2787	2680	2317	201	477	<i>ib.</i> 12	2434			1898	2090
6141	14,1,3	2787	2680	2317	201-2	477-8	<i>ib.</i> 12-3	2434-5	81,11-12	1551-2	1898-9	2090
6142					206	476	<i>ib.</i> 14	2436	Wy. 81,10	1550		
6144	14,1,4	2788	2680	2317	207	483	<i>ib.</i> 20	2440	81,16	1556		
6150	1877,14	2813	2673	2310	214	490			1882,40,3	1569	1904	2110
									<i>ib.</i> 26-28	1592-4	1938	2110
6151									Wy.	1593		
									1882,40,26	1592		
6152									<i>ib.</i> 30	1596		
6154	1877,14	2813							<i>ib.</i> 3	1569		
6157									<i>ib.</i> 29	1595		
6201	14,3 &c.	2802	2685	2322	1875,22	491	1874-5 &c.	2457	<i>ib.</i> 4	1570		
6202									1882,40,5	1571	1907	2111
6204			2691	2328			Ida.	2463	<i>ib.</i> 32	1598		
6205			2687	2324								
6214							1874-5 &c.	2464	1882,40,7	1573	1909	2115
6216			2690	2327	1875,22	491			<i>ib.</i> 32	1598	1940	2115
6217									1882,40,7	1573	1909	2115
6222	14,3,4	2806	2693	2330	Nev.	491	<i>ib.</i> 3	2469	<i>ib.</i> 6	1572		
6224	14,3,2-3; 1880, 23; 1885-35		2688	2325	216	492						
		2802-5			219	495						
6225			2689	2326			<i>ib.</i> 8	2471	<i>ib.</i> 8	1574	1910-58	2113
			2690	2327					<i>ib.</i> 31	1597	1939-57	2333
6226	1878,71	2802	2685	2322	1875,22	491	<i>ib.</i> 1-2	2483	<i>ib.</i> 5	1571	1941	2110
			2692	2329								
6227					222	498						
6240	14,3,2	2803			221	497						
6241	14,3,2	2803	2688	2325								
6242	14,3,5	2807			221	497						
6243			2699	2336	795	2982	Prob. C. 316		<i>ib.</i> 22	1588		
							5703					
6244	14,3,8	2809-10	2701	2338	217	493			42,8	2228	1915	2121
	1883,28; 1885,99 2811								<i>ib.</i> 14	1580		
6245					217	493	<i>ib.</i> 7	2474	<i>ib.</i> 14	1580		
6246	14,3,7	2809	2701	2338	217	493			<i>ib.</i> 13	1579		
									<i>ib.</i> 11	1577		
6248	14,3,6	2808	2700	2337	218	494			<i>ib.</i> 15	1581		



	CONNECTICUT.		ALABAMA.		NEVADA.		IDAHO.		WYOMING.		ARIZONA.	
§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
6249	.	.	.	.	218	494	.	.	<i>ib.</i> 19	1585	.	.
6250	.	.	.	.	.	.	.	.	<i>ib.</i> 17	1583	.	.
6251	.	.	2698	2335	220,218	496	.	.	<i>ib.</i> 20	1586	.	.
6252	.	.	.	.	162	510	.	.	.	.	.	.
6261	14,3,5	2807-13	.	.	220	496	.	.	<i>ib.</i> 15	1581	.	.
6262	14,3,5	2807	2696-7	2333-4	220	496	.	.	<i>ib.</i> 21	1587	.	.
6265	.	.	2694	2331	220	496	<i>ib.</i> 7	2472	<i>ib.</i> 12	1578	1912	2120
6266	.	.	.	.	220	494	.	.	<i>ib.</i> 16	1582	.	.
	.	.	.	.	218	493	.	.	.	.	.	.
6281	.	.	2702	2339	.	.	.	.	.	.	.	.
6285	.	.	2703	2340	.	.	.	.	.	.	.	.
6350	.	.	2746	2368	.	.	.	.	.	.	.	.
6351	1885,110,61	484	.	.	.	.	.	.	1882,40,18	1584	.	.
	14,2,6	2794	.	.	.	.	.	.	.	.	.	.
6352	.	.	.	.	164	512	.	.	.	.	.	.
6355	.	.	.	.	173	521	.	.	.	.	.	.
6356	.	.	.	.	175	523	Ida. . . . .	4093	.	.	.	.
	.	.	.	.	.	.	C. Civ. P. 185	4093	.	.	.	.
6401	1877,114,1-2	2796	.	.	174	522	.	.	.	.	.	.
6402	19,5,9	2795	2704	2344	166	514	1874-5 &c.	2504	82,6	1563	1979	2105
6403	19,5,9	984	.	.	172	520	.	.	.	.	.	.
	1877,114,2	2796	.	.	.	.	.	.	.	.	.	.
6404	19,5,9	984	.	.	.	.	.	.	.	.	.	.
6410	1877,114,1	1105	.	.	163,167	515	1874-5 &c.	4479	.	.	.	.
	<i>ib.</i> 2	2725-6	.	.	.	.	.	.	.	.	.	.
6411	19,5,9	984,2925	2704	2344	167	515	<i>ib.</i> 13	2504	82,7	1564	1979	2103
6412	1877,114	2925	.	.	167	515	.	.	.	.	.	.
6414	19,5,9	984	.	.	.	.	.	.	82,8	1565	.	.
6420	1877,114	2925	2705	2341	151	499	1874-5 &c.	2495	82,1	1558	1960,1967	2100
	.	.	.	.	.	.	<i>ib.</i> 5 &c.	2504	.	.	.	.
6421	1877,114	2925	.	.	168	516	<i>ib.</i> 6	2498	.	.	.	.
6422	.	.	.	.	151,165	499,513	<i>ib.</i> 1	2495	82,1	1558	1960	2100
	.	.	.	.	.	.	.	.	.	.	1881,37	2100
6423	.	.	.	.	151	499	<i>ib.</i> 1	2496	.	.	1967	2100
6424	14,2,1	2720	.	.	151	499	<i>ib.</i> 9	2497	.	.	1975 &c.	2100
	.	.	.	.	158	506	.	.	.	.	.	.
6426	1885,110,40	614	.	.	.	.	<i>ib.</i> 8	2499	.	.	.	.
6427	.	.	.	.	.	.	.	.	.	.	.	.
6430	.	.	.	.	153	501	<i>ib.</i> 3	2497	.	.	1981	2109
6431	.	.	.	.	154-5	502-3	.	.	.	.	1969-70	2611
6432	.	.	.	.	152	500	<i>ib.</i> 2	2497	.	.	.	.
6433	.	.	.	.	156	504	<i>ib.</i> 9	2505	.	.	1968	2102
	.	.	.	.	.	.	<i>ib.</i> 9	2497	.	.	.	.
6440	.	.	.	.	176	524	<i>ib.</i> 14	2508	.	.	1988-9	2097
6441	.	.	.	.	177	525	<i>ib.</i> 16	2509	.	.	.	.
6442	.	.	2172	1816	178-180	526-8	<i>ib.</i> 17	2510	.	.	1983-5	2610
6443	.	.	.	.	181	529	.	.	.	.	1986	2098
6445	.	.	.	.	.	.	.	.	.	.	1987	2099
6450	1877,114	2925	.	.	159	507	.	.	82,1-2	1559	1960	2103
6452	14,2,8	2929	.	.	.	.	.	.	.	.	.	.
6453	19,5,9	984	2892	2347	1070	3029	C. Civ. P. 185	4093	82,3	1560	1962,2443	683
	.	.	.	.	.	.	.	.	.	.	.	.
6454	.	.	.	.	1070-1	3029-30	C. Civ. P. 186	4094	1882,68	1560,2385	2443-4	683-4
	.	.	.	.	.	.	.	.	Civ. C. 26	2386	.	.
6455	19,5,10-2	985-7	2713	2352	813	3001	.	.	82,4	1561	1489	3232
6460	18,11,2	537	.	.	169-71	517-9	.	.	.	.	.	.
6480	.	.	.	.	182	530	<i>ib.</i> 2 & 20	2922	82,9	1566	1972	2103
6500	18,6,10 &c.	2793	.	.	229	2588	.	.	1882,1,2	2	2000	2581
	Ct.	2960	.	.	184	532	.	.	<i>ib.</i> 11	13	.	.
	14,2,4	2793	.	.	249-51	2590-2	<i>ib.</i> 22	2498,2956	.	.	.	.
6501	.	.	.	.	.	.	<i>ib.</i> 6	2956,2960	.	.	.	.
6506	.	.	.	.	183	531	.	.	.	.	.	.
6507	.	.	2237	1899	248	2589	.	.	.	.	.	.
6509	4,5,24	485	.	.	.	.	.	.	.	.	.	.
6520	19,5,11	986	.	.	225	536	.	.	82,5	1562	.	.
6521	.	.	.	.	223-4	535	Civ. C. 885-91	5850-7	.	.	.	.

	CONNECTICUT.		ALABAMA.		NEVADA.		IDAHO.		WYOMING.		ARIZONA.	
§§	Old	New	Old	New	Old	New	Old	New	Old	New	Old	New
6522	.	.	2729	1887,41,10	225-7	536-8	<i>ib.</i> 894-5	5859-60				
6601	.	.	.	.	323	4943	<i>ib.</i> 899	5858				
6605	20,12,4	2252	.	.	.	.	1874-5 &c.	2405				
6606	.	.	2735 &c.	2357	.	.	.	.	1879 &c.	2282-4		
6608	1882,30 &c.	3402	.	.	.	.	.	.	.	.		
6630	.	.	.	.	1883,73 &c.	600	.	.	.	.		
6631	1875,14 &c.	630	2742	2364	208	484	1876-7 &c.	2535	42,7	2227	1466	1470
							Prob. C. 316	.				
							5703	.				
6632	.	.	.	.	1885 &c.	609	1879 &c.	2554				
					795	2982	Prob. C. 316	.				
							5703	.				
6633	.	.	2743	2365	.	.	.	.				
6634	.	.	2744	2366	.	.	.	.				
6636	.	.	.	.	1883,73 &c.	599	.	.				
6640	14,4,1 &c.	471-4	2745	2545	1885,24	601,603,610	<i>ib.</i> 2-3	2546-7	2,1 & 2	2274	1883	1383-5
							1879 &c.	2545				
6641	14,4,2	472	2745	2367	<i>ib.</i> 5	605	<i>ib.</i> 6	2550	2,1	2274	1886	1388
							<i>ib.</i> 7-8	2280-1	2,3	2276	1887	1389
							Ida. <i>ib.</i> 7	2551	2,5	2278		
6642	Ct. 1880,29 &c.	471	.	.	<i>ib.</i> 4	604	<i>ib.</i> 5	2549	2,1-2	2274-5	1885	1387
6643	.	.	.	.	<i>ib.</i> 7	607	<i>ib.</i> 4	2548	2,9	2282		
					<i>ib.</i> 2	602	.	.	2,2	2275		
6645	14,4,2	472	2745	2367	<i>ib.</i> 6	606	<i>ib.</i> 8-9	2552-3	2,10	2286	1887	1390
6647	1885,110,66	472	.	.	<i>ib.</i> 2	602	.	.	.	.		
					<i>ib.</i> 2	602	.	.	2,4	2277	1888-9	1389-91
6649	<i>ib.</i>	472	.	.	.	.	.	.	2,10	2286		
Art. 606	} T. 14, C. 6		.	.	1879,93	611-26						
	} 1738-44		.	.								

# LIST OF CHANGES IN THE LAW.

## ARRANGED BY SECTIONS OF AMERICAN STATUTE LAW.

ALABAMA. §§ 1042, 1171, 1501, 1560, 1614, 1615, 1619, 1624, 1625, 1626, 1702, 1954, 1967, 1968, 1972, 1974, 1976, 1978, 1980, 2034, 2182, 2673, 2676, 3110, 3119, 3121, 3130, 3163, 3265, 3301, 4338, 4352, 4355, 4371, 4372, 4373, 4504, 4508, 4521, 4522, 4523, 4532, 4533, 4553, 4643, 4647, 4648, 4701, 4727, 4753, 4832, 5286, 5356, 6014, 6062, 6112, 6201, 6214, 6244, 6261, 6353, 6356, 6401, 6402, 6403, 6404, 6411, 6412, 6414, 6421, 6422, 6427, 6442, 6450, 6452, 6454, 6456, 6480, 6482, 6500, 6503, 6505, 6520, 6521, 6522, 6632.

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ARKANSAS. §§ 1110, 1582, 1585, 1944, 4359, 4371, 4372, 4373, 4832, 4833; Art. 486.

CALIFORNIA. §§ 1960, 1961, 1970, 4542, 4543, 6420, 6422.

COLORADO. §§ 240, 277, 551, 553, 561, 566, 1001, 1021, 1023, 1482, 1484, 1501, 1504, 1504, 1572, 1578, 1580, 1582, 1856, 1882, 1925, 1926, 1929, 1931, 1936, 4134, 4535, 4542, 4543, 4727, 4741, 6013, 6454.

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DAKOTA. §§ 1179, 1620, 1961, 2253, 4370, 4371, 4372, 4373, 4812, 6420, 6422, 6451, 6454.

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## ADDENDA.

THE numbering of the General Statutes of Connecticut is not in all cases identical with the bill prepared by the Commissioners; and the South Carolina acts of 1837 were received by the author since the main body of this book was stereotyped.

CONNECTICUT. In § 73, the new citation should be 679; in § 160, 3269-3272; in § 277 335; in § 1040, 418; in § 1043, 4016; in § 1581, 2956; in § 1582, 2954; the act of 1886 contained in § 1535 is omitted in the revision; in § 1624 the citations should be 2961 and 807; in § 1676 the act is omitted as in § 1585; in § 1905 the citation should be 2972; in § 1925, 3011, 3023, 3024, 3028, 3024, 3026 respectively; in § 1926, 3027; in § 1927, 3026; in § 1932, 3011 and 3028; in § 2104, insert *Ct. 1757* before *Ill.* in par. (B).

UTAH. § 240. Women are forbidden to vote, notwithstanding the statute; strike out *Uta.* in § 240 (F): U.S. 1887, 397, 18.

SOUTH CAROLINA. In § 4371, the usual statute against the fraudulent issue of warehouseman's receipts is adopted. Insert *South Carolina* after *Wyoming* in the 3d and 5th lines, and *S.C. 1887, 423, 1* in the citations at the top of p. 518. Add *S.C. ib. 2* after *Mo. 554* in the next par., *S.C. ib. 3* after *Wy.* in the following par., and *S.C.* after *Ore.* two lines below. The warehouseman, etc., cannot sell or remove the goods without the receipt-holder's written consent. Insert *S.C. ib. 4* after *Wy.* in the following par. Warehouseman's receipts may be transferred by indorsement. Insert *S.C. ib. 5* in the citations to the 1st par. of § 4372; and *S.C.* before *Ala.* in the 4th and 5th pars. on p. 519. In § 4373, insert *S.C. ib. 7* before *La.* in the last par.

IDAHO, ARIZONA. § 6201. For clause (8) read clause (δ); for clause (16) read (17).





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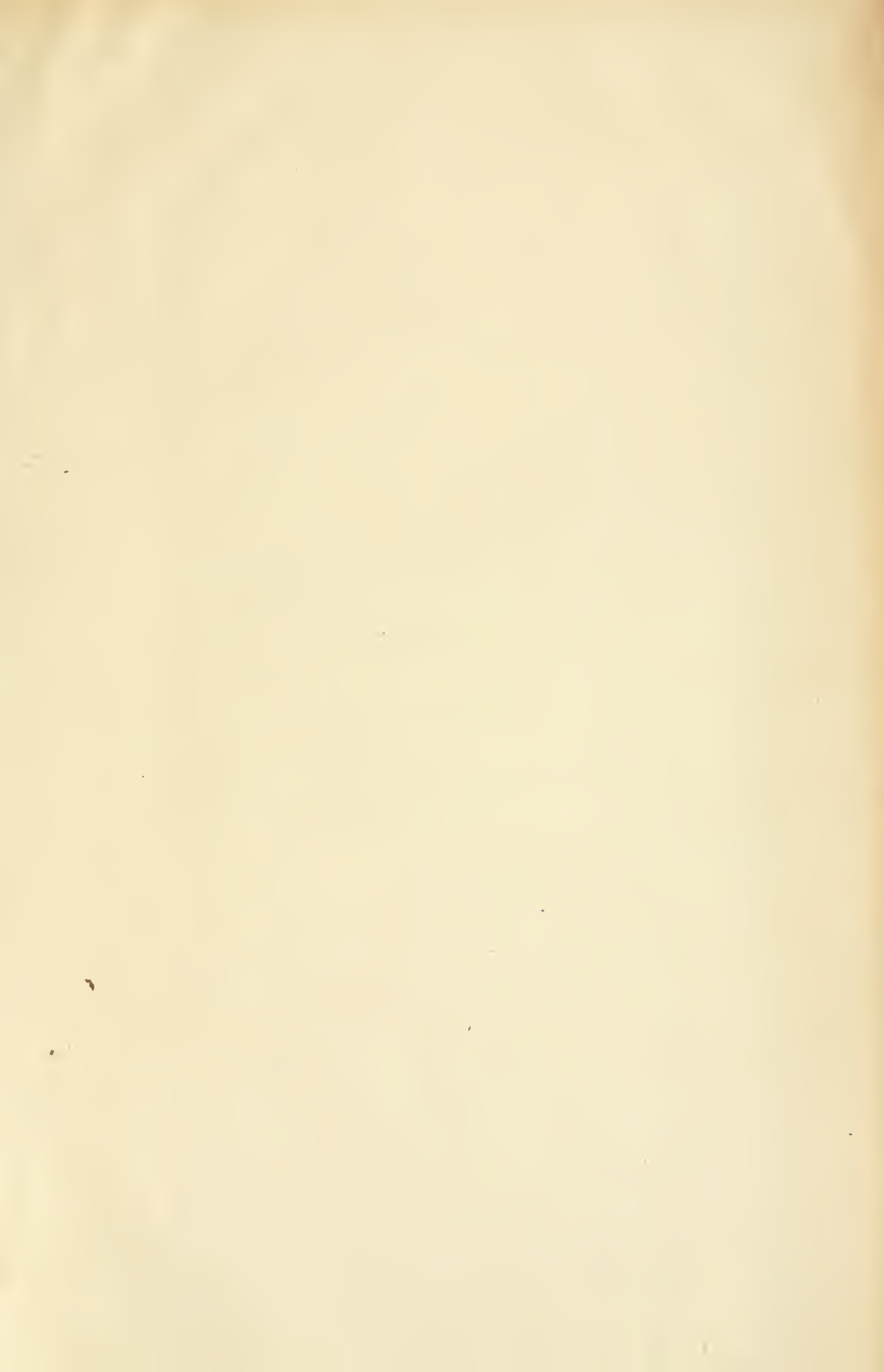
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